1943
*May 20, 21.
*June 29.

ROGERS-MAJESTIC CORPORATION LIMITED ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Assessment Act, R.S.O. 1937, c. 272—Company assessed under s. 8 for business assessment; also under s. 9 (1) (b) in respect of certain income—Income assessable as not being derived from business in respect of which company was assessable under s. 8 —Appeal under s. 85, as being "on a question of law or the construction of a statute".

Appellant company manufactured radios and other articles and, in respect of land occupied for that purpose, it was assessed by respondent city for business assessment as a manufacturer, under s. 8 (1) (*e*) of *The Assessment Act*, R.S.O. 1937, c. 272. Prior to 1934, appellant had also owned and operated on other land, as part of its business, a broadcasting station, but in 1934 a broadcasting company was incorporated to which appellant transferred certain capital assets including land, buildings and equipment used in the operation of

PRESENT:—Duff C.J. and Davis, Kerwin, Taschereau and Rand JJ.

the broadcasting branch of the business, and from that time the broadcasting company operated said station (and was assessed under s. 8 (1) (*k*) of said Act for business assessment in respect of the land occupied for that purpose). For its said transfer, appellant received the broadcasting company's issue of capital stock and bonds. Certain directors of appellant were also directors (and one of them was also manager) of the broadcasting company; the companies had the same president and secretary; the broadcasting company's books and its book-keeper were at appellant's head office (on land in respect of which appellant was assessed for business assessment); the broadcasting station was used to advance by advertising the sale of appellant's radio receiving sets without charge.

Respondent assessed appellant for income tax on a sum received as interest on said bonds of the broadcasting company held by appellant. Appellant disputed respondent's right to do so, claiming that the sum was not, within the meaning of s. 9 (1) (*b*) of said Act (having due regard to s. 8 (3), and to the facts), "income not derived from the business in respect of which" appellant was assessable under s. 8. Macdonell Co. Ct. J., on appeal from the Court of Revision, held that the sum was not taxable. On appeal by way of special case stated under s. 85 of said Act, his decision was reversed by the Court of Appeal for Ontario, [1943] O.R. 1.

Held (affirming judgment of the Court of Appeal): The sum in question was assessable. To escape assessment under s. 9 (1) (*b*), income of appellant would have to be derived from its business in respect of which it occupied land and was liable for business assessment; that business was the business of manufacturing and selling its products; from which the income in question was not derived.

Held, also, that respondent's appeal to the Court of Appeal was competent, being "on a question of law or the construction of a statute" within the meaning of s. 85 (1) of said Act (cases bearing on the question reviewed).

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing (Riddell J.A. dissenting) an appeal by the present respondent, by way of special case stated pursuant to s. 85 of *The Assessment Act,* R.S.O. 1937, c. 272, from the decision of His Honour Judge Macdonell, a Judge of the County Court of the County of York, in favour of the present appellant. The special case stated by His Honour Judge Macdonell was as follows (the present appellant being therein referred to as the "respondent" or the "respondent company", and the present respondent being therein referred to as the "appellant"):

Pursuant to the powers conferred by Section 123 of *The Assessment Act,* the Corporation of the City of Toronto enacted By-law 14140 dated June 25th, 1934, as amended by By-law 14584 dated June 29th, 1936, being a by-law respecting taxation of income.

The Respondent is a company with its head office at 622 Fleet Street West, in the City of Toronto, where it occupies or uses land for the

(1) [1943] O.R. 1; [1943] 1 D.L.R. 127.

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purpose of carrying on its business. It was assessed in the year 1939 for business assessment as a manufacturer under Section 8, paragraph (e) of *The Assessment Act*.

It was also entered on the roll of taxable income under Section 123 of the said Act for the year 1940 for taxable income for the sum of $14,625. The Respondent admitted that it had a taxable income of $4,125 but disputed its assessment for the balance of $10,500 and appealed to the Court of Revision, which confirmed the said assessment. The Respondent then appealed and the hearing came on before me at which time the Appellant asked me to make a note of any question of law or construction of statute that might arise and to state same in the form of a special case for the Court of Appeal.

The amount in dispute is the said sum of $10,500 which was credited to the Respondent Company by Rogers Radio Broadcasting Company Limited and received as interest on bonds of the latter company held by the Respondent Company.

Prior to 1934 the Respondent Company owned and operated broadcasting station CFRB as part of its business. In that year Rogers Radio Broadcasting Company Limited was incorporated and the Respondent Company transferred to the Broadcasting Company certain capital assets including land, buildings and equipment used in connection with the operation of the broadcasting branch of the business. The Respondent Company received as consideration for such transfer $200,000 in bonds of the Broadcasting Company as well as the entire issued capital stock. At the present time $150,000 of bonds are still held by the Respondent Company, the balance having been redeemed.

The Broadcasting Company was incorporated and the bond issue created in order that the Respondent Company might have an asset upon which it would borrow money for its purposes and the bonds were used for that reason.

The Broadcasting Company carried on the business of radio broadcasting thereafter (particularly in the year 1939, which is the year under consideration in this case), operating radio station CFRB, and was assessed for business assessment in respect of the premises occupied by it for this purpose at 37 Bloor Street West, in the City of Toronto, under Section 8, paragraph (k) of the said Assessment Act.

The Board of Directors of the Broadcasting Company consists of three of the Directors of the Respondent Company and two of the engineers of the Broadcasting Company. The companies have the same President and the same Secretary. Mr. Harry Sedgwick, the Manager of the Broadcasting Company, is a director of both companies.

The income of the Broadcasting Company is derived from the carrying on of the business of a broadcasting station. The books of the Broadcasting Company are kept at the Head Office of the Respondent Company and are under the general supervision of the Comptroller of the Respondent Company. The book-keeper for the Broadcasting Company was at the office of the Respondent Company, was paid by the Respondent Company and a part of her salary charged by journal entry against the Broadcasting Company.

The broadcasting station is used for the purpose of advancing by advertising the sale of the radio receiving sets of the respondent company without charge.

Equipment for the Broadcasting Company in some cases was made by the Respondent Company and charged to the Broadcasting Company at cost.

The interest which is in question was not paid in cash but was charged by the Respondent Company to the Broadcasting Company by means of journal entry and was thus received by the Respondent Company. The profits of the Broadcasting Company were turned over to the Respondent Company and treated as an asset of the Broadcasting Company and a liability of the Respondent Company.

The following powers are included in the Letters Patent of the Respondent Company dated May 13, 1925:

(a) To manufacture, sell, lease, purchase, import, export and otherwise dispose of and deal in radio and electrical machines, appliances, accessories and equipment of all kinds;

(b) To manufacture, sell, lease, purchase, import, export and otherwise dispose of and deal in all kinds of goods and merchandise directly or indirectly connected with or entering into the manufacture, construction and assembling of radio and electrical machines, equipment, accessories and appliances, or the erection, equipment and operation of radio reception and transmission stations;

(d) To build, acquire, equip, operate and dispose of radio reception and transmission stations;

(i) To purchase, take or acquire by original subscription or otherwise, and to hold, sell or otherwise dispose of shares, stock, debentures and other obligations in and of any other company and to vote all shares so held through such agent or agents as the directors may from time to time appoint.

The Respondent Company occupies three premises, one at 622 Fleet Street West, one at the Crosse and Blackwell plant on Fleet Street, and one in a building on Hanna Street, at all of which it is assessed for 60 per cent. of the value of the land occupied by it as a manufacturer. It manufactures radios, radio parts and equipment, electric refrigerators and similar products. Its income is derived from the sale of these products through a large jobber organization across Canada. The annual financial statement of the two companies indicate that both carry on a substantial business. In the year 1939 the Broadcasting Company had a net operating profit of $126,621.09 and the consolidated statement of the Respondent Company and its subsidiaries shows a net operating profit of $101,308.26.

DECISION

Upon these facts, I decided the said sum of $10,500 was not taxable and allowed the appeal reducing the assessment to $4,125.

REASONS FOR MY DECISION

Counsel for the Appellant contended that because there were two corporations, each liable for business tax, carrying on separate businesses, the said sum of $10,500 received by the Respondent Company from the Broadcasting Company as interest on bonds of the Broadcasting Company could not be income derived by it from the business in respect of which it was assessable under Section 8. He claimed that upon the proper construction of the said Section 9 (1) (b) the amount was assessable. I disagreed with this contention, whereupon counsel asked that I submit this question of law for the opinion of the Court of Appeal. 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.

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QUESTION

Upon a true construction of *The Assessment Act*, particularly section 9, (1) (b), was I right in deciding that the said sum of $10,500 did not form part of the taxable income of the Respondent Company in the year 1940.

To the question above propounded in the stated case, the Court of Appeal (Riddell J.A. dissenting) answered in the negative. The Court of Appeal also held (unanimously) that the question for determination was a question of law and therefore an appeal lay to it under said s. 85.

Special leave to appeal to the Supreme Court of Canada was granted to the present appellant by the Court of Appeal for Ontario.

Besides other contentions, counsel for the appellant referred to s. 8 (3) of the Act (quoted in the reasons for judgment in this Court *infra*) and contended that the assessment of appellant as a manufacturer under s. 8 (1) (*e*) was no more than a fixing of the rate at which it should be assessed; assessment as a manufacturer only indicated that the business of manufacturing was the chief or preponderating business of those carried on by appellant in respect of which it was assessed for business tax; and that the Act should be so construed that the words "business in respect of which it is assessable" as they appear in s. 9 (1) (*b*) mean all business carried on by appellant upon the premises in respect of which it is assessed for business tax; it could not be said that the income which appellant received prior to 1934 from the broadcasting branch of its business was not income derived from the business in respect of which it was assessed for business tax and the mere fact that it created a separate corporate entity did not make the broadcasting business any less the business of the appellant; it derived the income from the broadcasting branch of its business by means of interest on the bonds instead of directly from its earnings as theretofore; that the broadcasting company was merely appellant's agent for the purpose of earning income for appellant as part of appellant's business.

Against such a contention it was argued (*inter alia*) that the sum paid to appellant as interest on bonds was income not derived from the business in respect of which appellant occupied land and carried on business, but was derived from the business in respect of which the broad-

casting company occupied land and carried on business; and, when received by appellant, was clearly assessable under s. 9 (1) (*b*); the fact that it was received from a subsidiary company did not make it income derived from the business in respect of which appellant was assessable for business tax; the holding of the bonds was an investment which might be part of the business of appellant in the general meaning of that word "business", but it was not part of the business in respect of which appellant was liable for business assessment, and the income derived from such bonds or investments was the very income which the Act makes assessable; appellant did not occupy or use land for the purpose of radio broadcasting; that business was carried on solely by the broadcasting company and it alone was liable for business assessment in respect thereof; the companies were separate and distinct entities, and the business of radio broadcasting was not appellant's, but the broadcasting company's, business; further, there was no finding that appellant carried on the business of radio broadcasting or that appellant controlled the broadcasting company, or that the latter carried on as agent for appellant.

Samuel Rogers K.C. and *B. V. Elliot* for the appellant.

J. Palmer Kent K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—By leave of the Court of Appeal for Ontario, Rogers-Majestic Corporation Limited appeals from a decision of that Court allowing an appeal by the present respondent, the Corporation of the City of Toronto, from the decision of a County Court Judge by way of a special case stated pursuant to section 85 of *The Assessment Act,* R.S.O. 1937, chapter 272. The first question that arises is whether there was a question of law or the construction of a statute within the meaning of subsection 1 of section 85 upon which an appeal to the Court of Appeal could be based; and the second is whether the appellant was properly assessed for certain income under section 9, subsection 1 (*b*), of the Act, as being income not derived from the business in respect of which the appellant was assessable for business assessment under section 8.

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The relevant part of section 8, section 9, and subsections 1, 2 and 3 of section 85 are as follows:

8. (1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of 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 land so occupied or used by him, as follows:

(*e*) Subject to the provisions of clause *j* every person carrying on the business of a manufacturer for a sum equal to sixty per centum of the assessed value, and a manufacturer shall not be liable to business assessment as a wholesale merchant by reason of his carrying on the business of selling by wholesale the goods of his own manufacture on such land.

(*k*) Every person carrying on the business of a photographer or of a theatre, concert hall, or skating rink, or other place of amusement, or of a boarding stable, or a livery, or the letting of vehicles or other property for hire, or of a restaurant, eating house, or other house of public entertainment, or of a hotel or any business not before in this section or in clause *l* specially mentioned, for a sum equal to twenty-five per centum of the assessed value.

(3) Subject to the provisions of subsections 4 and 5, no person shall be assessed in respect of the same premises under more than one of the clauses of subsection 1, and where any person carries on more than one of the kinds of business mentioned in that subsection on the same premises, he shall be assessed by reference to the assessed value of the whole of the premises under that one of those clauses in which is included the kind of business which is the chief or preponderating business of those so carried on by him in or upon such premises.

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.

(2) The income to be assessed shall be the income received during the year ending on the 31st day of December then last past.

85. (1) An appeal shall lie to the Court of Appeal as hereinafter provided from the judgment of the judge on a question of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Ontario Municipal Board (except an order made under section 84).

(2) Any party desiring so to appeal to the Court of Appeal shall on the hearing of the appeal by the judge request the judge to make a note of any such question of law or construction, and to state the same in the form of a special case for the Court of Appeal.

(3) It shall be the duty of the judge to make a note of such request, and he may thereupon state such question in the form of a special case, setting out the facts in evidence relative thereto, and his decision of the same, as well as his decision of the whole matter.

Whether there is a question of law or the construction of a statute upon which an appeal lies to the Court of

Appeal is not always free from difficulty. Probably no satisfactory definition can be framed so as to cover all circumstances. In *Farmer* v. *Cotton's Trustees* (1), the Commissioners for the General Purposes of the Income Tax Acts had decided that certain premises were not "divided into and let in different tenements" within the meaning of a provision of the *Customs and Inland Revenue Act, 1878*. In the House of Lords, Earl Loreburn pointed out, at page 930, that the House had no jurisdiction to review the determination of the Commissioners upon any issue of fact. "We could, of course," he says,

> interpose if it were clear that the Commissioners had proceeded upon a wrong construction of the Act, and I think they did by regarding the question as one merely of structural separation; but they have not told us what construction they placed upon the Act.

He was disposed to remit the case to obtain that information, if it were necessary, but he decided there was another ground of law upon which the Commissioners were wrong. "There is, upon a true construction of the Act, no evidence in this case upon which their decision can be supported." Lord Atkinson concurred. Lord Parker, at page 932, states it is not always easy to distinguish between questions of fact and questions of law; that the views from time to time expressed in the House of Lords had been far from unanimous

> but in my humble judgment, where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only.

Lord Sumner, although dissenting in the result, stated in the opening of his speech, at page 938:

> In this case the Commissioners have furnished a description of the building in question, partly in words and partly by plans, so full that your Lordships know as much about it as they did. The rest is matter of law.

In *Girls' Public Day School Trust Limited* v. *Ereaut* (2), the House of Lords held that the term "public school", as used in a rule of Schedule A of the *Income Tax Act, 1918*, was not a term of art, and that the question of what was the common understanding of the term was a question of fact for the Commissioners; and that, there being ample evidence to support the conclusion, it could not be reviewed.

(1) [1915] A.C. 922. (2) [1931] A.C. 12.

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In *Re McIntyre Porcupine Mines Limited and Morgan* (1), Mr. Justice Hodgins of the Ontario Court of Appeal states at page 220:

> The construction of the words of any statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its terms is a question of fact:

but later on the same page he remarks:

> It is no doubt difficult to separate questions of law and fact in a case of this kind, where evidence which enables the Court to put itself in a position to construe the words of the Act is very often the same or practically the same as that which determines whether the statute covers the particular thing in question.

The substance of the first of these two sentences may be found in the judgment of this Court in *Township of Tisdale* v. *Hollinger Consolidated Gold Mines Limited* (2), but it is important, I think, to read the entire paragraph:

> The questions as to whether or not the buildings, plant and machinery are in or on mineral land, and are used mainly for obtaining minerals from the ground, or form part of the concentrators, are not exclusively of fact. The Ontario Railway and Municipal Board having found that the property attempted to be assessed is situate on "mineral land", it seems, as found by the Supreme Court of Ontario, that, upon the evidence adduced and the findings of the Board, we would be precluded from interfering therewith, if we agree, in law, with their view as to the meaning of the statute. The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.

Mr. Justice Grant, in the Court of Appeal (3), had pointed out in this case that there was no definition of the words "mineral land" and I think it may be taken that the Court of Appeal and this Court decided that there was evidence upon which the Ontario Railway and Municipal Board could decide as it did.

In *The Corporation of the City of Toronto* v. *Famous Players' Canadian Corporation Ltd.* (4), this Court dismissed an appeal from the Court of Appeal for Ontario because it considered that it would be impossible to set aside the findings of the Board on the ground that, on the evidence, they were legally inadmissible; and considered it equally impossible to hold that, given the findings, the order of the Board was wrong in law.

(1) (1921) 49 O.L.R. 214.
(2) [1933] S.C.R. 321, at 323.
(3) [1931] O.R. 640, at 644.
(4) [1936] S.C.R. 141.

In *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (1), it is stated in the judgment of this Court at page 254:

> It is argued that, the courts below having reached the conclusion that the land and building were used as distribution premises, this is a finding of fact with which we ought not to interfere. But it is a question of law that is made the subject-matter of the right of appeal from the County Judge upon a stated case and we are bound to determine upon the proper construction of the amendment whether or not, upon the facts stated, the land and building are caught by the increased rate of assessment. Questions of this sort are constantly before the House of Lords on taxing statutes and are dealt with as raising the proper construction to be put upon the language of the statutes.

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.

This really involves the determination of the second question. By letters patent, the appellant was authorized, *inter alia,* to build, acquire, equip, operate and dispose of radio reception and transmission stations, and, prior to 1934, the appellant owned and operated a broadcasting station, CFRB, as part of its business. In that year Rogers Radio Broadcasting Company Limited was incorporated and the appellant transferred to it certain capital assets, including land, buildings and equipment used in connection with the operation of the broadcasting branch of the appellant's business. Since 1934 the Broadcasting Company has carried on the business of radio broadcasting, operating radio station CFRB, and was assessed for business assessment in respect of the premises occupied by it for that purpose at 37 Bloor Street West, Toronto, under paragraph (*k*) of subsection 1 of section 8 of *The Assessment Act.* Since 1934 the appellant has not owned or operated the broadcasting station. The appellant, to quote from the stated case,

(1) [1936] S.C.R. 249.

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occupies three premises, one at 622 Fleet Street West, one at the Crosse and Blackwell plant on Fleet Street, and one in a building on Hanna Street, at all of which it is assessed for 60 per cent. of the value of the land occupied by it as a manufacturer. It manufactures radios, radio parts and equipment, electric refrigerators and similar products. Its income is derived from the sale of these products through a large jobber organization across Canada.

It is apparent from the stated case, and particularly from that part of it to which I have just referred, that it is as a manufacturer that the appellant is assessable, and is assessed, for business assessment under section 8 (1) (*e*). There is no evidence that the appellant carries on any business other than the business of a manufacturer on the three premises referred to and there is, therefore, no basis for any inquiry as to whether it has a chief or preponderating business within the purview of subsection 3 of section 8.

No doubt the appellant has power to invest in shares or bonds of other companies and for some purposes the income from such shares or bonds, such as the income from the broadcasting Company's bonds here in question, might properly be said to be part of the income of the appellant. Under subsection 1 (*b*) of section 9 of *The Assessment Act,* that is not sufficient. It must be income derived from the business of the appellant in respect of which it occupies land and is liable for business assessment. That business is the business of manufacturing and selling its products. The income in question was not derived from that business and is therefore assessable. In the Court of Appeal for Ontario, the Chief Justice of the Common Pleas and Mr. Justice Riddell decided in this sense in *Re City of Toronto and John Northway and Son Limited* (1), and I agree that this is the proper interpretation of the clause.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Rogers & Rowland.*

Solicitor for the respondent: *C. M. Colquhoun.*

(1) (1923) 54 O.L.R. 81.