

1942 ——— *Nov. 30 1943 *Feb. 2 ———	THE MINISTER OF NATIONAL REVENUE }	APPELLANT;
	AND	
	THE KELLOGG COMPANY OF CAN- ADA, LIMITED }	RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Deductions in computing income—Legal expenses incurred in defending suit against using certain words in connection with sale of products—Income War Tax Act, R.S.C. 1927, c. 97, s. 6 (a) (b).

In computing income for purposes of income tax under the *Income War Tax Act*, R.S.C. 1927, c. 97, in the ordinary course legal expenses are simply current expenditures and deductible as such. In the present case it was held that legal fees and expenses incurred by respondent in successfully defending a suit for an injunction against alleged infringement of registered trade marks by using certain words in connection with the sale of respondent's products, fell within that general rule; in that suit the question in issue was whether or not said trade marks were valid, and the right upon which respondent relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe its goods in the manner in which it was describing them.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

The Minister of National Revenue v. The Dominion Natural Gas Co., Ltd., [1941] S.C.R. 19, distinguished.

Appeal from judgment of Maclean J., [1942] Ex. C.R. 33, dismissed.

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APPEAL by the Minister of National Revenue from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), allowing the appeal of The Kellogg Company of Canada, Limited, the present respondent, from the decision of the Minister of National Revenue affirming certain assessments against said company for income tax under the *Income War Tax Act*, R.S.C. 1927, c. 97, which assessments disallowed as deductions, in computing the company's income, the amounts of legal fees and expenses incurred in defending a suit brought against it in which there was claimed an injunction to restrain an alleged infringement of registered trade marks by the present respondent's use of certain words in connection with the sale of some of its products. In that suit the present respondent succeeded throughout, in the courts of Ontario and before the Judicial Committee of the Privy Council. It was held that the said trade marks were not valid (2).

The respondent claimed that the legal fees and expenses incurred in defending the said suit were "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" (s. 6 (a) of said Act). The Minister claimed that they were not so, and that they constituted an outlay or payment on account of capital within s. 6 (b) of said Act.

C. W. R. Bowlby K.C. and *A. A. McGrory* for the appellant.

O. M. Biggar K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—Mr. Bowlby rested his case on the decision of this Court in *The Minister of National Revenue v. The Dominion Natural Gas Company, Limited* (3). That decision was concerned with a deduction

(1) [1942] Ex. C.R. 33; [1942] 2 D.L.R. 337.

(2) The judgment in the Privy Council is in 55 R.P.C. 125; [1938] 2 D.L.R. 145.

(3) [1941] S.C.R. 19.

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claimed by the respondents in respect of the costs of litigation which in its result affirmed the right of the respondents under certain by-laws of the Township of Barton to sell gas in certain localities in the City of Hamilton, Ontario. The boundaries of Hamilton having been extended to include parts of the Township, the United Company, which had certain exclusive rights under by-laws of the city, advanced the claim that under these by-laws it had the exclusive right to sell gas in the whole area embraced within the extended boundaries of Hamilton, including the localities in question. This claim was disputed and, in the course of the litigation, there was an appeal to the Judicial Committee of the Privy Council and in the result the right of the respondent company under the by-laws of the Township was sustained.

It was held by this Court that the payment of these costs was not an expenditure "laid out as part of the process of profit earning," but, was an expenditure made "with a view of preserving an asset or advantage for the enduring benefit of the trade," and, therefore, capital expenditure.

The present appeal concerns expenditures made by the respondent company in payment of the costs of litigation between that company and the Canadian Shredded Wheat Company. To quote from the judgment of the Privy Council, delivered by Lord Russell of Killowen in *Canadian Shredded Wheat Co. Ltd. v. Kellogg Co. of Canada, Ltd.* (1), the Canadian Shredded Wheat Company claimed

an injunction to restrain [the respondent] from infringing the registered trade marks consisting of the words "Shredded Wheat" by the use of the words "Shredded Wheat", or "Shredded Whole Wheat" or "Shredded Whole Wheat Biscuit", or any words only colourably differing therefrom.

As regards this payment, the question in issue was whether or not the registered trade marks of the plaintiffs in the action were valid trade marks, or, in other words, whether or not the present respondents, The Kellogg Company, and all other members of the public were excluded from the use of the words in respect of which the complaint was made. The right upon which

(1) [1938] 2 D.L.R. 145, at 149.

the respondents relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them.

It was pointed out in *The Minister of National Revenue v. The Dominion Natural Gas Company, supra*, at p. 25, that in the ordinary course legal expenses are simply current expenditures and deductible as such. The expenditures in question here would appear to fall within this general rule.

It is very clear that the appellant does not succeed in bringing his case within the decision upon which he relies.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Fisher.*

Solicitors for the respondent: *Smart & Biggar.*

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