THE BORDEN COMPANY LIMITED ..... } APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

1948 *Dec. 1

1949 *Feb. 28

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Excess Profits Tax Act, 1940, c. 32, s. 4(2)—"Taxpayer who acquired his business as a going concern after January 1, 1938"—Section does not apply to the case of a corporation in existence prior to that date which enlarges its business by purchase of assets of other companies by merging them in its own.

The appellant in 1941 and 1942 acquired the assets and business of three subsidiaries as going concerns. Without alteration of its share capital it then, under section 4(2) of *The Excess Profits Tax Act, 1940,* S. of C. 1940-41, c. 32, sought to have added to its own standard profits those of the businesses it had taken over. Section 4(2) provides:

"On the application of a taxpayer who acquired his business as a going concern after January 1, 1938, if the Minister is satisfied that the business carried on by the taxpayer is not substantially different from the business of his or its predecessor, he may direct that the standard profits of the said predecessor may be taken into account in ascertaining the standard profits of the said taxpayer."

Held: Affirming the decision of the Exchequer Court (1)—, that the appellant did not acquire its business as a going concern after January 1, 1938. What it did was to enlarge the business previously carried on by it by purchase of the assets of the three companies. S. 4(2) therefore does not apply to such a case.

APPEAL from a judgment of the Exchequer Court of Canada, (1) Cameron J., affirming the assessment of the appellant under *The Excess Profits Tax Act, 1940,* S. of C. 1940-41, c. 32, as amended, for the taxation year 1942.

John R. Cartwright K.C. and *B. M. Osler* for the appellant.

Gérard Beaudoin and *E. S. McLatchy* for the respondent.

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

KERWIN J.—This is an appeal against a decision of the Exchequer Court affirming the assessment of the appellant, the Borden Company Limited, under *The Excess Profits*

* PRESENT:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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Kerwin J.

Tax Act, chapter 32 of the Statutes of 1940 as amended, for the taxation year 1942. Either under its present or a previous name, the appellant has been in existence for a number of years, manufacturing milk products and also carrying on a fluid milk and dairy products business. It is, I think, unnecessary to state in detail the various changes that occurred in the nature of the business carried on by the appellant before 1937 because in that year it purchased all the shares of twenty-six operating companies from a subsidiary of a United States parent concern and all the assets and business of one of its own subsidiaries, and by this step re-entered the fluid milk business which for some time previous, it had ceased to operate.

Among the companies the shares of which the appellant had purchased in 1937 were Laurentian Dairy Limited, Moyneur Co-operative Creamery Limited, and Caulfield's Dairy Limited. As of January 1, 1941, it purchased the assets of the first two companies and as of June 1, 1942, it purchased the assets of the third company.

Under section 3 of *The Excess Profits Tax Act* there is to be assessed, levied and paid a tax upon the excess profits of every corporation or joint stock company residing or ordinarily resident in Canada or carrying on business in Canada. The appellant did not file a consolidated return pursuant to subsection 3 of section 35 of the *Income War Tax Act* and, therefore, it does not come within paragraph (i) of section 2(c) of *The Excess Profits Tax Act* but within paragraph (ii) so that, as to it, "excess profits" means the amount by which its profits exceed one hundred and sixteen and six hundred and sixty-six one thousandths per centum of its standard profits. For present purposes, "standard profits" means the average yearly profits in the years 1936 to 1939 both inclusive because it is admitted that the appellant was during those years carrying on the same class of business as it did in the year in question, 1942.

Unless, therefore, the appellant can bring itself within some other provision of the Act, there can be no question that it was correctly assessed. The contention is that subsection 2 of section 4 applies:—

(2) On the application of a taxpayer who acquired his business as a going concern after January first, one thousand nine hundred and thirty-eight, if the Minister is satisfied that the business carried on by the tax-

payer is not substantially different from the business of his or its predecessor, he may direct that the standard profits of the said predecessor may be taken into account in ascertaining the standard profits of the said taxpayer.

I think that the learned trial judge was right in deciding that it cannot be said that the appellant acquired its business as a going concern after January 1, 1938. The case of a company which starts a new business is referred to in other provisions of the Act, and apparently what Parliament had in mind in subsection 2 of section 4 is a new taxpayer who has acquired its business as a going concern after the specified date. The appellant is not a new taxpayer with reference to the business carried on by it. It is the same taxpayer carrying on a business, enlarged, it is true, to some extent by its purchase of the assets of the three companies, but it is still the same business, and it cannot be said that that was acquired as a going concern after January 1, 1938. Furthermore, "predecessor" is not an apt word in the context in which it is found to describe any of the three companies.

The trial judge dealt with the question as to whether in any event the power of the Minister to "direct" is to direct the Board of Referees for whose appointment provision is made by section 13 of the Act. At the moment I have grave doubts as to whether this is so but I prefer to express no opinion on the subject since my conclusion on the first point is sufficient to dispose of the appeal. The standard profits of Laurentian Dairy Limited, Moyneur Co-operative Creamery Limited and Caulfield's Dairy Limited were quite properly not taken into account in ascertaining the standard profits of the appellant.

The appeal should be dismissed with costs.

RAND J.—The appellant carried on a large business during the standard period under *The Excess Profits Tax Act, 1940,* and its standard profits standing alone are not in question. In 1941 and 1942 it acquired the assets and business of three subsidiaries as going concerns which themselves were carried on during that period, but without alteration in its share capital. It now seeks to have added to its own standard profits those of the businesses taken over and section 4(2) of the Act is invoked.

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Rand J.

I think it clear that section 4(2) is confined to a case where after January 1, 1938, a person acquires "his business" as distinguished from an addition to his business, as a going concern that was carried on in the standard period and continues it in substance as it was under his or its predecessor. In that situation section 5(2) comes into play. If the acquisition has been made in 1938, on the application of the taxpayer, or if after January 2, 1939, without an application, the Minister refers the case to the Board of Referees. Section 4(2) provides that in either case the Minister may direct the Board to take into account the standard profits, if there were such, of the predecessor. Two years is ordinarily the minimum period for the determination of such profits as average yearly profits, under the definition section 2(1)(i), and where the successor has less than that time within the standard period the case thus becomes or may become one for the Board.

What the appellant did was to add to the capital employed in its business. The Act makes provision for such cases, but the conditions laid down were not here complied with.

The appeal must, therefore, be dismissed with costs.

KELLOCK J.—Section 4, subsection 2, of *The Excess Profits Tax Act,* as it stood with relation to the year 1942, is as follows:

> On the application of a taxpayer who acquired his business as a going concern after January first, one thousand nine hundred and thirty-eight, if the Minister is satisfied that the business carried on by the taxpayer is not substantially different from the business of his or its predecessor, he may direct that the standard profits of the said predecessor may be taken into account in ascertaining the standard profits of the said taxpayer.

As of January 1, 1941, the appellant purchased, as a going concern in each case, the business and assets of Laurentian Dairy Limited and Moyneur Co-operative Creamery Limited, and as of June 1, 1942, the business and assets of Caulfield's Dairy Limited. Appellant contends that the above subsection is applicable to entitle it to have included in its standard profits for the year 1942, or the proportionate part thereof, the standard profits previously applicable to the companies whose assets were purchased. It is contended by the respondent, and this contention has been given effect to by the court below, that the subsection

does not apply to a taxpayer who, while already in business, acquired a further business or businesses since the date mentioned in the subsection.

The appellant's contention really is that "his" in the first line of the subsection is to be read as "a". Read literally in its actual form the subsection does not apply to the case at bar and when one finds that there is other provision in the statute covering the identical case presented by the facts here present, the subsection is, in my opinion, to be construed as the learned judge below has construed it. Subsection 1 of section 4 makes provision for an adjustment of standard profits where any alteration in the capital employed has taken place, provided other conditions not here present are met. The phrase "capital employed" is defined in the first schedule to the Act and includes the value of assets acquired by purchase after the commencement of the business of the purchaser. This being so, I think there is no ground upon which the appellant's contention can be sustained. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Osler, Hoskin & Harcourt.*

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