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No. 12 of 1942.

In the Privy Council

ON APPEAL
FROM THE SUPREME COURT OF CANADA

UNIVERSITY OF LONDON
W.C.1.

12 NOV 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

IN RE THE TREASURY DEPARTMENT ACT, 1938,

AND

INTERNATIONAL HARVESTER COMPANY OF CANADA, LIMITED,
an Ontario corporation doing business in the Province of Saskatchewan,

(Appellant) *Appellant*,

AND

THE PROVINCIAL TAX COMMISSION,
THE COMMISSIONER OF INCOME TAX,
THE PROVINCIAL TREASURER, and
THE ATTORNEY GENERAL FOR SASKATCHEWAN

(Respondents) *Respondents*.

CASE OF THE RESPONDENTS

GARD, LYELL & CO.,
Leith House,
47, Gresham Street,
London E.C. 2,

Solicitors for Appellant.

BLAKE & REDDEN,
17 Victoria Street,
London S.W. 1,

Solicitors for Respondents.

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In the Privy Council

**ON APPEAL FROM THE SUPREME COURT OF
CANADA**

IN RE THE TREASURY DEPARTMENT ACT, 1938,

AND

INTERNATIONAL HARVESTER COMPANY OF CANADA,
LIMITED, an Ontario corporation doing business in the Province
of Saskatchewan, (Appellant) *Appellant*,

AND

THE PROVINCIAL TAX COMMISSION,
THE COMMISSIONER OF INCOME TAX,
THE PROVINCIAL TREASURER, AND
THE ATTORNEY GENERAL FOR SASKATCHEWAN,
(Respondents) *Respondents*.

CASE OF THE RESPONDENTS

RECORD

1. This is an appeal by special leave from that part of the judgment of the Supreme Court of Canada dated the 22nd April, 1941, which is adverse to the appellant and whereby an appeal by the appellant from the judgment dated the 2nd April, 1940, of the Court of Appeal for Saskatchewan was dismissed in part and the cross-appeal of the respondents was dismissed and whereby the regulations passed under subsection (4) of section 9 of *The Income Tax Act, 1932*, being chapter 9 of the Statutes of Saskatchewan, 1932, as amended, were held to be *intra vires* and the said regulations to be validly adopted in the method of assessment of the appellant under *The Income Tax Act, 1932*, as amended, and *The Income Tax Act, 1936*.
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pp. 124-128
pp. 107-S
pp. 97-S

2. The appellant company was incorporated under The Companies Act of the Province of Ontario with its head office at Hamilton, Ontario, and is registered under the Saskatchewan Companies Act. The business

p. 1, l. 17
p. 1, l. 21

RECORD

of the company is the manufacture and sale of agricultural implements and parts thereof, the manufacture being carried on entirely outside of Saskatchewan while the sale thereof is carried on partly in Saskatchewan and partly elsewhere. All sales made in Saskatchewan of the appellant's goods are made by the agents of the appellant at its various branch offices in Saskatchewan, and the sale contracts in respect of such goods are made and executed in Saskatchewan. All moneys received by the appellant in Saskatchewan, either in respect of sales or as payments on debts owing to the appellant, are deposited in separate bank accounts and remitted in full to the head office of the appellant in Hamilton, Ontario, and the said office in turn sends to its branches in Saskatchewan such moneys as are required by them for operating and incidental expenses. There are no directors of the appellant resident in Saskatchewan and no meetings of the Board of Directors of the appellant are held in Saskatchewan. The central management and control of the appellant abide at the head office of the appellant in Hamilton, Ontario. The appellant keeps no separate profit and loss account in respect of the business it carries on in the Province of Saskatchewan, but does keep at its head office in Hamilton, Ontario, a profit and loss account of its entire business carried on in the Dominion of Canada and elsewhere. The appellant carries on business in Saskatchewan at branch offices in North Battleford, Regina, Saskatoon and Yorkton. It had also branch offices at Swift Current and Weyburn, but these offices were closed on 20th August, 1937.

p. 1, l. 40

p. 1, l. 44

p. 2, l. 5

p. 2, l. 7

p. 2, l. 8

p. 1, l. 27

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3. The Province of Saskatchewan levies a tax upon incomes under the authority of *The Income Tax Act, 1932*, which was amended in each of the years 1933, 1934 and 1935. The Act was consolidated in *The Income Tax Act, 1936*, which has been amended, but none of the amendments have application to the assessments for the years 1934, 1935 and 1936, which are before the court in this appeal. These statutes and other relative statutes have been bound separately for this appeal and have been filed herein. The Act of 1932 as amended continues to apply to the assessment of 1934. The 1936 Act applies to the assessments for 1935 and 1936. The sections of the 1932 Act, as amended, relevant to this case and the corresponding sections of the 1936 Act are practically the same.

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Under sections 7 and 29 of the Act of 1932 (sections 9 and 32 of 1936 Act) every person liable to taxation shall on or before May 31st in each year deliver to the Minister a return in such form as the Minister may prescribe of the income during the last preceding year. By chapter 5 of the Statutes of 1934 the definition of "person" contained in paragraph 8 of section 2 of the 1932 Act was amended to read as follows:

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"8. 'Person' includes any body corporate and politic and any association or other body, and the heirs, executors, administrators or other legal representatives of any person."

The definition as amended is to be deemed to have been in force from April 30th, 1932. (Paragraph 5 of section 2 of 1936 Act.)

Section 3 of the Act defines "income" as meaning the "annual net profit or gain . . . being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person . . . from any trade, manufacture or business as the case may be whether derived from sources within Saskatchewan or elsewhere; . . . and also the annual profit or gain from any other source including:

(d) all other gains or profits of any kind derived from any source within or without the Province whether received in money or its equivalent."

10 Section 4 of the Act sets out certain exemptions and deductions and states that such incomes shall not be liable to taxation under the Act and paragraph (m) (section 4(j) of 1936 Act) reads as follows:

"(m) profits earned by a corporation or joint stock company, other than a personal corporation, in that part of its business carried on at a branch or agency outside of Saskatchewan."

Section 7, subsection (1) of the Act (section 9(1) of 1936 Act) states that there shall be assessed, levied and paid upon the income during the preceding year of every person:

20 "(d) who, not being resident in Saskatchewan, is carrying on business in Saskatchewan during such year."

Subsection (3) of section 7 (section 9(3) of 1936) provides that save as otherwise provided corporations no matter how created or organized carrying on business within the province shall pay a tax at the rate set out in the first schedule to the Act upon income during the preceding year.

Subsection (4) of section 7 (section 9(4) of 1936) reads as follows:

30 "(4) Where the minister is unable to determine or to obtain the information required to ascertain the income within the province of any corporation or joint stock company or of any class of corporations or joint stock companies, the Lieutenant Governor in Council may, on the recommendation of the minister, make regulations for determining such income within the province or may fix or determine the tax to be paid by a corporation or joint stock company liable to taxation."

Section 21a (section 23 of 1936) provides that the income liable to taxation under this Act of persons residing outside of Saskatchewan carrying on business in Saskatchewan shall be "the net profit or gain arising from the business of such person in Saskatchewan".

40 Section 23 (section 26 of 1936) provides that where a non-resident person produces, grows, mines, manufactures, etc., anything within Saskatchewan and exports the same without sale prior to export shall be deemed to be carrying on business in Saskatchewan and "to earn a proportionate part of any profit ultimately derived from the sale thereof outside Saskatchewan".

RECORD

Section 24 of the Act (section 27 of 1936) provides that any non-resident person soliciting orders or offering anything for sale in Saskatchewan through an agent or employee whether any contract is completed within or without Saskatchewan, etc., shall be deemed to be carrying on business in Saskatchewan and to "earn a proportionate part of the income derived therefrom in Saskatchewan".

The Minister (the Commissioner under 1936 Act) is given full discretion as to the manner of determining such proportionate part under sections 23 and 24.

By section 43 (section 54 of 1936) the Minister (Commissioner) is not bound by returns made and may determine the amount of tax to be paid by any person. 10

By section 63 (section 66 of 1936) the Lieutenant Governor in Council is given power to make regulations not inconsistent with the spirit of the Act for the purpose of carrying out the provisions of the Act according to their true intent and of supplying any deficiency therein.

p. 2, l. 13 4. On the 28th May, 1935, the appellant filed with the Commissioner
 of Income Tax its return of income for the taxation year 1934. On the
 p. 2, l. 29 2nd June, 1936, the appellant filed its return for the year 1935 and on 26th
 p. 3, l. 1 May, 1937 the appellant filed its return for the period of ten months ending 20
 the 31st October, 1936.

p. 3, l. 25 Prior to assessing the appellant's income for the years 1934, 1935
 and 1936, the Commissioner of Income Tax asked for certain information
 p. 4, l. 4 from the appellant, which was given on the 6th June, 1938. The Com-
 p. 4, l. 11 missioner asked for further information, which was given on the 8th July,
 p. 4, l. 33 1938. The Commissioner did not request any further information, nor
 did the appellant supply any.

p. 2, l. 16 On the 23rd August, 1938, the Commissioner made an assessment
 in the sum of \$4,382.07 in respect of the income of the appellant for the
 p. 2, l. 35 taxation year 1934, an assessment in the sum of \$11,541.07 in respect of 30
 p. 3, l. 11 the income of the appellant for the taxation year 1935, and an assessment
 in the sum of \$10,136.60 in respect of the income for the period of ten months
 ending on the 31st October, 1936. The income was determined by the
 Commissioner pursuant to the regulations above mentioned.

p. 2, l. 26 5. There was an appeal to the Board of Revenue Commissioners in
 p. 2, l. 46 respect of the assessment for each of the years 1934, 1935 and 1936. The
 p. 3, l. 21 Board in a written judgment dated January 27, 1939 dismissed the three
 pp. 40-57 appeals and confirmed the three assessments.

p. 41, On the question of the allowance for bad debts the Board held that
 ll. 24-28 it was entirely within the discretion of the Minister and there could be no 40
 p. 41, l. 38 appeal. That in any event the Minister proceeded rightly. That neither
 p. 42, ll. 26-30 the Minister nor the Commissioner misread the statute or failed to apply
 p. 45, l. 39 their minds to the question. It is clear from sections 29 and 32 of the 1936
 Act and subsection 4 of section 7 of the 1932 Act that the legislature realized
 the difficulty or impossibility of segregating or identifying the exclusively

Saskatchewan income. The returns of the company show that the income of the appellant could not be divided and refer to an allocation basis. The company's proposed allocation basis is just as much subject to the objections urged in its appeal as that set out in the regulations. The Saskatchewan sales contribute to the need of and to the profits from the non-Saskatchewan manufacturing operations. The Province could not have determined or identified the actual as distinct from some arbitrarily estimated profit attributable to the company's operations in Saskatchewan. The case therefore falls within section 7(4) of the 1932 Act (section 9(4) of the 1936 Act). As a person carrying on business within the Province the company is subject to direct taxation within the province irrespective of residence and irrespective of where its grand total of net income is computed. The Board while finding on the evidence that there are varying ratios of expense to sales in various parts of Canada, cannot on the evidence submitted, make any finding as to whether that ratio is higher, equal to or less than that ratio elsewhere.

It has not been established that the tax levied in any of the three years is higher than it should have been. That the tax being on the company and not on the income it may vary because of outside income with respect to a company doing business in the province without being other than direct taxation within the province. The method used does not tax income derived outside Saskatchewan. The regulations make the income so determined the "income within the province" for the purposes of the Act.

The assessments appealed against are not contrary to section 21a of the 1932 Act (section 23 of 1936) as the "net profit or gain" has been determined in the manner provided by law and no other profit or gain is taxed.

6. There was an appeal from the Board to a King's Bench Judge and Anderson J. in a written decision dated August 10, 1939 dismissed the three appeals and confirmed the decision of the Board of Revenue Commissioners.

He held that it was for the Commissioner to decide whether or not he was able to obtain the information required to ascertain the taxable income of the appellant and having decided that he was unable to determine or obtain the information required to ascertain the company's income, the condition precedent to the application of the regulations was fulfilled. The regulations are specifically authorized by statute and carry a presumption that they are "not inconsistent with the spirit of the Act, which shall have the same force and effect as if incorporated herein" (Section 63 of 1932—Section 66 of 1936) and that they are "regulations for determining such income within the province". (Section 7(4) of 1932) The *onus probandi* that these regulations are *ultra vires* rests on the appellant.

The percentage allotment authorized by regulations 1 and 2 is taken from the Dominion Income Tax Act and Regulations. It is, in my opinion, as accurate and equitable a method as can be devised under the circumstances.

p. 45, l. 44
et seq.
p. 47, ll. 16-21
p. 48,
ll. 11-13
p. 48, l. 28
p. 48,
ll. 31-34
p. 51,
ll. 31-36
p. 52,
ll. 18-22
p. 52, ll. 35-40
p. 52, l. 43
—p. 54, l. 17
p. 54, l. 18
p. 55, l. 20
p. 56,
ll. 39-45
pp. 64-73
p. 68,
ll. 35-46
p. 69,
ll. 8-16
p. 69, l. 30

RECORD

- p. 70,
ll. 14-18 There is no proof that the assessments tax some of the company's income outside Saskatchewan. The evidence is that the assessments are approximately, but not absolutely accurate—an approximation to absolute accuracy.
- p. 70, l. 22 These were real, genuine assessments of the Commissioner, calculated as accurately as was possible under the circumstances. He stated that the appellant has been unable to show that any income outside the province has been taxed. On the question of the allowance for bad debts he upheld the allowance made.
- p. 71,
ll. 1-16
- p. 72,
ll. 15-18
- pp. 86-90
pp. 97-98 7. The matter was then carried to the Court of Appeal of Saskatchewan, which adjudged that there was no right of appeal from the decision of the Judge in Chambers in respect of the assessment for the taxation year 1934. The Court adjudged, however, that it had jurisdiction to entertain the appeals against the assessments for the taxation years 1935 and 1936. It held that they were defective in that they did not make provision for the appellant being allowed any deduction in respect of a reserve for bad debts. It ordered, therefore, that the said assessments be set aside; that the Commissioner, in making new assessments for the years 1935 and 1936 should reconsider the question of a reserve for bad debts in the light of the reasons for judgment of that Court and should exercise the discretion vested in him by section 6(d) of *The Income Tax Act, 1936*, upon sound principles. 20 These matters are not the subject of appeal to this Board.
- p. 95, l. 11
et seq.
- pp. 86-97
p. 90, l. 36
—p. 95, l. 10 8. The Judgment of the Court of Appeal was delivered by Turgeon C.J.S. who dealt with the matters in appeal to this Board as set out in this paragraph. He held those portions of *The Income Tax Act, 1932*, as amended and *The Income Tax Act, 1936*, applicable to the assessments in question before the court, were so worded as to indicate an intention to impose only a form of taxation which falls within the description of “direct taxation within the province”, reference being made to section 4(j) and 23 of the 1936 Act as well as section 3, which defines “Income”. It was held that reading the said sections together the term “Income” in the case of all 30 corporations or joint stock companies whether resident inside or outside the province means only the net profits arising from that part of the business of the corporation which is carried on in Saskatchewan. It was held that the Commissioner may under subsection (4) of section 9 recommend to the Government and the Government may issue on his recommendation, regulations which he may use “for determining such income”, which would mean not the exact income of the company but an amount which is to be deemed to be its income for the purposes of the tax. It was held that the regulations in effect substitute for an amount which would be the net profits of the company earned in Saskatchewan, if the information necessary to 40 ascertain those profits was available, another amount, to be such portion of the company's total income as corresponds to the percentage which the company's sales in Saskatchewan bear to its total sales and that under the authority of *Bank of Toronto v. Lambe* (1887) 12 App.Cas.575, such a tax is valid as being a direct tax within the Province. The court held that it was within the power of the Legislature to enact all the provisions of *The*
- p. 91,
ll. 11-19
- p. 91, l. 32
- p. 92, ll. 6-11
- p. 92, l. 45
—p. 93, l. 4
- p. 93, ll. 5-9

Income Tax Act, 1936, concerned in the appeal and that it was within the authority of the Lieutenant Governor in Council, acting under section 9(4), to make the regulations which the Commissioner applied in determining the assessments in question. The court held on the facts before the Court that the Commissioner was justified in having recourse to the regulations in arriving at an estimate of the income and in assessing the appellants. There is no appeal on questions of fact. Where a taxpayer does not furnish or cannot furnish the information necessary to determine his income the taxing authority must proceed with an estimate. *Attorney-General v. Till* (1910) A.C. 50.

p. 93,
ll. 19-42p. 94,
ll. 5-21

9. By special leave of the Court of Appeal for Saskatchewan the company appealed to the Supreme Court of Canada as to that part of the judgment which was adverse to it. The respondents cross-appealed, contending that the judgment of the Court of Appeal should be varied by holding that the said court had no jurisdiction to entertain the appeal with respect to the assessments for the taxation years 1935 and 1936, that proper allowance has been made for bad debts, and that the appellant is not entitled to any costs as against the respondents.

p. 99

p. 100

p. 101

10. The appeal was heard on the 15th, 16th, 17th and 18th days of October, A.D. 1940 and judgment was delivered on the 22nd April, 1941. Sir Lyman Duff, C.J., with whom Davis and Taschereau, J.J. agreed was of the opinion that the assessments were invalid for the reason that the regulation pursuant to which they purport to be made either does not apply to the appellant company or was beyond the powers of the Lieutenant Governor in Council. Rinfret, J. (now the Chief Justice) with whom Crocket and Kerwin, J.J. agreed held the regulation to be applicable to the appellant company and the regulation and the authorizing statutory enactment *intra vires* but dismissed the cross-appeal. Hudson, J. delivered a separate judgment in which he agreed with the conclusions of Rinfret J.

p. 107, l. 29

pp. 108-112

p. 109, ll. 1-4

pp. 112-120

pp. 121-124

11. The judgment of the Chief Justice and Davis and Taschereau, J.J. delivered by the Chief Justice dissented on the matters on which the appeal to this Board is taken and held the assessments for 1934, 1935 and 1936 invalid for the reason that the regulation pursuant to which they purport to be made either does not apply to the appellant company, or was beyond the powers of the Lieutenant Governor in Council.

pp. 108-112

p. 109,
ll. 1-4

The appellant company is admittedly resident outside of Saskatchewan within the meaning of section 21a of *The Income Tax Act, 1932*. The business of the company in Saskatchewan is limited to making contracts of sale by its agents and by them receiving the proceeds of such sales. The profits of the company are derived from a series of operations including the purchase of raw material or partly manufactured articles, completely manufacturing its products and transporting and selling them, and receiving the proceeds of such sales. That part of the proceeds of sales in Saskatchewan which is profits is received in Saskatchewan but the whole of such profit does not "arise from" that part of the business carried on there

p. 109,
ll. 12-25

RECORD

within the contemplation of section 21a when its language is contrasted with that of the other sections of the Act.

p. 109,
ll. 26-46
p. 110,
ll. 1-6

The Chief Justice referred to section 3, section 4(m), section 23 and section 24 and held that they support the view that the profits taxable under section 21a as "arising from the business" of a non-resident "in Saskatchewan" are that part of such profits as is "earned" therein.

p. 111,
ll. 15-22

The considerations on which their Lordships in the Judicial Committee proceeded in *Commissioners of Taxation v. Kirk* (1900) A.C. 588 are pertinent here and lead to the conclusion that all profits received in Saskatchewan by a company having its residence outside Saskatchewan are not taxable as profits "arising out" of that part of the company's business carried on in Saskatchewan. 10

p. 111,
ll. 38-41

The method of determination as it is put in regulation 2 is to ascertain the ratio of the sales within the province to the total sales of the company and then apply that ratio to the income which for our present purpose means profits. Under the regulation the subject of income tax is that part of the sales in Saskatchewan which is profit; that is to say, the whole of the profit received in Saskatchewan. This is a procedure wholly inadmissible under the Statute. Nowhere does the Statute authorize the Province of Saskatchewan to tax a manufacturing company, situated as the appellant company is, in respect of the whole of the profits received by the company in Saskatchewan. It is not the profits received in Saskatchewan that are taxable; it is the profits arising from its business in Saskatchewan, not the profits arising from the company's manufacturing business in Ontario and from the company's operations in Saskatchewan taken together, but the profits arising from the company's operations in Saskatchewan. 20

p. 112,
ll. 7-10
p. 112, ll. 12-13
p. 112,
ll. 13-21

Section 7(4) which authorizes regulations limits that authority to making regulations for determining such income within the Province, which means in the case of companies not resident in Saskatchewan, the profits arising out of that part of their business that is carried on in Saskatchewan. The regulation if it applies to non-resident companies such as the appellant company is not competently made, because the aim of it is not within the purpose for which the statutory authority is given to the Lieutenant Governor in Council. The aim of the regulation is to determine the profits received by such companies in Saskatchewan. The authority is to make regulations for determining the net profits as limited and defined by section 21a. The appeal should be allowed and the assessments set aside. The appellant company should have its costs throughout. 30

p. 112,
ll. 22-37

pp. 112-120

12. The judgment of Rinfret J., now Chief Justice, was also that of Crocket and Kerwin J.J. After reviewing the facts the Chief Justice held that there was a right of appeal as to the taxation year 1934 as well as with respect to the years 1935 and 1936 and to the extent of allowing the appeal for the taxation year 1934 the judgment of the Court of Appeal should be varied. This is not in question in this appeal. 40

p. 116,
ll. 27-30

After quoting the regulations passed under section 7(4) of *The Income Tax Act, 1932*, he held that the said section 7(4) is to be construed as authorizing the Lieutenant Governor in Council to make regulations in all cases where the Minister is unable to determine or to obtain the information required to ascertain the income. The contention of the appellant that the regulations were not applicable as the condition precedent to their application did not exist is not "a question of law arising in the appeal" but was a pure question of fact with which the court cannot concern itself. There was almost superfluous evidence in support of the contention that the condition precedent existed.

p. 117,
ll. 19-27p. 117,
ll. 37-44p. 118,
ll. 6-7

Section 21a of The Income Tax Act, 1932 (section 23 of the 1936 Act) and the regulations indicate the intention to tax only the income arising from the business within the Province of non-resident companies which carry on business in Saskatchewan. As a consequence these Acts are well within the sub-head 2 of section 92 of the B.N.A. Act. *Bank of Toronto v. Lambe* (1887) 12 App.Cas. 575.

p. 118,
ll. 23-39p. 119,
ll. 10-13p. 119,
ll. 13-14

By the Acts the tax is upon income arising from the business in the Province. In my humble opinion, the regulations do exactly the same thing. The amount to be taxed under the regulations is a percentage of the sales in Saskatchewan and that percentage is identical with the ratio between the total profits and total sales. The amount so to be taxed does not necessarily exceed the amount of the net profit or gain arising from the business in Saskatchewan.

p. 119,
ll. 15-16p. 119,
ll. 17-20p. 119,
ll. 20-22

In answer to the argument that even if the Acts are constitutional or the regulations *intra vires*, they have the effect in the present case of taxing profits or gains which did not arise from the business in Saskatchewan, the appellant is met by the difficulty that the question whether profits or gains arose within or without Saskatchewan is really a question of fact already decided against it by the Commissioner of Income Tax, the Board of Revenue Commissioners and the Judge of the Court of King's Bench.

p. 119,
ll. 27-31

In an endeavour to transform the last objection into a question of law it was said that the application of the regulations necessarily includes in the assessment manufacturing profits said to have arisen outside Saskatchewan. Such was not the purpose of the Acts of Saskatchewan or of the regulations applied in the present case. The Commissioner in each assessment intended to tax exclusively the profits and gains arising from the business of the appellant in Saskatchewan. Neither the Commissioner of Income Tax nor the Board of Revenue Commissioners meant to reach anything but the profits or gains arising from the business of the appellant in Saskatchewan and the method adopted to obtain that object was the best available means to ascertain the income of the appellant arising from its business in Saskatchewan and nothing more. The adoption of the method in question was rendered necessary by the fact that the appellant did not keep separate profit and loss accounts for its Saskatchewan business. *The Attorney-General v. Till* (1910) A.C. 50 at page 72.

p. 119, l. 28
—p. 120,
l. 15

Decisions on other statutes containing similar provisions to the Income Tax Acts of 1932 and 1936 cannot be applied to the present case as these

p. 120,
ll. 16-22

RECORD

other Acts "in language, and to some extent in aim, differ from the Acts now before" the court.

p. 120,
ll. 22-31

The appellant itself admits that its exact and precise income arising from its business in Saskatchewan could not be ascertained owing to its method of book-keeping which made it necessary that the method of allocation and apportionment prescribed by the regulations should be resorted to by the Commissioner of Income Tax and the appellant cannot complain.

p. 120, l. 32

The judgment then dealt with the appeal as to the allowance for bad debts which is not in question in the present appeal.

pp. 121-124

13. Hudson J. after referring to sections 9 and 23 of *The Income Tax Act, 1936*, and setting out the regulations passed under the said section 9 and reviewing the judgments of the Board of Revenue Commissioners, Mr. Justice Anderson of the Court of King's Bench and of the Court of Appeal, stated that the contention of counsel for the appellants that if section 9(4) was to be construed so as to authorize the inclusion in the amount assumed to be earnings of a particular sum which might be considered to be an external earning, then the subsection was invalid, could not be supported. 10

p. 122,
ll. 31-44

p. 122, l. 43
—p. 123, l. 7

There can be no doubt about the power of the Legislature to impose a tax on a company found doing business within the Province and the Legislature in settling the income tax may adopt any yardstick which they may deem suitable, providing, of course, the tax is being levied "in order to the raising of a revenue for provincial purposes" and not done to achieve any ulterior purpose beyond the legislative jurisdiction of the Province. *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575, and *Attorney-General for Alberta v. Attorney-General for Canada* (1939) A.C. 117. 20

p. 123,
ll. 10-16

Under section 9(4) the regulations apply only when the Commissioner is unable to determine or obtain the information required to ascertain the income within the Province. Therefore, the amount to be fixed under subsection (4) must normally be an assumed amount, to take the place of a figure which it is impossible to ascertain. For the purpose of fixing this assumed or estimated amount the Lieutenant Governor in Council is authorised to make regulations or to themselves fix or determine the tax. He was unable to say that the regulations exceed the power vested in the Lieutenant Governor in Council under the authority of section 9(4) and that they seemed to him to be generally well calculated to work out equitably the intention of the Legislature. The making of the estimate is not a purely arbitrary act on the part of an official but is open to review by an independent Board and by a Judge of the Court of King's Bench, both of which tribunals expressed the opinion that it was doubtful if it is possible for anybody to frame a better formula, and that they could not find that the formula suggested by the appellant would produce a result more reliable than the formula prescribed by the regulations. 30 40

p. 123, l. 26
—p. 124,
l. 24

p. 124,
ll. 25-31

He expressed the view that the Supreme Court of Canada having jurisdiction only to decide on questions of law would not be justified in setting aside the assessments unless the court could say that no assessment under section 9(4) is valid, if it can be shown that in any degree earnings

outside Saskatchewan may have been included in the estimate of the total figure deemed to be earnings within the Province. He stated that he was not prepared to go that far.

If it could be said that the Commissioner and the Board and Mr. Justice Anderson had misconstrued the statute or the regulations, or failed to direct their minds to the questions involved, then the court would be justified in sending it back for reconsideration. We have no information as to what was considered by the Commissioner, but the judgment of the Board of Commissioners indicates that the members of that body gave
10 some consideration to all of the arguments and have not necessarily misconstrued either the statute or the regulations. p. 124, ll. 32-39

On the other points involved in the appeal he agreed with the conclusion of Rinfret J. and also with the disposition of the appeal proposed by him. p. 124, l. 40

14. The Respondents submit that on the matters in appeal the judgments of Anderson J., the Court of Appeal of Saskatchewan and of Rinfret, Crocket, Kerwin and Hudson, J.J., of the Supreme Court of Canada are correct, and that this appeal should be dismissed with costs, and the regulations and the authorizing statutory enactments be declared *intra vires* the legislature of Saskatchewan, for the reasons set out in the said judgments
20 and for the following amongst other

R E A S O N S

1. Because the taxation imposed by the Act and the regulations thereunder is direct taxation within the Province within the meaning of section 92(2) of *The British North America Act, 1867*.
 2. Because the regulations are *intra vires* the Lieutenant Governor in Council and apply to the appellant.
 3. Because the question whether the Minister or Commissioner of Income Tax is "unable to determine or obtain the information required to ascertain the income within the Province" being a condition precedent to the application of the regulations is a question of fact with respect to which there is no appeal and on the evidence the condition precedent existed.
 4. Because the regulations are intended to tax only the income arising from the business of the appellant within the Province and must be resorted to in order to ascertain the income.
 5. Because the amount to be taxed under the regulations is a percentage of the sales in Saskatchewan and that percentage is identical with the ratio between the total profits and total sales which amount does not necessarily exceed the amount of the net profit or gain arising from the business in Saskatchewan.
 6. Because the question as to whether profits or gains arose within or without Saskatchewan is a question of fact already decided against
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the appellant by the Commissioner of Income Tax, the Board of Revenue Commissioners and the Judge of the Court of King's Bench and with respect to which there is no further appeal.

7. Because if in this particular case the tax as computed exceeded that which would be valid *qua* tax, it was valid *qua* penalty imposed upon the taxpayer which did not furnish the required information as to its income.
8. Because the Act clearly contemplates taxing the income received or arising from the Saskatchewan business and there can be no manufacturing profit unless sales are made and the profit arises 10 where the sale price is received and is taxable in Saskatchewan.
9. Because even assuming that some part of the manufacturing profit is taxed in Saskatchewan, such profit is received in Saskatchewan and is taxable here and the fact that it may be taxed in Ontario as well is immaterial.
10. Because both the income and the company through its branches are in the province and therefore the income received in the province is properly taxable as being direct taxation within the province.
11. Because the company being one doing business within the province is taxable by the Legislature which may adopt any yardstick which 20 they may deem suitable.
12. Because section 21*a* of The Income Tax Act of 1932 (s. 23 of 1936) provides in effect for the exemption of certain income and as such must be strictly construed and the words "arising from" in said section 21*a* must be construed as including the income received from sales in the province.
13. Because section 7(3) of the Act of 1932 (s. 9 (3) of 1936) provides for taxation of the income wherever it arises "save as herein otherwise provided" and section 21*a* (s. 23 of 1936) does not 30 exclude the taxation of profits received in Saskatchewan.
14. Because the expression "arising from" in section 21*a* (s. 23 of 1936) carries the same signification as "derived from" in section 23 (s. 26 of 1936) and "derived therefrom" in section 24 (s. 27 of 1936) and in each section the whole profit realized upon the sale is the profit dealt with.

R. S. MELDRUM.

In the Privy Council

No. 12 of 1942.

ON APPEAL FROM THE SUPREME COURT
OF CANADA

IN RE THE TREASURY DEPARTMENT
ACT, 1938,

AND

INTERNATIONAL HARVESTER COMPANY
OF CANADA, LIMITED, an Ontario
corporation doing business in the Province of
Saskatchewan, (Appellant) *Appellant*

AND

THE PROVINCIAL TAX COMMISSION,
THE COMMISSIONER OF INCOME TAX,
THE PROVINCIAL TREASURER, and
THE ATTORNEY GENERAL FOR
SASKATCHEWAN,
(Respondents) *Respondents*

CASE OF THE RESPONDENTS

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