1948
*May 31
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1949
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THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT;

AND

SIMPSONS, LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Business Assessment—Assessment of Income not derived from business assessed—Whether appeal lies from decision of county judge under s. 57(3)—the Assessment Act, R.S.O., 1937, c. 272, ss. 8, 9, 57, 84 and 123.

The respondent was incorporated with powers *inter alia* to purchase, hold, sell or exchange or otherwise dispose of shares of the capital stock of any other company. It owns all the shares, excepting qualifying shares, of *The Robert Simpson Co. Ltd.* It also owns all the property

*PRESENT: Kerwin, Taschereau, Kellock, Estey and Locke JJ.

occupied by the latter company in Toronto, which it leases to it. In 1936 the subsidiary surrendered a portion of its leased property on Mutual street to the respondent to be occupied by it as its principal office. The respondent's income consisted practically entirely of the dividends it received from its subsidiary.

The appellant under the *Assessment Act, R.S.O.*, 1937, c. 272, s. 8 assessed the respondent for business assessment in respect of the premises used for its business in each of the years 1939, 1940, 1941 and 1942 and the respondent paid the taxes thereon in each of the succeeding years. The appellant pursuant to s. 9(1) (*b*), in each of the years 1940 to 1943 inclusive, also assessed the respondent in respect of income which it contended was not derived from the business in respect of which it had been assessed under s. 8. In assessing such income it did so pursuant to a by-law passed under s. 123 (formerly s. 120a of 1934, c.1, s.8) which enables income to be taxed in the year immediately following the year in which income is received.

Held: per Taschereau, Kellock and Locke JJ., (Kerwin and Estey JJ., dissenting), that the facts in the case bring it within s. 123 of the *Assessment Act* and for the reasons given in *Walker's case*, ([1949] S.C.R. p. 215, there was no right of appeal from the decision of the county court judge to the Municipal Board, and the appeal should therefore be dismissed.

Per Kerwin and Estey JJ., (dissenting), that for the reasons given by them in *Walker's case, supra,* an appeal lay to the Municipal Board, and the question now to be decided was whether the appeal from the Board's decision to the Court of Appeal was upon a question of law, as prescribed by s. 84(6), and that it should be held, that even if the purposes for which the respondent was occupying and using the premises in question could be said to be the carrying on of a business, and that therefore the respondent was liable to business assessment under s. 8; the question whether the income for which the respondent was assessed was derived from the business in respect of which it was so assessable for business, is one of fact, and hence no appeal lies to the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for Ontario, setting aside a decision of the Ontario Municipal Board. The decision of the Ontario Municipal Board had allowed an appeal from a decision of His Honour Judge Parker, senior judge of the County of York, which held that since the respondent was liable to business assessment under s. 8 of the *Assessment Act,* R.S.O. 1937, c. 272, it was not liable to assessment under s. 9 of the Act. The result of the judgment of the Court of Appeal was that the decision of the county judge was restored.

F. A. Campbell K.C. and *J. P. Kent K.C.* for the appellant.

C. F. H. Carson K.C. and *Allan Van Every K.C.* for the respondent.

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CITY OF TORONTO v. SIMPSONS, LIMITED

The judgment of Kerwin and Estey JJ. was delivered by:

KERWIN J. (dissenting):—This is an appeal by the Corporation of the City of Toronto from a judgment of the Court of Appeal for Ontario allowing the appeal of the respondent, Simpsons, Limited, from an order of the Ontario Municipal Board which had allowed the appeal of the City from a decision of a county judge. All those appeals were assessment appeals under the Ontario *Assessment Act*, R.S.O., 1937, c. 272, as amended, as they arose from the following assessments for income made against the respondent:—

In 1940 in respect of 1939 income of $ 920,163.
In 1941 in respect of 1940 income of 1,039,859.
In 1942 in respect of 1941 income of 556,897.
In 1943 in respect of 1942 income of 175,015.

These assessments were made under section 123 of the Act, which, as section 120a of the *Assessment Act* of 1934, had been brought into effect as of January 1, 1935, by a by-law of the City, passed June 25, 1934. Accordingly, in each of the years 1940, 1941, 1942 and 1943, the City assessed and taxed the income for the previous year. In the *City of Windsor* appeals (1), I have stated my reasons for differing from the Court of Appeal's conclusion that no appeal lay to the Board, and the same result follows in the present case on the question of the Board's jurisdiction.

Appeals to the court of revision from such assessments for income were dismissed but the county judge allowed the appeals of the present respondent from the decision of the court of revision and set aside the assessments. On a transcript of the evidence given before the judge, the Board allowed an appeal by the City from the former's decision. The first question to be determined is whether the appeal from the Board's decision to the Court of Appeal was upon a question of law, as prescribed by subsection 6 of section 84 of the Act:—

(6) An appeal shall lie from the decision of the Board under this section to the Court of Appeal upon all questions of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality is concerned is a party, or any order of the Board.

(1) [1949] S.C.R. 215 and 234.

The provisions of subsection 1 of section 9 of the Act might here be noted:—

9. (1) Subject to the exemptions provided for in sections 4 and 8—
(*a*) every corporation not liable to business assessment under section 8 shall be assessed in respect of income;
(*b*) every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section.

As a matter of fact the respondent was assessed for business assessment in each of the years 1939, 1940, 1941 and 1942, in the sum of $750 and the respondent paid the taxes thereon in each of the succeeding years. While an explanation appears in the record as to this being done as a result of an earlier appeal to the county judge, who declared that the respondent carried on business at 108 Mutual Street, Toronto, it is unnecessary in the view I take to deal with the argument on behalf of the City that, notwithstanding such actual assessment, the respondent was not properly "liable" to business assessment under section 8.

The income in question consists practically entirely of the dividends received by the respondent from the Robert Simpson Company, Limited. The conclusion of the county judge is stated as follows:—

I find that the premises occupied by Simpsons Limited at 108 Mutual Street is occupied and used for the purpose of carrying on its business as an investment, financing and holding company, and that such business is within the contemplation of the *Assessment Act* and liable for business assessment; and I further find that the dividends on shares held by Simpsons Limited in the Robert Simpson Company, Limited, is income derived from the business of which it (Simpsons, Limited) is liable for business assessment.

On the other hand, the Board found on the same evidence that

even if the purpose for which the respondent was occupying and using the premises at 108 Mutual Street could be said to be the carrying on of a business the dividends received by it from The Robert Simpson Company, Limited, and assessed to it by the appellant are not income received by it from that business.

The difficulty of determining whether there is a question of law involved has been pointed out in *Rogers-Majestic Corporation* v. *City of Toronto* (1). The appeal in that case originated with a stated case under section 85 of the *Assessment Act* and the judgment of this court was

(1) [1943] S.C.R. 440.

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based upon the ground that there was no evidence upon which the decision of the county judge could be supported. The appeal culminating in the decision of this court in *Loblaw Groceterias Co. Ltd.* v. *Corporation of the City of Toronto* (1), also originated upon a stated case under section 85. As to appeals under section 84, the Court of Appeal has taken such a finding as that of the Board in the present case as one of fact; *The City of Toronto* v. *Famous Players Canadian Corporation Ltd.* (2); *Re International Metal Industries Ltd. and City of Toronto,* (3); *Re Russell Industries Ltd.* v. *The City of Toronto,* (4). The judgment of this Court in the first mentioned case, [1936] S.C.R. 141, was carefully expressed so as not to decide the point.

In the chapter on *"Fact or Law in Cases Stated under the Income Tax Acts"*, in Dr. Farnworth's book *"Income Tax Case Law"*, the author discusses practically all the cases in the House of Lords and Court of Appeal in England dealing with the question under the Taxing Acts. He points out that no guidance can be obtained from other branches of the law in which the distinction between fact and law is important. The decision of the House of Lords in *National Anti-Vivisection Society* v. *L.R.C.* (5), on the particular question of fact there involved may appear to some to be revolutionary but it is in conformity with the course of decision in the Court of Appeal for Ontario under the *Assessment Act*. There is much to be said for the contrary view but in my opinion, it should be held that, even if the purposes for which the respondent was occupying and using the premises at 108 Mutual Street could be said to be the carrying on of a business and that therefore the respondent was liable to business assessment under section 8 of the Act, the question whether the income for which the respondent was assessed was derived from the business in respect of which it was so assessable for business is one of fact and hence no appeal lay to the Court of Appeal.

The appeal should be allowed and the order of the Board restored. The appellant is entitled to its costs in the Court of Appeal and in this Court.

(1) [1936] S.C.R. 249.
(2) [1935] O.R. 314.
(3) [1940] O.R. 271.
(4) [1941] O.W.N. 147.
(5) [1947] 2 A.E.R. 217.

The judgment of Taschereau, Kellock and Locke JJ. was delivered by

KELLOCK J.:—The facts in this case bring it within section 123 of the *Assessment Act* and for the reasons given in *Walker's case* (1) I am of the opinion that there was no right of appeal on the part of the appellant from the decision of the county judge to the Municipal Board. I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for appellant: *W. G. Angus.*

Solicitors for respondent: *J. S. D. Tory* and associates.