1955

*Mar. 25
*May 24

THE FIRESTONE TIRE & RUBBER COMPANY OF CANADA, LIMITED (*Applicant*) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF HAMILTON (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment—Taxation, Municipal—Jurisdiction—Claim for refund of Business Tax—Plant closed by strike—Office Staff employed—Whether manufacturing business carried on—The Assessment Act, R.S.O. 1950, c. 24, s. 124 (e).

The appellant, a manufacturer of rubber goods, was forced to shut down its plant for a four-month period due to a strike. In the interval its office staff, housed in a separate building, continued in their employment in so far as they were able to do so. The appellant subsequently applied under s. 124 (*e*) of the *Assessment Act,* R.S.O. 1950, c. 24, to the Court of Revision for a refund of the business assessment tax paid by it for the period of the shut-down. The application was granted. An appeal by the respondent was dismissed by the Ontario Municipal Board but the Court of Appeal for Ontario set aside the Board's order. The appellant appealed and contended that the Court of Appeal had assumed jurisdiction which was not conferred on it by the Act and had purported to determine a fact (whether the appellant occupied or used land for the purpose of a manufacturer) which was not within its jurisdiction.

Held: That the appellant failed to establish that it did not, within the meaning of s. 124 (*e*) of the *Assessment Act,* carry on the business of a manufacturer for the period in question and its appeal should be dismissed.

Held Also by (Kerwin C.J. and Estey and Locke JJ.): That the Court of Appeal had jurisdiction.

Per Kerwin C.J. and Estey J.: The finding of the Board that the business of a manufacturer had not been carried on within the meaning of s. 124 (*e*) raised a question of law as to whether there was evidence to support such a finding.

Per Kerwin C.J. and Locke J.: If there was such evidence, it was also a question of law whether the evidence brought the case within the Statute.

Loblaw Groceterias v. *City of Toronto* [1936] S.C.R. 249; *Rogers-Majestic Corp.* v. *City of Toronto* [1943] S.C.R. 440; *South Behar Ry. Co.* v. *Commsrs. of Inland Revenue* [1925] A.C. 476 at 485, referred to.

Decision of the Court of Appeal [1954] O.R. 493, affirmed.

*PRESENT: Kerwin C.J. and Rand, Estey, Locke and Cartwright JJ.

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing a decision of the Ontario Municipal Board (2) ordering a refund of business tax.

H. E. Manning, Q.C. and *J. S. Marshall* for the appellant.

J. D. Arnup, Q.C. and *A. McN. Austin* for the respondent.

THE CHIEF JUSTICE:—Under s. 124 (*e*) of the *Assessment Act* of the Province of Ontario, R.S.O. 1950, c. 24, The Firestone Tire and Rubber Company of Canada, Limited, applied to the Court of Revision of the City of Hamilton for a reduction or refund of its business assessment taxes paid by it to the City in the year 1952. So far as is relevant s. 124 is as follows:—

> 124. (1) An application to the court of revision for the abatement or refund of taxes levied in the year in respect of which the application is made may be made by any person,
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> * * *
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> (*e*) liable for business tax who has not carried on such business for the whole year;
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> and the court of revision may reject the application or cancel or reduce the taxes or order a refund of the taxes or any part thereof.

The application was granted, the Ontario Municipal Board dismissed an appeal by the City, but the Court of Dans *Rex* v. *Nowell* (2), la même Cour déclarait admisdeclared that the application to the Court of Revision should have been dismissed. The Company now appeals to this Court.

Subsequent to the argument before it the Court of Appeal raised the question as to the constitutional power of the Province to authorize the Court of Revision and the Board to determine the point in issue. Although notified, neither the Attorney General of Canada nor the Attorney General for Ontario was represented upon the further argument. The Court of Appeal decided that the Province had such power, but, as the question was not raised by either party before this Court, nothing is said with reference to it. A point was raised which had not been taken before the Court of Appeal,—that whether the appellant did in fact occupy or use land for the purpose or in connection with the business of a manufacturer was a question of fact only and,

(1) [1954] O.R. 493; [1954] 3 D.L.R. 685.

(2) [1953] O.W.N. 873.

(3) [1954] O.R. 493.

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therefore, no appeal lay to the Court of Appeal. Irrespective of whether there was any evidence upon which the Board could have decided as it did, which is always a question of law, it is also a question of law whether the evidence brings the case within the statutory provision. *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (1); *Rogers-Majestic Corp Ltd.* v. *City of Toronto* (2). The Court of Appeal, therefore, had jurisdiction.

The appellant agrees that, with two exceptions to be mentioned later, the reasons of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal, contain an accurate statement of the facts and that statement is, therefore, reproduced:—

> Firestone Tire & Rubber Company of Canada Limited carries on a manufacturing business in Hamilton. It manufactures tires, mechanical rubber goods, tire accessories, tubes and miscellaneous rubber products. Its plant consists of some eight buildings, including a pumphouse, a cement-house, and a gatehouse, a special testing-building and several buildings used for manufacture. Its collective bargaining agreement with the Rubber Workers' Union Local 113, expired on 25th January, 1952. Negotiations respecting a new agreement began in November, 1951, a conciliation board was set up and this board made a report on 15th May, 1952. Further negotiations followed, but a strike began on 3rd June and continued until 28th September, 1952, a period of 118 days. During the strike about 165 employees of the company in its general office continued in their employment but owing to the union's picket lines only 5 or 6 of the factory office workers, all having management functions, entered the plant. No manufacturing was carried on during the strike and there were no shipments in or out of the plant. The following activities were carried on:
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> (1) the pumphouse was tested each week;
> (2) the gatehouse, with a watchman, continued to operate, one man being on duty each 8-hour shift;
> (3) telephone messages were received, mostly enquiries about when the company would resume manufacture;
> (4) new orders were received;
> (5) mail was delivered;
> (6) invoices were sent and received, payments were received and made and correspondence continued;
> (7) plant watchmen made their rounds;
> (8) the company conferred with sales-agents, some of whom entered the office for that purpose;
> (9) emergency repairs were made in the plant.

The exceptions are these: (1) In addition to the assessment in 1951 (upon which the levy for taxes for 1952 was based) the City in 1952, pursuant to a power for that purpose in the *Assessment Act*, assessed, by a supplementary

(1) [1936] S.C.R. 249. (2) [1943] S.C.R. 440.

assessment, a recent extension of the Company's buildings as from July 1, 1952. The taxes consequent upon that assessment, as well as upon the assessment made in 1951 for business assessment purposes, were entered upon the collector' rolls for the City and paid by the Company in 1952. (2) In the Company's general office building the only business done was to receive telephone enquiries as to when the Company might start business and supply orders; orders and other communications were received by mail; some mail was despatched but "strictly in payment for goods that would have come in during the last month of operation"; there was also some conferences with salesmen.

It was argued that the Court of Appeal had misconstrued s. 124 and emphasis was placed upon the word "such" in paragraph (*e*). It was said that the appellant's business is that of a manufacturer and that it could not be deemed to have been carrying on that business when no manufacturing was done. A distinction was suggested between what actually happened and a shutdown of the manufacturing establishment for the purpose of retooling or overhauling the machinery, since those would be occasioned by the will of the Company. It may be pointed out that if a fire had occurred causing such a cessation as did occur, but with all the other existing circumstances, the appellant would not voluntarily have ceased to carry on such business for the whole year, and yet such a case would not fall within paragraph (*e*), although relief might be obtained under (*b*):—

> (*b*) in respect of a building which was razed by fire, demolition or otherwise in the year for the proportionate part of the taxes levied on the building assessment for the part of the year remaining after the building was razed;

Mr. Manning put the supposititious case of a Company having its office building in the City of Hamilton and its factory in an immediately adjoining Township. However, in that case if a strike occurred with the same consequences, while the Company might not have carried on any business in the Township for the whole year, it would certainly have done so in the City.

The other considerations telling against the appellant are dealt with satisfactorily by Mr. Justice Laidlaw and there might be added merely a reference to *South Bahar Ry. Co.* v. *Commissioners of Inland Revenue* (1), not so much for

(1) [1925] A.C. 476.

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the actual decision, since the circumstances there differed entirely from the present case, but because of the comments of Viscount Cave at 483 and at Lord Sumner at 485.

The appeal must be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by:—

RAND J.:—Notwithstanding Mr. Manning's exhaustive argument, I am unable to accept his interpretation of s. 124(1)(*e*) of the *Assessment Act* within which he claims to come.

What the statute envisages is the use or occupation of land for the purposes of a business being carried on. Both the use and the business life are deemed to continue while the work of employees or the operations, say, of machines are recurrent or periodic, that is, alternating with temporary cessations of various kinds.

There are, for example, periods, frequently annual, for revising models of industrial products and like purposes during which the machine and employee activity is suspended, while other activity continues. But labour relations are an important part of the body of the business and their determination by negotiation or by means of economic pressures is likewise an incident which the statute must be taken to contemplate. Marking time while this issue is being decided does not bring about a condition of "not carrying on" the business.

Several modes of non-user or non-"carrying on" are furnished which throw some light upon the question. Par. (*a*) of s.s. (1) permits a refund in respect of land which has been vacant three months or more in the year. It would be extraordinary that actual vacancy for two months should not give rise to a right to a refund while a strike for two weeks, involving only employees of certain departments, should do so. Par. (*b*) provides for the case of the total elimination of the building in which the business is carried on and it indicates what is meant by the absence of business. Here, although the machinery was not running, it was being kept in general running condition, the business office was being carried on as usual, there was communication with outside agencies or parties, orders were being

received and accepted; only part, however important it was, of the business was engaged in a temporary complication which, in these days, lies within the scope of foreseen possibility in most industrial businesses.

That was the view of the statute taken by Laidlaw J.A. in giving the reasons for the judgment of the Court of Appeal, and with what he said I am in agreement.

I would dismiss the appeal with costs.

ESTEY J.:—The appellant carries on business in the City of Hamilton as a manufacturer of automobile tires, tubes, tire accessories and mechanical rubber goods, for which purpose it utilizes eight buildings, including an office building. In 1952 the respondent City of Hamilton, under s. 6(1)(*e*) of the *Assessment Act* (R.S.O. 1950, c. 24), imposed upon the appellant, as a manufacturer, a business tax which it paid in the sum of $40,578.30. The relevant part of s. 6(1)(*e*) reads:

> 6(1) . . . every person occupying or using land for the purpose of, or in connection with, any business mentioned or described in this section shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the lands so occupied or used by him, as follows:
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> * * *
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> (*e*) . . . every person carrying on the business of a manufacturer for a sum equal to sixty per cent of the assessed value . . .

In that year the appellant, because of a strike lasting 118 days, applied to the Court of Revision for an abatement or refund of a portion of the $40,578.30, under s. 124(1)(*e*), which reads:

> 124(1) An application to the court of revision for an abatement or refund of taxes levied in the year in respect of which the application is made may be made by any person
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> * * *
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> (*e*) liable for business tax who has not carried on such business for the whole year.

The appellant does not ask an abatement or refund with reference to that portion assessed in respect of the office building. It does, however, contend that in the other buildings it was not carrying on the business of a manufacturer and in respect of them it is eligible for an abatement or refund.

The facts are not in dispute. Throughout the 118 days the 1,438 factory workmen were not permitted upon the premises and without their presence no product could be

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nor was produced. In fact, the only buildings to which unrestricted access was permitted were the general office, where 165 were employed, and a smaller building known as the gate house. On certain occasions 5 or 6 out of 50 supervisory employees engaged in factory supervision, such as the plant superintendent, development engineer and chief chemist, were permitted to enter the plant. The watchmen made their rounds. Certain emergency repairs were permitted. The appellant conferred with its salesmen. A few orders were received, collections made and inquiries answered. However, no products were manufactured and no shipments were made, nor were supplies for manufacturing received.

The Court of Revision allowed the abatement or reduction. This was affirmed in the Ontario Municipal Board, but the Court of Appeal disallowed the appellant's claim (1). Mr. Justice Laidlaw, writing the judgment of the Court, stated in part:

> The employers had no intention of giving up business but, on the contrary, kept their organizations together so far as was possible in the circumstances. There was simply a temporary interruption in certain departments and a provisional suspension in production. The companies did not cease to engage in business activities of a varied and substantial character. They maintained the plants, the office and clerical staffs, they received orders and payments and, I observe in particular, there were conferences with their sales-agents. Indeed it would appear to me that they carried on business in every way possible in the face of the strikes and ceased only for the time being to manufacture and distribute their products.

The question, therefore, arises, do the foregoing facts bring the appellant within the scope of s. 124(1)(*e*) as one eligible for an abatement or a refund. Subpara. (*a*), in clear and unambiguous language, requires the appellant to establish that it "has not carried on" its manufacturing business for the whole year in order to make itself eligible for an abatement or refund. The language of this subpara (*e*) is in marked contrast to that of subparas. (*a*) and (*b*). Under (*a*), if the taxpayer's land be vacant for three months, or (*b*), the building be destroyed, even if the business otherwise continues, the taxpayer is, by these subparas., given a basis to apply for an abatement or a refund. Under subpara. (*e*) no such curtailment or non-usage of a particular parcel or area is contemplated. It is not, under

(1) [1954] O.R. 493.

this subpara. (*e*), a question of the extent or the degree, but rather whether the business is not carried on, in order to provide a basis for an application. The language of this latter subpara. does not contemplate that a taxpayer who suffers merely a reduction or curtailment of business activity or operation may make a claim thereunder.

In the determination of this question it is well to keep in mind the language of s. 6(1)(*e*) imposing the tax. Under that provision the assessment of a business tax is not only in respect to the premises in which only the actual production takes place, but those used in connection therewith. In *Canadian Leaf Tobacco Co. Ltd.* v. *Chatham* (1), the appellant's warehouses were taxed as part of the business of manufacturing, though far removed from the premises or plant used strictly for manufacturing purposes.

In the present application the phrase "carried on such business" under s. 124(1)(*e*) is identical in meaning with the phrase "carrying on the business of a manufacturer" under s. 6(1)(*e*). The only business the appellant is engaged in is that of a manufacturer. It was this business, curtailed or limited by the circumstances of the strike, which the appellant continued to carry on through its office. It maintained its equipment and organization throughout the other buildings to the end and purpose that, with the conclusion of the strike, production and the normal scope and extent of the business would be resumed. The appellant was, therefore, carrying on the business of manufacuring throughout all of its buildings, substantially limited or curtailed, but which does not provide a basis for an application for an abatement or refund under s. 124(1)(*e*).

While the business of manufacturing involves the production of a product, I respectfully agree with Mr. Justice Laidlaw's statement, in writing the judgment of the Court of Appeal, that the appellant "does not cease to carry on business because during an uncertain interval of time his production facilities are temporarily not in operation." There appears to be a substantial difference between non-production of a product during a temporary period and not carrying on of business as contemplated in s. 124 (1) (*e*). It would appear that the facts do not bring the appellant

(1) [1944] O.R. 458.

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within the meaning of the words "has not carried on" such business during the period of 118 days as contemplated by s. 124(1)(*e*).

The appellant submits that the finding of the Ontario Municipal Board that it did not carry on business was a finding of fact supported by the evidence and, therefore, ought not to have been disturbed by the Court of Appeal, restricted as it is to the considerations of questions of law. The Ontario Municipal Board concluded "that, by reason of the strike action of its employees, it did not carry on business during the strike period and is therefore entitled to an abatement or refund for the period in which the strike was in progress." Even if this be regarded as a finding of fact, it clearly discloses a misapprehension of the provisions of s. 124(1)(*e*).

A similar question was raised in *Rogers-Majestic Corp. Ltd.* v. *City of Toronto* (1), where my Lord the Chief Justice (then Kerwin J.), writing the judgment of the Court, at p. 449 stated:

> In the present case the County Court Judge states in the stated case, immediately before propounding the question, "Upon my construction of the statute I considered that I should find as a fact that the said sum was received as income derived from the business of the Respondent Company and was not assessable." The difficulty is that we do not know what his construction of the statute was, but, in my opinion, upon a true construction of the relevant provisions of *The Assessment Act,* there is no evidence upon which his decision can be supported.

The appellant cited, in support of his contention, *Re International Metal Industries Ltd. and the City of Toronto* (2), in which Mr. Justice Gillanders at p. 283 stated:

> The Municipal Board is unable to find that the appellant company is carrying on business at the premises in question. That to my mind, in view of the decisions, is a question of fact, and the matter is therefore concluded by the Board's finding.

It is important to note that in the course of his reasons and immediately before the foregoing Mr. Justice Gillanders stated:

> Had the matter turned on the question as to whether or not managing, operating and controlling subsidiary companies may be a business in respect of which a person may occupy or use land and be liable to assessment under sec. 8 of the Act, and I would think under proper circumstances it well might be, I would consider the matter a question of law

(1) [1943] S.C.R. 440. (2) [1940] O.R. 271.

involving as it would construction of the statute as to whether or not it included as a business the particular activities of the appellant company. But in this case that is not the question involved.

The facts are here not in dispute and they do not disclose any evidence to support a finding that the appellant was, at any time throughout the strike, not carrying on its business as a manufacturer within the meaning of s. 124(1)(*e*). The case of *Delhi* v. *Imperial Leaf Tobacco Co. Ltd.* (1), cited by the appellant, is in accord with the foregoing view. There Robertson C.J.O., at p. 649, stated:

> Having regard to the arguments submitted to us, to determine whether the respondent is (1) a manufacturer under s. 8(1)(*e*), or (2) a wholesale merchant within s. 8(1)(*c*), or (3) falls within s. 8(1)(*k*), depends upon the proper construction of the statute.

Roach J.A., at p. 656, after pointing out that there was no complaint with respect to the County Court judge's interpretation of the vital words, continued:

> Therefore, the only question of law that arises here is whether or not there was evidence from which the County Judge could reasonably decide, that is make his conclusion of fact, that the business carried on by the company came within one of the businesses assessable under s. 8(1)(*k*) and not in s. 8(1) specifically mentioned by name. . . . In my opinion there was no evidence on which he could reasonably have placed it in any of the classifications specifically named in the section.

Nor do I find anything in the other cases cited by counsel for the appellant which is contrary to the foregoing view.

The appeal should be dismissed with costs.

LOCKE J.:—By s. 6 of the *Assessment Act* (c. 24, R.S.O. 1950) it is provided that every person occupying or using land for the purpose of any business described in it shall be assessed for a sum to be called "business assessment", to be computed by reference to the assessed value of the land so occupied or used by him. By subparagraph (*e*) every person carrying on the business of a manufacturer, subject to an exception which does not apply, is to be assessed for a sum equal to sixty per cent of the assessed value of the premises referred to.

The appellant manufactures tires, tire accessories, tubes and mechanical rubber goods at the City of Hamilton. On June 3, 1952, a strike of the members of the Rubber Workers' Union was called as a result of which 1,438 of its employees engaged in the process of manufacturing ceased

(1) [1949] O.R. 636.

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work. In consequence, the entire manufacturing operation carried on was closed down until September 28, 1952, when these employees returned to work.

In separate buildings from those in which the manufacturing operations were carried on, there were employed 165 office workers and about 50 others in the factory office. These latter were described as the supervisory group which included the plant superintendent, the chief chemist and those employed in activities of that nature. None of these 215 employees was a member of the union and none ceased work.

By s. 124 of the Act it is provided that an application may be made to the Court of Revision for the abatement or refund of taxes levied in the year in respect of which the application is made, inter alia, by any person who is:—

> (*e*) liable for business tax, who has not carried on such business for the whole year.

While it is common ground that the appellant was properly classified as a manufacturer, it does not follow that its business was confined to carrying on the manufacturing process. The fact that the services of 165 people were required in the general office indicates that there were other extensive business activities incident, no doubt, to the necessity of purchasing raw materials for current and future use and selling the manufactured products when produced.

The evidence as to the activities of those employed in the general office is very meagre. The controller and assistant treasurer of the company who gave evidence said that some new orders for goods were received by mail and accounts of the company which had fallen due were paid, and he admitted that the office staff continued their activities in the normal way "in so far as they were able to do so." The evidence is silent as to what these activities consisted of during the nearly four month period of the strike.

Provision for permitting a rebate of taxes assessed on the carrying on of business where the taxpayer "has not carried on business for the whole year" was first introduced into the *Assessment Act* of Ontario by s. 20 of the *Assessment Amendment Act* of 1910 (c. 88). We have not been referred to any decided case in Ontario in which the question as to what constitutes a cessation of business sufficient to justify a rebate of taxes under the statute has been considered. I

have been unable to obtain any assistance from the decided cases in England to which we were referred, as they were decided upon different facts under revenue statutes.

It does not suffice to show that part of the appellant's business activities were suspended, even though it be the major part. It was incumbent upon it to show that no part of its business was carried on during the period. The evidence adduced in this matter before the Ontario Municipal Board did not establish this, in my opinion.

The question as to the nature and extent of the business activities carried on during the strike was a question of fact but the question as to whether, in view of these activities, the appellant had not carried on such business within the meaning of that expression in s. 124 was a question of law and the objection that the Court of Appeal was without jurisdiction to determine the matter should fail.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Manning, Mortimer, Mundell & Reid.*

Solicitors for the respondent: *Mason, Foulds, Arnup, Walter & Weir.*

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*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ.