WM. WRIGLEY JR. COMPANY LIMITED ..... APPELLANT;

AND

THE PROVINCIAL TREASURER OF MANITOBA..... RESPONDENT.

1946
*Nov. 6, 7.

1947
*Feb. 4
*April 22, 23.
*June 18.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Income tax—Company, with head office and manufacturing plant in Ontario, selling in Manitoba—Assessed for income tax in Manitoba—Question whether, from profits assessed, company entitled to deduction of allowance for profits on its operations in Ontario—The Income Taxation Act, R.S.M. 1940, c. 209, s. 24—"Net profit or gain arising from the business" of the Company in Manitoba.

*PRESENT at hearing on Nov. 6, 7, 1946, were Hudson, Taschereau, Rand, Kellock and Estey JJ. Subsequently Hudson J. died, and on Feb. 4, 1947, the Court required a reargument, which took place on April 22, 23, 1947, before Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ. On June 18, 1947, judgment was delivered.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

By s. 24 (1) of *The Income Taxation Act*, Man., R.S.M. 1940, c. 209, "the income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, * * * shall be the net profit or gain arising from the business of such person in Manitoba". By s. 24 (2), the section applies to a joint stock company carrying on business in Manitoba and which has not its head office in Manitoba.

Appellant, a joint stock company manufacturing and selling chewing gum, had its head office and manufacturing plant in Ontario. It had a warehouse and office in Manitoba. Manufactured goods were shipped to the warehouse in Manitoba where they were stored and, on orders received and accepted there, were distributed to appellant's customers in Manitoba and certain other provinces. The selection and the credit rating of the jobbers to whom the Manitoba office might make sales, the book-keeping, collecting of accounts, and the general direction and control of the business were all dealt with exclusively at the head office in Ontario.

Appellant was assessed for income tax for the years 1936, 1937, 1938 and 1939, under Manitoba statutary provisions not materially different from provisions now contained in said Act, on all the net profits from sales made from appellant's Manitoba office. Appellant claimed a deduction of an allowance for profits on its operations in Ontario, as not being profits on gain arising from its business in Manitoba.

Held (Rand and Kellock JJ. dissenting): Appellant was entitled to deduction of an allowance for profit on the cost of manufacture in Ontario. (Judgment of the Court of Appeal for Manitoba, 53 Man. R. 213, reversed, and judgment of Major J., *ibid*, restored).

Per the Chief Justice and Taschereau J.: The manufacturing profits were made in Ontario and cannot be said to have arisen from appellant's business in Manitoba. The selling in Manitoba cannot have the effect of imparting, for taxing purposes in Manitoba, profits earned in the initial operations in Ontario which made the goods ready for sale. "Arising from the business * * * in Manitoba" in s. 24 means "what is attributable to the business in Manitoba" or "profits derived from sources in Manitoba"; and the manufacturing profits made in Ontario are not so attributable or so derived. (Cases reviewed).

Per Estey J.: In the light of the authorities (discussed) and the taxing power of Manitoba, s. 24 must be construed that the tax is imposed only on the net profit arising out of that portion of the business which a non-resident carries on in Manitoba. Activities and operations other than contracts for sale constitute a carrying on of business and produce or earn income, and therefore, while the income may be realized through the sale, it does not entirely arise from the sale. In the present case, the manufacturing operations in Ontario are a carrying on of business which contributes to appellant's income and the income should be apportioned accordingly. (Other sections of the Act discussed as to their bearing on the construction of s. 24).

Per Rand J., dissenting: Construing s. 24 with other sections of the Act, the net profit or gain "arising from" the business in Manitoba is the entire profit; "arising from" is not intended to be the equiva-

lent of "earned"; the legislative assumption is a business embracing the necessary elements to a profit and the whole profit realized upon the sale is the profit dealt with.

Per Kellock J., dissenting: Construing s. 24 with other sections of the Act, the legislative intent is that in any case where there is a carrying on of business within the Province by reason of the habitual making of contracts of sale therein, s. 24 applies to make taxable the entire profit arising from such sales, without any apportionment, (16 & 17, Vict. (Imp.), c. 34, and decision thereunder, discussed; those decisions are pertinent and the principle of them is applicable).

APPEAL by Wm. Wrigley Jr. Company Limited (a company, incorporated under the Dominion *Companies Act,* with head office and manufacturing plant in Ontario and licensed to do, and doing, business in Manitoba) from the judgment of the Court of Appeal for Manitoba (1) which, reversing the judgment of Major J. (2), affirmed (Trueman J.A., and Dysart J.A. (*ad hoc*), dissenting) the assessments made against the appellant for income tax for the years 1936, 1937, 1938 and 1939, under Manitoba statutory provisions not materially different from provisions now found in *The Income Taxation Act,* R.S.M. 1940, c. 209. The main question in the appeal had to do with the interpretation of s. 24 of said Act.

The material facts of the case and the question in dispute are stated in the reasons for judgment in this Court now reported and are indicated in the above headnote.

Everett Bristol K.C. for the appellant.

G. L. Causley K.C. for the respondent.

The judgment of the Chief Justice and Taschereau J. was delivered by:

TASCHEREAU J.—This litigation arises out of the interpretation of section 24 (1) of *The Income Taxation Act* of the province of Manitoba.

This section reads as follows:—

The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the *net profit or gain arising from the business of such person in Manitoba.*

(1) 53 Man. R. 213; [1945] 3 W.W.R. 305; [1945] 4 D.L.R. 463; [1945] C.T.C. 299.

(2) 53 Man. R. 213, at 216-221; [1943] 3 W.W.R. 49; [1943] 4 D.L.R. 548; [1943] C.T.C. 131.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Taschereau J.

The appellant company has its head office in the city of Toronto, Ontario, and carries on business in the province of Manitoba. For the purpose of the Act, the appellant company is deemed to be residing outside of Manitoba, in view of subsection 2 of section 24, which enacts that a joint stock company not having its head office in Manitoba, will be subject to subsection 1 of section 24.

The appellant company manufactures chewing gum, and while the manufacturing plant is located in Ontario, it has a warehouse and a distributing organization in the city of Winnipeg, Manitoba. After the goods have gone through the manufacturing processes in Ontario, they are shipped to the Winnipeg warehouse where they are stored and distributed to the appellant's customers in Manitoba, Saskatchewan and Alberta. All orders from those three provinces are received in Winnipeg, and are filled by that office out of that stock.

For the fiscal years 1936, 1937, 1938, 1939, the Provincial Treasurer of Manitoba has assessed the appellant for income tax purposes, on all the net profits from the sales of gum, made from the Winnipeg office, in the three above mentioned provinces. The company claims that it is entitled to an allowance as profit on the actual cost of manufacture; in other words, that factory profits are deductible because *they are not profits or gain arising from the company's operations in Manitoba.*

The matter was heard before Mr. Justice Major in the Court of King's Bench in Manitoba, who ruled that these manufacturing profits were deductible, but the Court of Appeal (Messrs. Justices Trueman and Dysart (*ad hoc*) dissenting) allowed the appeal and affirmed the decision of the Minister.

The contention of the respondent is briefly that the profits or gain of the company arise from the sales, and as the sales were made in Manitoba, within the time provided in the Act, the assessments are properly made.

A preliminary observation, as to sections 3 and 24 of the taxing statute, is essential.

Section 3 is drafted in the following terms:—

For the purposes of this Part, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, *as the case may be whether derived from sources within Manitoba or elsewhere;* and includes the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including * * *

In view of this language, it would seem that the legislature intended to tax profits whether derived from sources within Manitoba or *elsewhere,* but section 24 deals particularly with persons residing outside of Manitoba, carrying on business in Manitoba, and says that the income liable to taxation shall be the net profit or gain arising from the business of such person *in Manitoba.*

I have no doubt that the definition of the word "income" in section 3, and which includes profits derived from sources outside of Manitoba, does not apply to section 24, where the tax is limited on the net profit or gain arising from *the business in Manitoba.*

The same point arose in *International Harvester Co. of Canada, Ltd.* v. *The Provincial Tax Commission* (1) and in that case Sir Lyman Duff, dealing with a similar statute, said at page 331:—

It is clear, I think, that the effect of the words "net profit or gain arising from the business of such person in Saskatchewan" in section 21*a* is, for the purpose of that section, to delete from the definition of income in section 3 the words "or elsewhere".

It is, therefore, section 24, taken independently of section 3, that must be examined for the purpose of determining this case. If the profits arise where the sales are made then the assessments are valid, but if the manufacturing profits are deductible in computing the gain made in Manitoba, and on which the tax is imposed, this appeal must succeed.

This question of allowances of manufacturing profits for provincial income tax purposes is by no means a new

(1) [1941] S.C.R. 325.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Taschereau J.

one. In *International Harvester Co. of Canada, Ltd.* v. *The Provincial Tax Commission* (1) the same argument made by the present respondent was also considered by this Court. The International Harvester Company carried on the business of manufacturing and selling agricultural machinery, and had its head office at Hamilton, Ontario, where the manufacturing business was carried on. The company sold its products in Saskatchewan as well as in other parts in Canada, and it was admitted by all parties that the central management and control of the company, as in the present case, were at the head office in Ontario.

The Commissioner of Income Tax for Saskatchewan made assessments upon the company in respect of its income for each of the years 1934 to 1936 inclusive, without allowing for manufacturing profits. The charging section in Saskatchewan was similar to the one enacted by the legislature of Manitoba, and which we have now to consider.

The business of the company in Saskatchewan was the making of contracts of sale by its agents, and the International Harvester Company therefore claimed that it was entitled to an allowance for manufacturing profits, which did not arise from the business of the company in Saskatchewan. The then Chief Justice of Canada, Sir Lyman Duff, with whom concurred Davis and Taschereau JJ. said:

> 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.

The judgment of Sir Lyman Duff was a dissenting judgment, but Rinfret, Crocket, Kerwin and Hudson, JJ., who took an opposite view on some other points of the case, did not in any way contradict the opinion of Chief Justice Duff on that particular point. Although not a binding pronouncement, this expression of opinion is, I believe, the logical interpretation to be given to that part of the Saskatchewan statute, which is identical to section 24 of the Manitoba Act.

(1) [1941] S.C.R. 325.

The respondent has cited the following passage of Mr. Justice Kerwin in the case of *Firestone Tire and Rubber Co. of Canada, Ltd.* v. *Commissioner of Income Tax* (1).

> The manufacture in Ontario of the appellants' goods, however necessary to the existence of its business, does not earn income. The goods are manufactured for the purpose of sale and the income is earned when the goods are sold and all the income, therefore, was earned within British Columbia.

In that case, the Firestone Tire and Rubber Co. of Canada, Ltd., having its head office at the city of Hamilton, had no office or any employees in the province of British Columbia. Its sales, in that province, were made through an independent firm, and the majority of this Court held that the contract between the parties was not one of agency, but one of sale, and, therefore, it was held that the Firestone Tire and Rubber Co. Ltd. was not liable to income tax in British Columbia.

The *Income Tax Act* of British Columbia, R.S.B.C. 1936, Chap. 280, provides:—

> 3. (1) To the extent and in the manner provided in the Act and for the raising of a revenue for Provincial purposes:
>
> (*a*) All income of every person resident in the Province and *the income earned within* the Province of persons not resident within the Province shall be liable to taxation.

It may be first of all pointed out that the judgment of Mr. Justice Kerwin, with whom Mr. Justice Hudson concurred, was a minority judgment, but moreover, Mr. Justice Kerwin in his reasons said that the entire scope of the British Columbia Act is quite different from that of the Saskatchewan Act, and that, therefore, the decision in *International Harvester Co. of Canada Ltd.* v. *The Provincial Tax Commission* (2) did not apply in the Firestone case. In Saskatchewan a tax is imposed on "the net profit or gain *arising from the business* of such person in Saskatchewan", while in the British Columbia Act a tax is imposed on "all income of every person resident in the Province and the *income earned within the Province* of persons not resident within the Province".

(1) [1942] S.C.R. 476 at 494-495. (2) [1941] S.C.R. 325.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Taschereau J.

In his reasons for judgment in the *International Harvester* case (1), Sir Lyman Duff further says at page 331:—

> 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. The essence of its profit making business is a series of operations as a whole. That part of the proceeds of sales in Saskatchewan which is profits is received in Saskatchewan, but it does not follow, of course, that the whole of such profits "arises from" that part of the Company's business which is carried on there within the contemplation of section 21 *a*; and I think such a conclusion is negatived when the language of this section is contrasted with that of other sections of the Act.

Sir Lyman Duff cites the case of *Commissioners of Taxation* v. *Kirk* (2). In that case the income tax statute of New South Wales charged within income tax, income "derived from lands of the Crown held under lease or licence" in New South Wales, and income "arising or accruing" from "any other source in New South Wales". The statute provided that "no tax shall be payable in respect of income earned" outside New South Wales. The company whose income came into question in that case was a mining company owning and working mines in New South Wales, the crude ore being there converted for the most part into concentrates. Almost the whole of the ore so treated was sold and the contracts for sale were made outside New South Wales. The Supreme Court of New South Wales held, following a previous decision in *In re Tindal* (3), that the whole of the income included in the proceeds of sales was earned and arose at the place where the sales were made and the proceeds of the sales received, and that, consequently, no part of such proceeds was taxable as income in New South Wales. The Judicial Committee reversed this judgment and, at pages 592 and 593 (2), their Lordships said:

> Their Lordships attach no special meaning to the word "derived", which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income: (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first

(1) [1941] S.C.R. 325.
(2) [1900] A.C. 588.
(3) (1897) 18 N.S.W.L.R. 378.

process seems to their Lordships clearly within sub-s. 3, and the second or manufacturing process, if not within the meaning of "trade" in sub-s. 1, is certainly included in the words "any other source whatever" in sub-s. 4.

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales * * * This point was, if possible, more plainly brought out in *Tindal's* case (1) * * * The question in that case, as here, should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony.

The fallacy of the judgment of the Supreme Court in this and in *Tindal's* case (1) is in leaving out of sight *the initial stages,* and fastening their attention exclusively *on the final stage* in the production of the income.

This reasoning, I think, applies in the present case. When the goods of the appellant company reach Winnipeg, they have also gone through a series of processes or operations which make them ready for consumption. It is in these first stages that the manufacturing profits are made, and I fail to see how it can be said that they have "arisen from the business of the appellant in Manitoba". It is quite true that the goods are sold in Manitoba, but the business of selling and collecting the sales price in Manitoba, which is the final stage of a series of operations, cannot have the effect of importing for taxing purposes in Manitoba, profits earned in the initial stages in the province of Ontario, as a result of manufacturing operations.

I fully agree with Mr. Bristol when he suggested that "arising from the business" means "what is attributable to the business in Manitoba" or "profits derived from sources in Manitoba". The manufacturing profits made in Ontario are surely not attributable to the operations in Manitoba, and they are not derived from sources in Manitoba.

In order to accept the conclusions of the respondent, it would be necessary to say that the law taxes profits "derived from contracts entered in Manitoba" and I find myself unable to so construe section 24.

I, therefore, come to the conclusion that the appellant is entitled to an allowance as profit on the actual cost of manufacture and I would, therefore, allow the appeal and restore the judgment of Mr. Justice Major, with costs throughout.

(1) (1897) 18 N.S.W.L.R. 378.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Rand J.

RAND J. (dissenting)—The transactions in Manitoba, constituting admittedly a business carried on there, were these: the receipt and warehousing at Winnipeg of merchandise, the acceptance and fulfilment of orders received from approved jobbers in the three prairie provinces through distribution by shipment or delivering of the goods called for; general superintendence of the business in those provinces, including coordinate direction over the field representatives canvassing the prairies; and the keeping of all proper records of the business so done. The expenses at Winnipeg were met by cash received from the head office at Toronto. The price for the goods was remitted by the purchasers direct or through the Winnipeg office to Toronto where all commercial accounts were kept. The travelling representatives were under general instruction from headquarters and paid direct from there. The question is, what was the net profit or gain "arising from" the business so conducted?

The relevant provisions of the taxing Act are as follows:

3. For the purposes of this Part, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Manitoba or elsewhere; * * *

4. The following incomes shall not be liable to taxation hereunder:

(*v*) Income earned by a corporation or joint stock company with its head office in Manitoba (other than a personal corporation) in that part of its business carried on outside of Manitoba.

(1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of * * *

(4) Where a corporation or joint stock company with its head office in Manitoba, other than a personal corporation, carries on business outside of Manitoba, no losses incurred in respect to that part of its business shall be deducted or taken into account in calculating the amount of income earned in Manitoba.

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person * * *

(*d*) who, not being resident in Manitoba, is carrying on business in Manitoba during such year;

24. (1) The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

(2) This section shall apply to a taxpayer which is a corporation or joint stock company carrying on business in Manitoba and which has not its head office in Manitoba.

25. The income liable to taxation under this Part of every person residing outside of Manitoba, who derives income for services rendered in Manitoba, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Manitoba, shall be the income so earned by such person in Manitoba.

26 (1) Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything within Manitoba and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business in Manitoba and to earn within Manitoba a proportionate part of any profit ultimately derived from the sale thereof outside of Manitoba.

(2) The minister shall have full discretion as to the manner of determining such proportionate part.

27A. (1) Any non-resident person soliciting orders or offering anything for sale in Manitoba through an agent or employee, and whether any contract or transaction which may result therefrom is completed within Manitoba or without Manitoba, or partly within and partly without Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

(2) The minister shall have full discretion as to the manner of determining such proportionate part.

It is agreed that section 24 is the applicable provision, but it can be seen at once that the first consideration raised is that of the meaning of certain words and expressions used both in that and the other provisions. We have "arising from", "derived from", "earned". Others of analogous import appear in the cases cited to us: "accruing from", "accruing from any source", "produced in". Primarily, to "earn" income or profit is, I should say, to expend the effort or exertion which creates the value to be exchanged; profit is "realized" if and when that value is converted into money or, in a practical business sense, into debt, in an amount greater than the cost of producing it. "Arising from", "derived from" and "accruing from" I take to be equivalents; they are applicable to a defined source; and in the case of a business, where used without more, it is on the assumption that the "business" includes factors essential in substance to producing profit. In the present case, the sales in Manitoba are obviously the final step in an overall business embracing manufacture and sale; but for the purposes of Manitoba, they and their clustered elements are a segregated and distinct business of themselves. The only difference between them and ordinary

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Rand J.

commercial trading is that in the latter case the goods are bought and they enter the business with their value therein so created; the essential factors are purchase, possession and sale; here, value is produced instead of purchased out of Manitoba, brought there and localized for the same purpose. In the statutory conception, ownership, possession, and disposal of the goods in Manitoba furnish the foundation of the taxable business there conducted. Not every "business" can be said to possess all factors required for the production of profit within the localization. It may, though self-contained, be but an intermediate process; for some, at least, of such cases section 26 makes provision; in them the legislature taxes either the process or a potential profit deemed annexed to it, on the basis of that portion of ultimate profit attributable to it. If, therefore, there is in a business from which profits must "arise", a sufficient basis in fact for the legislative assumption, as I think the case here, jurisdiction to tax the entire profit, on that apart from any other ground, is established; in the absence of modifying language in the context, the profit "arising from" that business is the entire profit; and the cost to that point, even though a manufacturing cost, determines the amount of it.

But the question remains whether by the provisions of the statute as a whole such a meaning is modified to point clearly to another subject-matter of tax or basis of determining the taxable profit. Does it appear that the words "arising from" are intended to be the equivalent of "earned" and the basis of the tax, that share of the profits from the company's entire operations—where, as here, they consist of a connected series—completed by the Manitoba transactions, which the value added to the goods by the operations in Manitoba bears to the total value produced? The different conceptions are sufficiently defined and the difficulty is one of legislative meaning only.

The provisions as a whole make it, I think, indisputable that the distinction suggested between "arising from" and "earned" was fully appreciated. Section 26,

> to *earn* within Manitoba a proportionate part of any profit ultimately *derived from* the sale thereof outside of Manitoba,

seems to put that beyond question. The contention is that the converse of the effect of this unambiguous language was intended in section 24, but I am unable to agree with it. The expression "arising from" in section 24 carries the same signification as "derived from" in 26; in each case there is assumed a business embracing the necessary elements to a profit and in each the whole profit realized upon the sale is the profit dealt with.

It is argued that *Commissioners of Taxation* v. *Kirk* (1) is against that view. There again the question was one of the particular language used, and, as put by Lord Davey, it was

> whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony.

He treats "derived" as synonymous with "arising" or "accruing" but he does not extend that equivalence to "earned" or "produced". It was the four processes there that earned or produced the income. Section 27 declared that no tax should be payable in respect of income earned outside the Colony, and what Lord Davey was concerned to ascertain was what income was earned within the Colony. In such a context "arising" or "accruing" was referrable to the distributed income attaching to the process of production carried out in New South Wales and his statement

> Nor is it material whether the income is received in the Colony or not if it is earned outside

applies whether it is wholly or partly earned outside. The "earning", the work resulting in the creation of value, is the proper measure of the share of total profit to be annexed to the particular process wherever it may be carried out.

The many other authorities brought to our attention are of value only in clarifying the subject-matter and the terms employed; to ascertain the intention of the legislature from the language used is in each case an individual problem for which we can generally look for but small assistance from principle or analogy.

I would, therefore, dismiss the appeal with costs.

(1) [1900] A.C. 588.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Kellock J.

KELLOCK J. (dissenting)—The appellant Company has its head office and factory in Toronto and an office and warehouse in Winnipeg. Its business is the manufacture and sale of chewing gum. At the factory ingredients for the finished article are purchased and stored, manufactured and packaged ready for sale. Shipments are then made from Toronto to Winnipeg, where a stock is carried for distribution in Manitoba, Saskatchewan, Alberta and a part of Northwestern Ontario. The Winnipeg branch receives the orders taken by jobbers in these areas, accepts and fills them and bills the purchasers, copies of the invoices being forwarded to the head office. Payment is made, not to the Winnipeg branch, but directly to the head office.

The assessments in question on this appeal are in respect of the appellant's fiscal periods ending in the years 1936 to 1939, inclusive. For the legislation governing, it is convenient to refer to R.S.M. 1940, cap. 209. It was not contended that there is any material difference between this and the earlier statutes which are applicable. Section 3, so far as material, defines "income" as

> the annual net profit or gain * * * directly or indirectly received by a person from * * * any trade, manufacture or business * * * whether derived from sources within Manitoba or elsewhere * * *

The persons who are made liable to taxation on income thus defined are set out in section 9, the relevant part of which is as follows:

> 9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person * * *
>
> (*d*) who, not being resident in Manitoba, is carrying on business in Manitoba during such year;
>
> tax at certain rates.

The combined effect of these two provisions purport, in the case of a non-resident carrying on business in Manitoba, to make such person liable to taxation in Manitoba in respect of his whole income. However, special provision is made for the case of a non-resident who carries on business in Manitoba by section 24 (1), which reads as follows:

> The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

This subsection is, by subsection 2, made applicable to a company whose head office is without the province. The question for determination on this appeal is the proper construction of the words "the net profit or gain arising from the business of such person in Manitoba".

Appellant submits that, while it has only one profit, that profit, to quote its factum, "must be deemed to have arisen in all stages of the company's operations" and "must be apportioned on some basis to arrive at the taxable income in Manitoba". Reliance is placed upon the decision of the Privy Council in *Commissioners of Taxation* v. *Kirk* (1) and the dissenting judgment in *International Harvester* v. *The Provincial Tax Commission* (2) (Sask.). It is said that the net profit or gain "arising from the business" in Manitoba means the net profit arising from the appellant company's "operations" in Manitoba. Appellant also invokes sections 26, 27 and 27A, as showing a legislative intent to apportion profit on the basis contended for. For the respondent it is contended that the whole of the net profit arising from contracts of sale made in Manitoba are taxable, while profit arising from contracts made elsewhere are not taxable.

Before turning to a consideration of the authorities, it is essential first to consider the particular legislation which is here in question. In the statute one finds that section 24 is followed by a group of sections, 26 to 28, inclusive, grouped under the heading "Income from *Operations* in Manitoba". These sections are as follows:

26. (1) Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything within Manitoba and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business in Manitoba and to earn within Manitoba a proportionate part of any profit ultimately derived from the sale thereof outside of Manitoba.

(2) The Minister shall have full discretion as to the manner of determining such proportionate part.

27. (1) Any non-resident person, who lets or leases anything used in Manitoba, or who receives a royalty or other similar payment for anything used or sold in Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

(2) The Minister shall have full discretion as to the manner of determining such proportionate part.

27A. (1) Any non-resident person soliciting orders or offering anything for sale in Manitoba through an agent or employee, and whether any

(1) [1900] A.C. 588. (2) [1941] S.C.R., 325.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Kellock J.

contract or transaction which may result therefrom is completed within Manitoba or without Manitoba, or partly within and partly without Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

(2) The Minister shall have full discretion as to the manner of determining such proportionate part.

28. Nothing in the three last preceding sections shall in any way affect the generality of the term "carrying on business" used elsewhere in this Part.

It is admitted that appellant is carrying on business in Manitoba within the meaning of section 24. The question is, what is the "business" in Manitoba the net profit arising from which is taxable? Is the line to be drawn horizontally, as appellant contends, by apportioning some notional profit to all of the operations of the appellant which culminate in the sale of its product, the part apportioned to the later operations actually performed within the province alone being taxable, or does the statute indicate, as respondent submits, that the line is to be drawn vertically as between the profit arising from contracts of sale made within and those made without the province? It is quite clear from section 24 itself that the entire net profit arising from the business carried on in Manitoba is taxable. The only question is, what is "the business"? Under section 26 any one of a number of particular operations is made to constitute the carrying on of business and there is express provision for apportioning profit to such operations. It is also significant that the section expressly excludes sale, and it would seem that the intention of the legislature is thereby indicated that where sale takes place within the province, that is a carrying on of business within the meaning of the statute without the necessity for any express provision to that effect, as the legislature evidently thought was necessary in the case of operations which do not culminate in sale. The same theory is exhibited by section 27A. I think it follows, therefore, that in any case where there is a carrying on of business within the province by reason of the habitual making of contracts of sale therein, section 24 applies and the entire profit arising from such sales is taxable and there is no apportionment.

Were section 24 absent from the Act, section 27A would apply to the appellant in respect of orders solicited in Manitoba. That section isolates the solicitation of orders

or the offering of anything for sale in Manitoba from other operations and constitutes this a carrying on of business in Manitoba for the purposes of the section. The greater, however, is made to include the less by the provisions of section 24, and, as the operations of the appellant go beyond what is described in section 27A, I think section 24 is the section which applies to the appellant. Counsel for the appellant agrees with this construction.

Turning to the English legislation, 16 and 17 Victoria, cap. 34, section 2, Schedule D, makes provision for taxation "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from * * * any * * * trade * * * exercised within the United Kingdom".

For my part, I cannot follow counsel for the appellant in his argument that: "the annual profits or gains arising or accruing to any person * * * from any trade exercised within the United Kingdom" differs in meaning from "the annual profits or gains arising or accruing to any person from the trade (or business) of such person in the United Kingdom", had the statute been so expressed as is the case with the Manitoba legislation here in question. To my mind, therefore, the decisions under the Imperial statute are pertinent. It is to be observed that that statute does not indicate what constitutes the exercise of a trade within the United Kingdom. Two questions therefore arise in any given case namely, (1) whether there is a trade exercised or carried on within the United Kingdom from which profits arise; and (2) what are the profits which are made subject to tax.

In *Erichsen* v. *Last* (1), the appellants were a foreign company domiciled in Copenhagen, having three marine cables connecting with the United Kingdom at different points. They accepted messages in the United Kingdom for transmission to various countries over their own cables and the cables of others. It was held that they were exercising a trade in the United Kingdom and chargeable to income tax on the profits arising from the contracts made within the United Kingdom. Any apportionment of profit such as is here contended for was negatived.

(1) (1881) 8 Q.B.D. 414.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Kellock J.

As to the first question, Brett L.J. said at p. 418:

The only thing that we have to decide is whether, upon the facts of this case, this company carry on a profit earning trade in this country. I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, *even though everything to be done by them in order to fulfil the contracts is done abroad.*

At p. 420 (1) Cotton L.J. said:

* * * and in my opinion when a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business.

This was approved by Lord Watson in *Grainger* v. *Gough* (2).

As to the second question, Brett L.J. said at p. 419 (1):

Then from what is the duty to be collected? It is from the profit accruing to this company from the trade which they carry on in England, namely, the making such contracts, and that profit is the difference between the sum the company receive and what it costs to earn that sum. There is no difficulty about that. It is immaterial whether the company have expended in this country or abroad what it properly can be said to cost them in order to earn the money which they so receive, but such expense, and nothing more, must be deducted in order to get the profit.

At p. 420 (1), Cotton L.J. said:

Then as to the question on what profit the company are to pay? The question is, what profit they make by the business carried on here, which is contracting to send messages to various parts of the world. It is, in my opinion, the sum received, after deducting everything which the company pay for the purpose of performing their contract. If part is performed by the company themselves, they cannot deduct anything in respect of a profit supposed to have been earned by them in the course of such performances. They can, of course, deduct all expenses, including their own expenses, and sums paid to other companies, but they cannot deduct a profit which is imaginary and has no real existence.

Under the same legislation in question in the above cited case, on the other hand, it was held by the House of Lords in *Grainger* v. *Gough* (2), that the solicitation of orders in the United Kingdom by an agent on behalf of a wine merchant carrying on business in France would not fall within the statute, no contracts being made in England. In that case Lord Davey, at page 345, said:

Now, what does one mean by a trade, or the exercise of a trade? Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased.

(1) (1881) 8 Q.B.D. 414.
(2) [1896] A.C. 325, at 340.

It was held also in *Sulley* v. *Attorney General* (1) that where an American firm carried on business in New York consisting in the resale there of goods purchased on their account in England by one of the partners who resided in England did not constitute the exercise of a trade in the United Kingdom within the meaning of the legislation. As stated by Lord Watson in *Grainger's* case (2) at page 341:

> One reason assigned for the decision was that the firm's transactions here did not involve any profits or gains, which were wholly dependent upon the resales effected by the firm on the other side of the Atlantic.

In *Maclaine* v. *Eccott* (3), Viscount Cave L.C. expressed the principle thus at page 432:

> I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally) exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations; but the most important, and indeed the crucial, question is, where are the contracts of sale made?

It would appear that the use of the phrase, "a merchant's business" was not intended to exclude from the application of the principle, businesses which include the production of the article sold as distinct from mere purchase. All of the members of the House approved of the dissenting judgment of Lord Dundas in *Crookston* v. *Furtado* (4), where the company concerned was the owner of phosphate mines, the product of which it sold in the United Kingdom. See also *Werle & Co.* v. *Colquhoun* (5).

In my opinion, the principle of the above decisions is applicable to section 24 of the legislation here in question. I am further of opinion that the legislation, including sections 26, 27 and 27A, was drawn with that principle in view. Although a different opinion with respect to somewhat similar legislation is expressed in the dissenting judgment in the *International Harvester* case (6), already referred to, I cannot, with respect, accept it, for the reasons set forth above. That opinion was founded upon *Kirk's* case (7) but Lord Davey, who was a party to the judgment

(1) (1860) 5 H. & N., 711.
(2) [1896] A.C. 325.
(3) [1926] A.C. 424.
(4) 1911 S.C. 217.
(5) (1888) 20 Q.B.D. 753.
(6) [1941] S.C.R. 325.
(7) [1900] A.C. 588.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Kellock J.

in *Grainger* v. *Gough* (1) in which *Erichsen* v. *Last* (2) was approved, said, in relation to the New South Wales *Income Tax Act,* 1895, with which the Privy Council was concerned in *Kirk's* case (3), at page 593:

> The learned judges refer to some English decisions on the Income Tax Acts of this country, which in language, and to some extent in aim, differ from the Acts now before their Lordships.

In *Kirk's* case (3) their Lordships were concerned with two companies, each incorporated under the law of the Colony of Victoria and having its head office and board of directors in that Colony. Each company conducted mining operations on leasehold lands held from the Crown in New South Wales, where each had an office and a mine manager. It is stated by Lord Davey, who delivered the judgment of their Lordships, that neither company made any contracts for sale in New South Wales. In addition to the mining of the ore the greater part of the ore was converted into a merchantable product in New South Wales.

The legislation in question in that case, so far as material, provided by section 15 for income tax in respect of all incomes:

> 1. Arising or accruing to any person wheresoever residing from any profession, trade, employment or vocation carried on in New South Wales * * * 3. Derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown. 4. Arising or accruing to any person wheresoever residing from any kind of property * * * or from any other source whatsoever in New South Wales not included in the preceding subsections.

It was also provided by section 27, subsection 3, that:

> No tax shall be payable in respect of income earned outside the Colony of New South Wales.

It was held by the Board that there were four processes in the earning or production of the income of the companies: (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. It was pointed out that the word "trade" no doubt primarily means traffic by way of sale or exchange or commercial dealing, but that it may

(1) [1896] A.C. 325.
(2) (1881) 8 Q.B.D. 414.
(3) [1900] A.C. 588.

have a larger meaning so as to include manufacture. Confining the word to its literal meaning, their Lordships asked why in the case before them the income was not derived mediately or immediately from lands of the Crown held on lease under subsection 3 or from some other source in New South Wales under subsection 4, and they held that the question must be answered in the affirmative even if the manufacturing process did not come within the meaning of trade within subsection 1.

If subsection 1 of the statute in question in *Kirk's* case (1) be examined, it will be found, in my opinion, to be indistinguishable from the English legislation already referred to. If, therefore, the language and the aim of the English legislation was considered by the Privy Council to differ from the New South Wales legislation, as above pointed out, it can only be because of the presence of subsections 3 and 4 of section 15 and subsection 3 of section 27. In my opinion, as section 24 of the legislation here in question, like Schedule D of the United Kingdom statute, stands alone, there is nothing upon which any apportionment of profit over the various operations of the appellant company can be based. It seems to me that when the legislature intended to provide for an apportionment of profits to operations they did so expressly in sections 26, 27 and 27A. The fact that there is no similar provision in section 24 is not only significant but, in my opinion, conclusive.

Appellant points to the provisions of clause (*v*) of section 4, which exempts from taxation

> income earned by a corporation or joint stock company with its head office in Manitoba (other than a personal corporation) in that part of its business carried on outside of Manitoba.

I see no basis for applying this provision to a company such as the appellant whose head office is without the province. Section 24 deals with that kind of case.

I would dismiss the appeal with costs.

ESTEY J.—The appellant is a Dominion company manufacturing and selling chewing gum, with head office and manufacturing plant in the province of Ontario. It admits that it is carrying on business in Manitoba and as such

(1) [1900] A.C. 588.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Estey J.

is liable for the payment of income tax for the years 1936 to 1939 inclusive under the provisions of *The Income Taxation Act*, being R.S.M. 1940, c. 209 (a consolidation of earlier statutes in which the sections material hereto are unchanged). The question in this appeal is the basis or principle upon which this income tax should be computed.

The appellant contends that, while the profit is realized only when the goods are sold, under section 24 this profit should be distributed or apportioned to all of its operations leading up to and culminating in the sale, that the amount so apportioned to the business in Manitoba is "the net profit or gain arising from the business" of the appellant in Manitoba.

The respondent submits that the business of the company in Manitoba is the selling of gum, that no profit or gain arises from any prior operations of the company and therefore the full profit or gain arises out of the sale in Manitoba. This profit is therefore taxable as "the net profit or gain arising from the business" of the appellant in Manitoba.

The learned trial judge accepted the appellant's contention. His judgment was reversed in the Appellate Court, Mr. Justice Trueman and Mr. Justice Dysart (*ad hoc*) dissenting.

There is no dispute as to the facts. The appellant has its head office and manufacturing plant in Ontario. It maintains an office and a warehouse in Manitoba. Orders are received, accepted, and the gum shipped and invoiced from its premises in Manitoba to jobbers in Western Ontario, Manitoba, Saskatchewan and Alberta. The selection and the credit rating of the jobbers to whom the Manitoba office may make sales, the bookkeeping, the rendering and collecting of accounts and the general direction and control of the business are all matters dealt with exclusively at head office in Ontario. It is clear that the contracts of sale for the gum are made in Manitoba.

The parties hereto are in agreement that the liability of the appellant is under section 24 of the Act and that the determination of the issue in this case depends upon the construction of that section.

Section 3 of *The Income Taxation Act*, R.S.M. 1940, c. 209, reads in part as follows:

3. For the purposes of this Part, "income" means the annual net profit or gain * * *from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Manitoba or elsewhere; * * *

Section 9 (1) (*d*) reads as follows:

There shall be assessed, levied and paid upon the income during the preceding year of every person

* * *

(*d*) who, not being resident in Manitoba, is carrying on business in Manitoba during such year;

* * *

a tax at the rates applicable * * *

"Income" is defined in section 3, and section 9 is the charging section. It is common ground that if sections 3 and 9 were the only provisions with respect to non-residents, the statute would purport to tax a non-resident carrying on business in Manitoba upon the net profit or gain derived from sources within Manitoba or elsewhere. Such a provision applicable to non-residents would give rise to obvious constitutional issues. That fact was, no doubt, the essential reason why section 24, which applies specifically to non-residents, was enacted.

Section 24 reads as follows:

24. (1) The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

(2) This section shall apply to a taxpayer which is a corporation or joint stock company carrying on business in Manitoba and which has not its head office in Manitoba.

Throughout the hearing of this appeal, and in many of the cases, particularly the earlier ones, it was emphasized that where the contracts of purchase and sale were made business was carried on. Even in those cases it was pointed out that such was not the only test, and it is now recognized that business may be carried on by a person in different places and by operations quite apart from the making of contracts. Moreover, under section 24 the business of

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Estey J.

the non-resident may be wholly or partially carried on in Manitoba. The legislature of Manitoba, no doubt, had both of these factors in mind in enacting section 24 and providing thereby that the

> income liable to taxation * * * shall be the net profit or gain arising from the business of such person in Manitoba.

In this case the appellant carries on the business of manufacturing and selling gum. The fact that it manufactures in one and sells in many provinces does not in any way detract from the fact that it conducts but one business. Its business is not that of a manufacturer and then that of a wholesaler or jobber, but that of manufacturing and selling gum. Its business is a unit and every operation contributes to the ultimate profit or loss. That the profit is realized but once and only through the medium of the sales is admitted, but that does not determine the meaning of the words in section 24 as to what is the net profit or gain arising from the business of the appellant in Manitoba.

The several sections of the statute discussed at the hearing are phrased to cover special circumstances. Sections 26, 27 and 27A are phrased upon the assumption that the activities and operations there enumerated on the part of non-residents do not constitute a carrying on of business. Some of them would not and in a given case under any heading there might be a doubt. These sections declare not only that the non-resident who engages in the specified activities or operations shall be deemed to be carrying on business in Manitoba, but also that the non-resident shall be deemed "to earn a proportionate part of the income derived therefrom". The legislature is here legislating to create in certain cases that which for purposes of taxation exists in fact in other cases. That this was the view of the legislature is evidenced by the provisions of section 28, which avoids any conflict between section 24 and sections 26, 27 and 27A. In effect it provides that when the non-resident is in fact carrying on business in Manitoba the provisions of section 24 apply. In these circumstances, if any conclusion may be drawn to assist in the construction of section 24, it is that the legislature is by these sections providing that the specific circumstances dealt with shall

be "deemed to be" that which in fact exists elsewhere in the statute. The legislature was here creating statutory fictions. (*Hill* v. *East and West India Dock Co.* (1)) and were therefore making the provisions as complete and full as possible.

Then by section 4 (*m*) (prior to 1940 amendment), dealing with a company having its head office in Manitoba, the "profits earned by a corporation * * * in that part of its business carried on at a branch or agency outside of Manitoba" "shall not be liable to taxation". It would follow that, in order to come within the exemptions, the company must be carrying on business in fact outside of Manitoba. The phrase "in that part of its business" is significant, and the section as phrased must contemplate apportionment as regards a resident company.

The Saskatchewan statute dealt with in *International Harvester Co. of Canada, Ltd.* v. *The Provincial Tax Commission* (2) is for all practical purposes identical except that the Saskatchewan Act contained an additional provision for the adoption of regulations setting up a method for the determination of the tax if the information necessary to compute the income of any taxpayer was not available to the commission. The commission, acting under such regulations, determined the tax. Litigation followed in which the issues raised by the company included the constitutional validity of both the statute and the regulations. These regulations, it was contended, were invalid because they involved the imposition of a tax upon income arising from the company's business outside of Saskatchewan. The majority of this Court affirmed the judgment of the Court of Appeal in Saskatchewan and held the regulations valid because it was not the intention of either the statute or the regulations to exceed the taxing powers of the province, and 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 who did not furnish the required information. In the course of his judgment my lord the Chief Justice (then Rinfret, J.), with whom Crocket and Kerwin JJ. agreed, stated at pp. 351-352.

(1) (1884) 9 App. Cas. 448, at 455. (2) [1941] S.C.R. 325.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Estey J.

It was next argued that, even if the Acts are constitutional or the regulations are *intra vires*, yet in their operation in the present case they have the effect of taxing profits or gains which did not arise from the business of the appellant in Saskatchewan.

* * * In an endeavour to transform that objection into a question of law, appellant's counsel stresses the point to the extent of saying that the application of the regulations necessarily includes in the assessment manufacturing profits said to have arisen exclusively outside Saskatchewan, i.e., at the head office of the appellant in Hamilton, Ontario, where the central management and control of the appellant abide (*De Beers Consolidated Mines* v. *Howe* (1); *Commissioners of Taxation* v. *Kirk* (2)).

Such, in my view, was not the purpose of the Acts of Saskatchewan or of the regulations made thereunder and applied in the present case. The Commissioner, in making each assessment, intended to tax exclusively the profits and gains arising from the business of the appellant in Saskatchewan.

Mr. Justice Hudson's conclusions were in accord, but Chief Justice Duff (with whom Davis and Taschereau JJ. agreed) dissented on the basis that (p. 334):

* * * 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 * * * I humbly think that 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.

In the Court of Appeal of Saskatchewan (3), Chief Justice Turgeon construed the corresponding section in the Saskatchewan statute as applied to the business of a corporation carrying on business in provinces other than Saskatchewan to mean "only the net profits arising from that part of the business of the corporation which is carried on in Saskatchewan." It would appear that the reasons of all the learned judges in this Court were agreed in principle with that statement. The majority of the learned judges had in mind specifically "manufacturing profits" as indicated by the foregoing quotation from my lord the Chief Justice (then Rinfret, J.) but construed the regulations as not to include them, while the minority, because in their opinion they did, held them *ultra vires*.

(1) [1906] A.C. 455 (H.L.).
(2) [1900] A. C. 588 (P.C.).
(3) [1940] 2 W.W.R. 49.

In *Commissioners of Taxation* v. *Kirk* (1), the Privy Council considered the provisions of the *Land and Income Tax Assessment Act,* 1895, of New South Wales. The respondent companies were incorporated in the State of Victoria and had their head offices at Melbourne in the latter state. In 1897, the year in question, the companies carried on mining operations in New South Wales, but the contracts for sale of their product were all made outside of New South Wales. Lord Davey, speaking for the Privy Council, at p. 592 stated:

> The real question, therefore, seems to be whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony.

He then analyzes the business as follows:

> It appears to their Lordships that there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages.

The Supreme Court of New South Wales had decided that there was no income derived or arising or accruing in New South Wales, basing their decision upon one of their earlier cases, *Tindal's* case (2). Lord Davey, in referring to that case, speaks as follows:

> The fallacy of the judgment of the Supreme Court in this and in *Tindal's* case (2) is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income.

The Privy Council based their decision upon the words in section 15 (3), "derived from lands of the Crown held under lease", and the words in section 15 (4), "arising or accruing * * * from any other source whatsoever in New South Wales", and then, referring specifically to the four processes in the earning or production of income, stated:

> The first process seems to their Lordships clearly within sub-s. 3, and the second or manufacturing process, if not within the meaning of "trade" in sub-s. 1, is certainly included in the words "any other source whatever" in sub-s. 4.

The problem in the *Kirk* case (1) was to determine whether income was derived or was arising or accruing (words which were treated as synonymous by the Privy

(1) [1900] A.C. 588. (2) (1897) 18 N.S.W. L.R., 378.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Estey J.

Council) in New South Wales. An analysis of the business carried on disclosed that income was derived and therefore taxable under the provisions of the statute in New South Wales. This case is important because of the analysis of the business and that, notwithstanding contracts of sale were not made in New South Wales, the Privy Council held that income was derived from the initial process within New South Wales, which process, with subsequent operations, produced the product that, when sold, realized the income.

In *Commissioners of Taxation (N.S.W.)* v. *Meeks* (1), Mr. Justice Isaacs stated:

> Now, the question in the special case in *Kirk's* case (2) as Lord Davey is careful to point out in the opening sentence of the judgment, was whether the companies had *any* income in 1897 taxable in New South Wales—and not whether *all* the income arising from their contracts was taxable in the State * * * Then, after referring to *Tindal's* case (3) he says: "The question in that case, as here, should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony"—that is, what apportionment should be made attributable to New South Wales. And it is because the Privy Council divide the operations of the company into those operations which are carried on in the State, and those which are not, that the observation is made that the fallacy of the Supreme Court judgment existed in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income.

The *Kirk* case (2) is of particular significance because the judgment of the Privy Council was written by Lord Davey who was one of their Lordships in *Grainger & Son* v. *Gough* (4), and, referring specifically to that and the case of *Sulley* v. *Attorney-General* (5), he states that:

> * * * these cases do not appear to their Lordships to have much to do with a case such as the one before them, where a business is admittedly carried on in this country.

He was also one of their Lordships in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (6), with regard to which he states at p. 594 (1):

> It would have been difficult to say in that case that the profits or income were not to some extent, at any rate, earned in Brazil.

(1) (1915) 19 C.L.R. 568, at 582.
(2) [1900] A.C. 588.
(3) (1897) 18 N.S.W. L.R. 378.
(4) [1896] A.C. 325.
(5) (1860) H. & N. 711.
(6) [1896] A.C. 31.

Then with respect to the authorities in Great Britain generally, at p. 593 he states:

> The learned judges refer to some English decisions on the Income Tax Acts of this country, which in language, and to some extent in aim, differ from the Acts now before their Lordships. The language used in the English judgments must of course be understood with reference to the cases then under consideration.

In *Underwood Typewriter Co.* v. *Chamberlain* (1), the Underwood Typewriter Company was a Delaware corporation seeking recovery of a tax paid under protest in the State of Connecticut. Connecticut imposed a tax of 2 per cent. upon the net income of the corporation earned during the preceding year from business carried on within the state. The head office of the company was in the City of New York but all its manufacturing was done in Connecticut and it had a branch for selling in Connecticut as well as in other states. A number of questions were raised, including one that it imposed a tax upon the income arising from business conducted beyond the boundaries of the state. Mr. Justice Brandeis stated at p. 120.

> The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State * * * There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its application to this corporation produced an unreasonable result.

It would, therefore, appear that where statutory limitations are imposed upon the taxing authorities, the principle of apportionment has been approved, as evidenced by the foregoing cases.

A number of British decisions were cited and it was pointed out that there was a similarity in the language of Schedule D of the Imperial Income Tax Act, 1853 (16 & 17

(1) (1920) 254 U.S. Sup. Ct. Rep. 113.

1947

WM. WRIGLEY JR. CO. LTD. v. PROVINCIAL TREASURER OF MANITOBA

Estey J.

Vict., c. 34), with that of section 24 of the Manitoba statute, both of which impose a tax upon the non-resident. Schedule D of the Imperial Act reads in part:

> * * * the annual profits or gains arising or accruing to any person * * * although not resident within the United Kingdom, from any * * * trade * * * exercised within the United Kingdom.

The same provision was enacted in Schedule D, 1 (*a*), of the *Income Tax Act, 1918.*

Once under the foregoing provision it is established that a non-resident is exercising a trade in Great Britain, the annual net profits or gains arising or accruing therefrom are taxable and they are not concerned whether these profits are earned within the boundaries of Great Britain or elsewhere, and therefore the apportionment of the profits earned in Great Britain or elsewhere is never an issue. There are no constitutional limitations upon the taxing power of Parliament in Great Britain.

In *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1), the issue was whether the resident company should pay a tax, as provided by section 5, 16 & 17 Vict., c. 34, under the first or the fifth case. If the trade was carried on wholly or partly within Great Britain the tax was imposed under the first case, but if exclusively outside of Great Britain under the fifth case. There the resident company operated a railway in Brazil, and, apart from the control and direction, all the work and the profits were earned in Brazil. It was held, however, that the fact that the control and direction existed in Great Britain that the company was carrying on business in Great Britain and therefore taxable under the first case.

These authorities establish that activities and operations other than contracts for sale constitute a carrying on of business and, further, that these respective activities and operations produce or earn income, and therefore, while the income may be realized through the sale, it does not entirely arise from that one activity or operation.

Moreover, it is clear that a taxing authority, in order to impose an income tax, must have either the person or the source, in this case the business, within its jurisdiction.

(1) [1896] A.C. 31.

The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.

Colquhoun v. *Brooks* (1), *Smidth & Co.* v. *Greenwood* (2).

Operations that have been held to constitute a carrying on of business and which contribute to the income are in this case outside of Manitoba.

Then from the statute itself it appears, both with respect to residents who are carrying on business outside of the province, and with respect to non-residents who are carrying on business in the province, that a separation or segregation of that business carried on within the province is contemplated. Section 24, in the light of the foregoing authorities and the taxing power of Manitoba, must be construed so that the tax is imposed only on the net profit arising out of that portion of the business which a non-resident carries on in the province of Manitoba.

The judgment of the learned trial judge should be restored and the appeal allowed with costs throughout.

Appeal allowed and judgment of the trial judge restored, with costs throughout.

Solicitors for the appellant: *White, Bristol, Gordon, Beck & Phipps* and *Williams, Dilts, Baker, Laidlaw, Shepard & Hamilton.*

Solicitor for the respondent: *R. B. Baillie.*

---

(1) (1889) 14 App. Cas. 493, *per* Lord Herschell at 504.

(1) [1921] 3 K.B. 583, at 594.