Privy Council Appeal No. 46 *of* 1948

The Provincial Treasurer of Manitoba - - - - - *Appellant*

v.

Wm. Wrigley Jr. Company Limited - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 12TH OCTOBER, 1949.

Present at the Hearing :

LORD GREENE
LORD MORTON OF HENRYTON
LORD MACDERMOTT
LORD REID
LORD RADCLIFFE

[*Delivered by* LORD RADCLIFFE]

This is an appeal from a judgment of the Supreme Court of Canada dated 18th June, 1947. The Supreme Court judgment had reversed a judgment of the Court of Appeal for the Province of Manitoba dated 19th September, 1945, and by so doing had restored a judgment of the Court of King's Bench in Manitoba dated 10th March, 1943. The purpose of the appeal to their Lordships therefore is to upset the judgment of the Court of King's Bench.

The proceedings originated with an appeal by the respondent under the appellate procedure provided by the Income Taxation Act of Manitoba. A part of the respondent's business being carried on in Manitoba and the respondent being a corporation or joint stock company, the head office of which was outside the Province, the appellant made assessments to income tax upon the respondent in respect of the years 1936-1939 inclusive. The respondent objected to these assessments as being excessive in amount, and, so objecting, put in motion the procedure provided by the Act, first by serving a notice of appeal upon the appellant himself and then, on the appellant refusing to allow the objection and to reduce the assessments, by appealing to the Court of King's Bench under s. 29 of the Income Taxation Act that was then in force.

There is no dispute as to what was in issue between the parties or as to the facts to which the issue related. The respondent is a Dominion company which has its head office and manufacturing plant in Ontario and a branch office and warehouse in Manitoba. In the Manitoba warehouse is stored chewing gum manufactured in Ontario and from the stocks of this warehouse are filled orders for chewing gum which are obtained from customers not only in Manitoba but also in Alberta, Saskatchewan and parts of Ontario itself. While the orders in respect of such sales are received by the respondent's branch office in Manitoba, payment for the chewing gum supplied is made to the respondent's head office in

Ontario. Plainly such a course of business raises questions as to the ascertainment of the profit arising in Manitoba similar to the questions which were recently answered by this Board in the case of *International Harvester Company of Canada Ltd.* v. *Provincial Tax Commission* 1949 A.C. 36.

In this case the respondent has maintained throughout that in the assessment of its profits in Manitoba under the Act an allowance should be made for " manufacturing profit " in Ontario. Except in argument before this Board the appellant has consistently maintained that no such allowance should be made to the tax-payer and that " the net profits arising from sales in Manitoba are taxable in Manitoba ". Phrases such as " allocation of profits " or " apportionment of profits " have been used from time to time in the course of the controversy: but in substance what the appellant was insisting upon and what the respondent was challenging was that the whole net profit from a sale in Manitoba ought to be treated as arising from the business in Manitoba with the consequence that no part of that profit could be treated as arising from the part of the business that consisted of manufacturing and other activities in Ontario. For the purposes of this appeal there is no necessity to go further into the dispute on this question of principle between the tax-payer and the taxing authority. For it is in all material respects the same point as was decided by this Board in the *International Harvester Co.* case. Section 21 *(a)* of the Saskatchewan Income Taxation Act is the equivalent of S. 24 of the Income Taxation Act of Manitoba, under which the respondent's assessment was made. (The parties have throughout referred to the relevant sections according to the language and numbering of the Revised Statutes of Manitoba 1940 Cap. 209, and it is convenient to adhere to this course.) And the scheme of the Saskatchewan Act is for this purpose the same as the scheme of the Manitoba Act. Consequently, the decision in the *International Harvester Co.* case, which was made known after the Supreme Court of Canada had delivered their judgments upon the appeal in this case, concluded the issue between the appellant and the respondent in favour of the latter. The view which Mr. Justice Major had taken when the case was before him in the Court of King's Bench in Manitoba and the view which had commended itself to the majority of the learned judges in the Supreme Court coincided with that approved by their Lordships in the *International Harvester Co.* case. Therefore the appeal as conducted before this Board proceeded upon the basis that it was not open to the appellant's counsel to ask that the Order of the Supreme Court from which he was appealing should be set aside on the ground that the respondent was not in law entitled to be allowed a " manufacturing profit " outside Manitoba in the ascertainment of his profits in Manitoba. The main, and hitherto the only, issue in controversy between the parties thus disappeared.

The submission that was made to their Lordships on behalf of the appellant was based on quite a different argument. Attention was directed to the form of the Order which Mr. Justice Major had made when allowing the respondent's appeal in the Court of King's Bench. Not only had he allowed the appeal and set aside the assessments and the appellant's decisions which had affirmed them—this, it was conceded, was within the power of the Court—but he had also gone on by his Order to adjudge and declare what was the figure of net profit or gain of the respondent for each of the years in question and had referred the matter back to the appellant with a direction that he should assess the respondent on that basis. The Court, it was said, had no jurisdiction enabling it thus to arrive at an actual figure of assessable income or to direct the appellant to adopt it. To do this was to invade the administrative function of the appellant, as the responsible Minister, and to force upon him the application of a particular formula for reducing the total profit to the assessable profit which he neither had adopted nor might, when he came to consider the matter, think it right to adopt. And it followed, said the appellant's Counsel, that, if Mr. Justice Major exceeded

his jurisdiction in the form of Order that he made, then the Order of the Supreme Court which had restored his Order without alteration was wrong in law and ought to be reversed.

Their Lordships propose in this case to express their opinion of this argument on its merits. But it is right to note that when Counsel for the respondent came to address their Lordships he raised the objection that the argument ought not to be entertained, whatever its merits, since it was being advanced as a ground of appeal before this Board without having been relied upon in any of the Courts below. The facts to which he drew attention in support of his objection make a formidable list. It will be convenient to notice them in order. Firstly, the hearing before the Judge in the Court of King's Bench had been occupied wholly with the question of principle whether "manufacturing profit" should be allowed or not: in the course of the hearing one of the respondent's witnesses had put forward a formula for ascertaining the profit, if "manufacturing profit" was to be allowed, and no objection had been taken to the admissibility of such evidence: no alternative formula had been put forward by the appellant, and his witness, Mr. Lowery, the Provincial Inspector of Income Tax in charge of the administration of assessments, stated in evidence that, if there had to be apportionment of profit, he was "quite satisfied to leave it to the Court". Secondly, after the Judge had given his Reasons for allowing the appeal, at the close of which he said "in the absence of any other formula or failure to exercise the powers given to the Minister as above indicated I direct that it" [the formula put forward by the respondent's witness] "shall be applied", the representatives of the two parties worked out the relevant figures on the basis of this formula and by agreement of Counsel inserted them in the Order of the Court, the terms of which they in fact settled and agreed. Thirdly, the appellant's Notice of Appeal to the Court of Appeal for Manitoba contains no ground of appeal that can be read as an objection to the Judge's Order in point of form or jurisdiction. In the circumstances this is not surprising. Fourthly, it is not mentioned in the appellant's Factum for the Supreme Court. Fifthly, it was not mentioned in the appellant's petition to this Board for special leave to appeal nor does the Order in Council granting the leave make any reference to the existence of such an issue.

These considerations do indeed present a strong argument for the Board to refuse to entertain an appeal which has this issue as its only ground. In effect the appellant, now that the question of principle on which he has hitherto fought the case has been decided contrary to his contention, is seeking at this late stage to raise a new ground which he has not presented to the Courts below. The result is that their Lordships are invited to decide the matter without the assistance of any observations bearing upon it in the judgments of the learned Judges of the Supreme Court: and such allusions as are made to it in some of the judgments in the Court of Appeal of Manitoba certainly do not suggest that any substantive issue was argued before that Court as to Mr. Justice Major's jurisdiction to make the Order that he did. But the point has now been fully argued before their Lordships: and this is not a case in which the respondent has been in any way taken by surprise by the presentation of the argument, since it is the same as that propounded by Mr. Justice Dysart in the Manitoba Court of Appeal. Their Lordships, having considered the appellant's argument, do not agree with it, and, since Mr. Justice Major's Order has been restored by the Supreme Court without any explicit reference to this point, it appeared to their Lordships that the balance of public advantage in this case inclined towards their entertaining the appeal on this new ground and stating their reasons for thinking that it ought not to succeed. This they now proceed to do. But they think it well to add a reminder that the course that they have taken on this occasion is not a precedent for allowing an appeal to succeed on another occasion in any comparable circumstances.

The section of the Manitoba Income Taxation Act under which the respondent's assessment has been made is by common consent S. 24. That section runs 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 tax-payer which is a Corporation or joint stock company carrying on business in Manitoba and which has not its head office in Manitoba ".

The problem involved in ascertaining the taxable income under this section is the problem of ascertaining what is the net profit or gain that arises from the business in Manitoba. Where a Corporation that is within the section sells in Manitoba a product that it has manufactured without Manitoba it follows from the decision in the *International Harvester Co.* case that the net taxable profit is to be ascertained after making an allowance for " manufacturing profit " to be attributed to the manufacturing activity outside the Province. It is this allowance that the assessments appealed against refused to concede.

What then is the purpose and scope of the statutory right of appeal under the Act? For that one must resort to the appeal provisions of the Act. Under S. 58 of the Act " any person who objects to the amount at which he is assessed " may serve a notice of appeal upon the appellant. Under S. 59 the appellant must duly consider the same and either affirm or amend the assessment appealed against. Under S. 60, " if the person objecting is dissatisfied with the decision ", of the appellant, he has the right to appeal to a Judge of the Court of King's Bench by a notice which is to set out the grounds of his appeal. By subsection (2) of the same section the Judge is directed to hear the appeal and the evidence adduced before him by the appellant and the Crown and to " decide the matter of the appeal ".

If that procedure is applied to the facts of the present case, what happened was that the respondent objected to the amount of its assessments. It claimed, and the appellant refused to concede, that it was entitled to an allowance for " manufacturing profit ". Thereupon the respondent appealed to the Court of King's Bench claiming that for this reason the assessments made upon it were too large. In their Lordships' view the " matter of the appeal " which was thus brought before the Judge comprised both the question of law whether there should be an allowance for " manufacturing profit " and the question of fact what, if there ought to be such an allowance, the net profit or gain in Manitoba was to be treated as being. The Judge's Order decided no more than this, and their Lordships are of opinion that it was within his jurisdiction so to decide.

It is true that the Judge, having decided the question of principle that was in controversy, might have remitted the matter to the appellant to make new assessments on that basis. At least their Lordships will assume that he had power so to deal with an appeal. But, while it is clear that he was under no obligation to remit, it is not clear what advantage would have been gained by so remitting. A new assessment would have produced a new right of appeal, if the amount of the assessment was objected to: and the Judge would only have had to consider on a second occasion the propriety of a calculation of " manufacturing profit " which he might just as well have considered on the first when the original appeal was before him. It was not, after all, his fault that on that occasion the appellant offered no evidence as to the basis of calculation which he would prefer if some basis had to be adopted or that the Inspector of Taxes stated that he was quite satisfied to leave that matter to the Court.

In truth the appellant's objections to the form of the Order invest him, as Minister, with a discretion that he does not possess. It is to no purpose to point out that under certain special sections, such as S. 26, S. 27 and S. 27A, there are express statutory provisions to the effect that a proportionate part of profit or income derived from specified activities in Manitoba is to be treated as earned in Manitoba and that the appellant, as Minister, is to have full discretion as to the manner of determining such proportionate part. The statutory discretion that is conferred for the purpose of administering the taxation system under these sections cannot be imported by any method of construction into S. 24, which is the section in question here. Here the appeal from the assessments under that section reached the Court without any discretion having been exercised in fact, or any statutory discretion conferred for the purpose of S. 24 existing in law. It is impossible therefore to attribute to the Judge dealing with these appeals a position comparable to that which he might occupy if he were dealing with an appeal against an assessment under one of these special sections when the Minister had already exercised his discretion "as to the manner of determining" a proportionate part of certain income. Their Lordships express no view as to the range of the Judge's power on such an appeal. What they are concerned to point out is that there is no useful analogy between such an appeal and those which are the subject of the present case.

For these reasons their Lordships think that the appeal must fail and they will humbly advise His Majesty accordingly. The appellant must pay the respondent's costs of the appeal.

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In the Privy Council

THE PROVINCIAL TREASURER OF MANITOBA

v.

WM. WRIGLEY JR. COMPANY LIMITED

DELIVERED BY LORD RADCLIFFE

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