1942

* May 8, 11, 12.
* Nov. 3.

FIRESTONE TIRE AND RUBBER COMPANY OF CANADA, LIMITED (APPELLANT) ..... } APPELLANT;

AND

COMMISSIONER OF INCOME TAX (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Income tax (provincial)—Extra-provincial company manufacturing goods—Distribution of same goods by provincial company—Whether profits from such sales are income of extra-provincial company "earned within the province"—Interpretation of contract—Whether contract of agency or sale—Taxation Act, R.S.B.C., 1924, c. 254—Income Tax Act, R.S.B.C., 1936, c. 280.

The appellant company is a Dominion company having its head office at the city of Hamilton, in the province of Ontario, having no office or any employees in the province of British Columbia; it manufactures automobile tires, accessories and repair equipment at its plant at the same city. The appellant company had a contract called "Distributor's Warehouse Contract," with M., W. & D. Ltd., a British Columbia company doing business entirely within that province as wholesale dealer in tires, automobile accessories, radios and electric supplies, Firestone products being about 25% of its business. The detailed conditions of the contract are given in the judgments of this Court. The appellant company, on April 8th, 1938, was assessed in respect of income in connection with sales of its products in British Columbia by M., W. & D. Ltd. The assessments were confirmed by the Provincial Minister of Finance; but they were set aside by the Supreme Court of British Columbia, Murphy J. Upon a further appeal to the Court of Appeal for British Columbia, the decision of the Minister of Finance was restored by a majority of that Court.

Held, reversing the judgment of the Appellate Division ([1941] 3 W.W.R. 635), Kerwin and Hudson JJ. dissenting, that the contract between the parties was one of agency, with the result that M., W. & D. Ltd. would only be the agent of the appellant company and, as a consequence, the sales made by M., W. & D. Ltd. in British Columbia would be in reality sales made there by the appellant company itself. The contract must be construed as an agreement of sale made in the province of Ontario. Neither upon that contract as a matter of construction nor constitutionally the profits accruing to the appellant company from these sales may be deemed to be income earned in British Columbia. Therefore, these profits did not come within the charge of the *Income Tax Act* of that province. *John Deere Plow Company* v. *Agnew* (48 Can. S.C.R. 208) applied.

Per Kerwin and Hudson JJ., dissenting.—The effect of the agreement between the parties in this case is to make the distributor, M., W. & D.

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc.*

Ltd., merely an agent of the appellant company for the sale of its goods in the province of British Columbia.—The manufacture, in the province of Ontario, of the appellant company's goods, however necessary to the existence of its business, does not earn income. The goods are manufactured for the purpose of sale and the income is earned when the goods are sold and all the income, therefore, was earned within the province of British Columbia.—The agreement in the *John Deere Plow* case (*supra*) is entirely dissimilar to the one in the present case.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Murphy J. (2), the latter having allowed an appeal from the confirmation by the Minister of Finance of the province of British Columbia of the income tax assessments levied against the appellant company by the respondent, the Commissioner of Income Tax for that province.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

J. W. de B. Farris K.C. and *E. B. Bull* for the appellant.

R. L. Maitland K.C. and *H. Alan Maclean* for the respondent.

The judgment of Rinfret and Taschereau JJ. and of Gillanders J. *ad hoc* was delivered by

RINFRET J.—The appeal concerns the income tax assessments levied against the appellant by the Commissioner of Income Tax for the province of British Columbia. The appellant Firestone Tire and Rubber Company of Canada Limited is a Dominion company having its head office at the city of Hamilton, in the province of Ontario. This company manufactures pneumatic passenger and truck type casings and tubes, solid tires, tire accessories, repair material and repair equipment at its plant at Hamilton. It has no office or any employees in British Columbia, save one, whose sole duty is to make adjustments on faulty products of the Firestone Company.

At all material times the appellant had a contract with MacKenzie, White & Dunsmuir Limited, a British Colum-

(1) [1941] 3 W.W.R. 635; [1941] 3 D.L.R. 256.
(2) 56 B.C.R. 45; [1941] 1 W.W.R. 257; [1941] 3 D.L.R. 257.

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Rinfret J.

bia company doing business entirely within the province and which is a wholesale dealer in tires, automobile accessories, radios and electric supplies.

The decision of the case turns upon the construction of the contract in question.

It is called a "Distributor's Warehouse Contract".

By the first paragraph thereof (entitled "Sales"), the Firestone Company grants to MacKenzie, White & Dunsmuir Limited (called the distributor)

> the right to sell Firestone pneumatic passenger and truck type casings and tubes, solid tires, all types, tire accessories, repair materials and repair equipment,

referred to in the contract as "Firestone Products", in the territory of the Island of Vancouver and the province of British Columbia east to and including Revelstoke and Nelson.

In consideration,

> the distributor agrees to receive from the Company and to warehouse in accordance with the terms and conditions herein contained and maintain a sufficient stock of Firestone products to meet the requirements of his territory, to vigorously push the sale and distribution of Firestone products within the said territory; to sell to all commercial accounts, to persons, firms or corporations known as national accounts (a list of which will be furnished to the distributor by the Company) who qualify for and are entitled to special prices under the Company's regulations from time to time made; to sell or upon the order of the Company to deliver to the Dominion Government departments or their servants holding certificates, provincial government departments, and in special cases to automobile and truck manufacturers, and their agents, Firestone products under the terms and conditions and at the prices set forth and provided for in the Company's regulations from time to time made and furnished to the distributor.

It may at once be noted that no question arises concerning the tire accessories, repair materials and repair equipment, as it is conceded that they are purchased outright by MacKenzie & Company and that, accordingly, these sales are only made outside the province, to wit: in Hamilton, and that no tax is payable on profits resulting from these sales. Anything stated in the present judgment should not therefore be taken to have any reference to tire accessories, repair materials or repair equipment.

As for the sales to national accounts, including the Dominion and provincial governments and the automobile and truck manufacturers, they are admittedly in a class by themselves and they are not to be taken into account to ascertain the true nature of the general contract between the appellant and the distributor.

Bearing in mind the remarks just made, we may now proceed further with the analysis of the contract.

Paragraph 4 (entitled "Lien") provides that

the right, title, ownership and property of, in and to all Firestone products * * * ordered by the distributor from the Company or shipped by the Company to the distributor shall be and remain in the Company notwithstanding delivery, either actual or constructive, of the said Firestone products or any part thereof to the distributor so long as the same or any part thereof shall remain in the said warehoused stock and shall not have been *bona fide* sold or otherwise disposed of to dealers or consumers in accordance with the terms and provisions hereof.

The distributor may, subject to the terms, provisos, conditions and agreement

resell in the usual and ordinary course of his business, but not otherwise, any of the Firestone products delivered or to be delivered by the Company provided, however, that no article shall be sold by the distributor at a price less than the list price established from time to time by the Company * * * less such discounts as may be authorized from time to time in connection with the prices so fixed or to be fixed by the Company. The mailing by the Company to the distributor of such price lists from time to time shall be conclusive evidence of the establishment of such prices.

Promptly on the twenty-third day of each month the distributor must mail to the Company a stock movement report made up as of the twentieth of that month and on the following basis:—

Inventory of the twentieth of the previous month plus all receipts in detail, (less deductions for returned goods and so forth). "New inventory as of the twentieth to be deducted from this total to give the amount to be charged to the distributor."

Any increase in the value of any portion of the stock of Firestone products which shall not have been resold by the distributor, and occasioned by a rise in price or otherwise, shall inure solely to the benefit of the Company.

The distributor shall accord to the duly accredited representative of the Company full opportunity at all times to inspect the distributor's books of account, vouchers, sales notes or slips and all other documents and papers of the distributor relating to the distributor's business or the conduct thereof and to take extracts and make summaries thereof and to inspect and check all goods in the possession of or belonging to the distributor.

Paragraph 10 reads as follows:—

10. Price and discount. The distributor shall account to the Company for Firestone products at the prices and shall be entitled to the discounts on Firestone products set forth and contained in the schedule of covenants and conditions hereinafter referred to.

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Rinfret J.

In the case of a decline in the Company's dealer list price or in the Company's solid tire net price list, the Company agrees to compensate the distributor by merchandise credit in respect of any rebates which he shall have made to a dealer.

The Company agrees to prepay the freight charges on carload shipments and to refund the charges in respect of shipments less than carload lots.

The agreement is for a term of five years, with liberty to each party of terminating it upon giving to the other one year's written notice.

The terms, covenants and conditions upon which the agreement is made are set forth in detail in a schedule attached to it and are declared to have the same force and effect as if they were contained in the body of the agreement.

Among the terms and conditions in the schedule are the following:—

> The distributor shall pay to the company for Firestone products purchased from the Company, the following prices, namely: For pneumatic passenger and truck type casings and tubes * * * the Company's list price in force at the time the order is received and accepted. Provided that such list prices are subject to change without notice.
>
> 2. Terms: Payment due on or before the 20th day of the calendar month following date of shipment * * * ; 2% cash discount to be allowed if payment is made on or before the due date. Net thereafter. The Company may at its discretion decline to make deliveries except for cash whenever it deems such action necessary.

If the Company should decide as a matter of policy that a graduated bonus for volume of sales should be allowed to dealers, the distributor will credit the dealer with such bonus when earned and the Company will, upon proof to its satisfaction, allow the distributor at the end of the Company's fiscal year, the amount of such bonus in the form of a merchandise credit.

The Company shall not be bound by or charged with any claim or adjustment made by the distributor, unless special adjustment privileges have been granted to the distributor by the Company; and there are elaborate provisions dealing with such adjustment privileges.

Paragraph 10 of the schedule reads as follows:—

> The distributor has the exclusive right to sell Firestone products to dealers in the territory specified, but this contract is not to be construed as constituting the distributor the agent of the Company for any purpose.

The only other material provision in the schedule (paragraph 14) is to the effect that the stock of Firestone products in the distributor's warehouse shall be at the sole risk of the distributor and the distributor agrees at all times to carry in the name of the Company, with loss payable to the Company, but at the expense of the distributor, insurance on the said stock.

This provision was later modified by a letter dated March 1st, 1934, whereby MacKenzie & Company were "relieved of all responsibility whatsoever as to fire insurance." But it was explained that the new arrangement was made because MacKenzie & Company felt that they would save money on the premiums, in view of the fact that the Firestone Company was able to make a Dominion-wide contract and that, in such a way, the saving on the premiums would accrue to MacKenzie & Company. The latter, however, continued to pay the premiums, although at the more advantageous rates secured by the Firestone Company.

The Commissioner of Income Tax contends that, as a result of the agreement above outlined, the distributor is an agent for making sales of the Firestone products on behalf of the appellant in British Columbia, and that, as a consequence, the Firestone Company must pay income tax on the profits it makes on the sales of these products in the province.

Pursuant to the *Income Tax Act* (Revised Statutes of British Columbia, 1936, c. 280) the appellant, on April 8th, 1938, was assessed in respect of income for the fiscal years from October 31st, 1927, to October 31st, 1931, inclusive, and from October 31st, 1932, to October 31st, 1937, inclusive, to the amounts of $3,255.14 and $6,322.77 respectively.

Under section 41 of the *Income Tax Act,* these assessments were placed before the Minister of Finance by the Commissioner of Income Tax and, after considering the submission contained in the appeal submitted on behalf of the Firestone Company and the information and documents on file in the office of the Commissioner, the assessments were confirmed by the Minister.

Upon appeal to a judge of the Supreme Court of British Columbia from the decision of the Minister of Finance, the appeal was allowed; but upon a further appeal to the Court of Appeal for British Columbia, the

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Rinfret J.

decision of the Minister was restored with costs, except as to the amount of tax, if any, levied on income of the Firestone Company earned on the sale of accessories, repair materials and repair equipment; otherwise the assessments were confirmed. The Chief Justice of British Columbia and D. A. MacDonald J.A. however dissented from that judgment and stated that they had reached the same conclusion as the learned trial judge.

It must be admitted that the wording of the contract under discussion makes the case a difficult one, for, to borrow the words of Viscount Haldane in *Michelin Tyre Company Limited* v. *MacFarlane (Glasgow) Limited* (1):

> The decision must turn on the right reading of agreements which have aimed at putting into writing the methods of men whose concern has been with practical results in business, rather than with exactitude in legal definition.

But, as stated by Pollock M.R. in *The Commissioners of Inland Revenue* v. *The Eccentric Club Limited* (2):

> It is a well-established principle that, in revenue cases, regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty, and that the form may be disregarded.

And in order to get at the substance of the transactions between the appellant and the MacKenzie Company it will undoubtedly be helpful to examine the "methods" followed by them in the carrying out of the contract, as they have been explained in the course of the evidence given at the trial. "There is no better way of seeing what the parties intended than seeing what they did under the agreement" (*Chapman* v. *Bluck* (3); *Pearson* v. *Ries* (4).

MacKenzie, White & Dunsmuir Limited do a large volume of business. They keep a stock commensurate with the amount of business they are doing and, in order to meet the requirements of their clients, they place orders (which they call specifications) with the factory of the appellant, upon receipt of which orders the latter ships the goods usually in carload lots.

The appellant has no right to tell the MacKenzie Company how much stock they shall carry. As a matter of

(1) (1916) 55 Sc. L.R. 35, at 39.
(2) (1923) 12 Tax C. 657, at 690.
(3) (1838) 4 Bing. N.C. 187, at 193.
(4) (1832) 8 Bing. 178, at 181.

fact, no order for tires placed by the MacKenzie Company has ever been refused, nor has any complaint ever been made on that score.

The specification or order for goods merely states the number and the kind of tires that are required. It is sent to the appellant at Hamilton and, upon it being accepted (and we are told that none has ever been rejected), a memorandum invoice or a record of the shipment is sent by the appellant from Hamilton to the MacKenzie Company in Vancouver, freight prepaid.

On this memorandum invoice, as it is called, the number, the size and the description of the tires ordered are repeated in the same way as appears in the specifications sent by the MacKenzie Company, but the prices are not extended, the reason for it being that the MacKenzie Company does not pay upon this specific invoice. It pays, in accordance with the terms of the contract as we have already seen them, only for the removals from the stock in the course of the period extending between the twentieth day of the previous month and the twentieth day of the month on which the report is mailed by the MacKenzie Company to the Firestone Company, as provided for in clause 6 of the contract.

On the 23rd of each month the monthly inventory and sales report is sent showing these removals from stock. The report indicates the inventory of the goods as of the 20th of the previous month, the receipts of goods in the course of the month just expired and the inventory on the 20th of the month on which the report is made. By deducting the new inventory from the total shown by the inventory of the previous month, plus all receipts in the meantime, the parties arrive at the total removal to be charged to the MacKenzie Company; and, the quantity of removals of each particular description having thus been ascertained, a new invoice is sent from Hamilton by the Firestone Company to the MacKenzie Company, on which the prices are extended and showing the amount which the latter will have to pay on or before the 20th of the month following the mailing of their report. That is done every month.

The prices charged to the MacKenzie Company, according to the contract, are those "in force at the time the order is received and accepted". Those prices are fixed by all the rubber companies and are stabilized across Canada.

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Rinfret J.

Those are the prices that the MacKenzie Company is called upon and obliged to pay to the appellant and not, as stated in the judgments of the majority of the Court of Appeal, "the proceeds of the sales, made by the distributor in Vancouver". This is very important as it has necessarily a particular bearing on the question of the relationship of the parties.

Thus the MacKenzie Company is charged with the goods removed from stock in the course of the previous month and it is not called upon to account for the proceeds of these goods, it is only obliged to pay for them at the price prevailing "at the time the order is received and accepted". There may have been a change of price in the meantime to which the MacKenzie Company may be subject under certain circumstances provided for in the contract, but this does not affect the essential provision that what they are charged with by the appellant and what they pay is the price stipulated by the terms of the contract and not the proceeds of the sales made to the dealers in Vancouver or the specific purchaser.

Now, the MacKenzie Company is charged with and pays for all the goods removed from stock as shown in the inventory report, and we agree with the learned trial judge and it is established by the evidence that, under the contract, goods removed from stock would include not only those that have actually been sold, but also any other goods that might have disappeared through fire, theft or other occurrences.

The only concern of the Firestone Company is with regard to the quantity of goods of the specified description which have been removed from the stock warehoused and to the amount that they are to receive from the MacKenzie Company for the goods so removed, at the price fixed under the terms of the contract.

The appellant has no control over the sales or the removals made in Vancouver; it has no authority to give instructions as to whom the goods shall be sold. It employs no salesmen of its own; it has no employees in British Columbia, except the man already referred to whose only duty is to approve the adjustments on claims made upon the MacKenzie Company by its purchasers. The MacKenzie Company run its own business, of which the

sale of Firestone products is only a small part (evidence shows 25% of the whole business); they employ their own servants, with whom the appellant has nothing to do whatever; they make their sales as they please, in their own name, and they give title directly to the purchasers. As a matter of fact, they can do absolutely what they like with the goods in the warehouse and they deal with them as owners.

The Firestone Company is not bound by or not to be charged with any claim or adjustment made by the MacKenzie Company, except as a result of special privileges granted to the debtor by the appellant under the provisions of the contract. As for the MacKenzie Company itself, it becomes liable for the payment of the goods as soon as they have disappeared from the inventory; and if the purchasers do not pay, the loss is the MacKenzie Company's loss; the appellant "takes absolutely no loss whatever".

Upon an examination of the terms of the agreement, of the "methods" adopted by the parties to carry it out and of the course of dealings between them, I find myself in agreement with the learned trial judge and the two dissenting judges in the Court of Appeal that the contract between the parties is not that of agency, but is that of sale.

Here we have, first, a case of offer and acceptance. Under no circumstances contemplated in the contract does the Firestone Company ship goods without an order or specification.

Then we have the promise to pay for the goods made by the MacKenzie Company. It is not an obligation to pay which arises only upon the MacKenzie Company having received the amount paid by a customer as a result of a sale. The MacKenzie Company becomes liable for the payment as soon as the goods are removed from the warehouse or disappear from the inventory. Immediately upon such occurrence they are obliged to pay the price fixed under the contract, irrespective of the amount paid by the customer and whether the customer pays or not. The agreement calls for no act done within British Columbia in order to complete the sale. The removal of the goods from inventory does not make the title of the MacKenzie Com-

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Rinfret J.

pany to the goods any more complete than it was upon its order or specification being accepted in Hamilton. The occurrence of the removal has only the effect of fixing the date of the payment of the price of sale, which is irrevocably established by the specific terms and conditions of the contract. The due date of the payment is the 20th of the month following the removal or disappearance of the goods from the warehouse. That is the only object of referring to the disappearance or removal of the goods. It has nothing to do with the completion of the sale as between the appellant and the MacKenzie Company; it is there mentioned only for the purpose of fixing the date of the payment.

It is true that, as a result of the terms so agreed upon by the appellant, the due date of the payment might never occur—although, in practice, that would no doubt be an exceptional case—but that would flow only from the terms upon which the parties have agreed. It is essentially a matter for the vendor's concern and I do not see how it can alter the nature of the contract.

Such, in my view and with respect, is the substance of the agreement which the respondent asks the Court to bring within the charge of the *Income Tax Act* of British Columbia. I do not understand it to be disputed that if that contract is to be construed as an agreement of sale, made in Hamilton, Ontario, the profits accruing to the appellant are not income earned in British Columbia and coming within the charge of the *Income Tax Act* of that province. The ground upon which the Commissioner of Income Tax claims that these profits are subject to the charge is that the contract under discussion is one of agency, that the MacKenzie Company is only the agent of the appellant and that consequently the sales made to the purchasers in British Columbia are in reality made by the appellant.

In my view, the relationship between the Firestone Company and the MacKenzie Company is one of vendor and purchaser; whatever profits are derived from it by the Firestone Company result from a contract of sale made in Hamilton, Ontario; and, accordingly, neither upon that contract as a matter of construction nor constitutionally, may the respondent Commissioner of Income Tax legally and validly assess the appellant's profits as claimed in the present case.

No doubt some of the clauses of the agreement may be held consistent with agency relationship, but none of them are inconsistent with the notion of an outright sale.

Primarily we have the declared intention of the parties in clause 10 of the schedule that

> this contract is not to be construed as constituting the distributor the agent of the Company for any purpose.

There is no suggestion, anywhere in the case, of bad faith or of colourable phraseology used by the parties for the purpose of defeating the British Columbia legislation. The contract has now been in force for at least twenty years. There can be no doubt that under that stipulation in clause 10, between the parties themselves at all events, such a clause would have to be given its full effect.

Then we have the situation that the MacKenzie Company gets all the profits on the sales to the purchasers in British Columbia and that it bears all the losses. We have the further fact that the MacKenzie Company pays the appellant as a debtor and not as an accountant. It must pay on the date fixed by the contract the price stipulated therein, without any reference to the price which it gets from its customers and even in the case where it does not collect from them any amount whatever.

Of course there is clause 4 of the contract, by force of which the right, title, ownership and property of the Firestone products ordered by the MacKenzie Company and shipped by the appellant remain in the latter, notwithstanding delivery either actual or constructive, so long as the same remains in the warehoused stock and has not been *bona fide* sold or otherwise disposed of in accordance with the terms of the contract. But that clause is styled "Lien". It is consistent with the idea that the legal title will remain in one while the beneficial title becomes vested in the other. To a situation such as this the words of the present Chief Justice of this Court in *John Deere Plow Company* v. *Agnew* (1) may well be applied:—

> It is, in my judgment, an agreement relating to the sale and purchasing of goods embodying elaborate provisions for the protection of the sellers. Until the sellers have been paid in full the property remains vested in them and all moneys received on sale by the respondent are to be treated as theirs; but the rights thus reserved to them are only for

(1) (1913) 48 Can. S.C.R. 208, at 231.

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Rinfret J.

securing the payment of the purchased money; and on payment they would disappear at once. Subject to the rights so held by the sellers as security the purchaser is the beneficial owner of the goods.

The clause subjecting to certain conditions the "resale" by the MacKenzie Company to its customers is readily explained by the fact that the appellant gives to the MacKenzie Company the exclusive right to sell their products in the defined territory. The same may be said of the clauses relating to advertising and bonus. They are according to usual practice and merely intended for promoting the sales.

The provision that the goods are to be paid upon being removed is, as we have seen, merely a term of credit.

The learned trial judge relied on the decision of this Court in *John Deere Plow Company* v. *Agnew* (1), and I think he was perfectly justified in doing so. Many of the circumstances in that case are also present here. There also the question of the retention of title and property, the obligation to insure in the name of the vendor, the compulsion upon the purchaser to sell at a fixed price were stipulated in the contract; and yet the agreement was held not to be an agency contract.

A strikingly similar situation was examined by the House of Lords in the case of *Michelin Tyre Company Limited* v. *MacFarlane (Glasgow) Limited* (2) and their Lordships held that the relationship created between the parties by such a contract was one of sale and return.

Moreover, in the latter case, the vendors had the right to recall the goods and, in the agreement under discussion, there is no provision to that effect.

The result is that the contract between the appellant and the MacKenzie Company is a contract of sale made in Hamilton, Ontario, and that the profits accruing to the appellant under such a contract are not income earned in the province of British Columbia. Therefore, they do not come within the *Income Tax Act* of that province, indeed constitutionally they could not come under it (*Rex* v. *Lovitt* (3); *Provincial Treasurer of Alberta* v. *Kerr* (4)).

The conclusion thus reached makes it unnecessary to discuss the point whether, at all events, the assessments having been made indiscriminately both on the manufac-

(1) (1913) 48 Can. S.C.R. 208.
(2) (1916) 55 Sc. L.R. 35.
(3) [1912] A.C. 212.
(4) [1933] A.C. 710.

turing profits in Hamilton and the selling profits in British Columbia, they might not have been held unconstitutional and be equally set aside on that ground. (See Duff, C.J., in *International Harvester Company* v. *The Provincial Tax Commission and the Attorney-General for Saskatchewan* (1)).

The appeal should therefore be allowed with costs here and the Court of Appeal and the judgment at the trial should be restored.

The judgment of Kerwin and Hudson JJ. (dissenting) was delivered by

KERWIN J.—Firestone Tire and Rubber Company of Canada, Limited, is a Dominion company having its head office at Hamilton, Ontario, where it manufactures tires and casings, automobile accessories and repair material and equipment. Under the provisions of successive British Columbia taxation Acts, the Commissioner of Income Tax for that province had assessed the Company to income tax. The assessments were confirmed by the Provincial Minister of Finance but were set aside by Murphy, J., of the Supreme Court of British Columbia. From that decision an appeal was taken to the Court of Appeal by the present respondent, the Commissioner of Income Tax. The Commissioner did not claim in either court that the Company was subject to income tax on the profits derived from the sales in British Columbia of accessories, repair material and repair equipment. He did, however, contend that all other Firestone products were merely warehoused by a distributor in Vancouver, which was in reality the agent of the Company, and that the Company was therefore liable for income tax with respect to the income from the sale in British Columbia of those products. The Court of Appeal agreed with this contention, the Chief Justice of British Columbia and Mr. Justice D. A. Macdonald dissenting.

Section 3 of the *Income Tax Act*, R.S.B.C., 1936, chapter 280, provides:—

> 3. (1) To the extent and in the manner provided in the Act and for the raising of a revenue for Provincial purposes:
>
> (*a*) all income of every person resident in the Province and the income earned within the Province of persons not resident within the Province shall be liable to taxation.

(1) [1941] S.C.R. 325, at 331.

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Kerwin J.

The earlier applicable legislation contains a similar provision.

Bearing in mind that we are not concerned with accessories, repair material and repair equipment, the result of this appeal depends, first of all, upon the proper construction of a certain agreement between the Company and the distributor referred to above, MacKenzie, White and Dunsmuir Limited. By clause 1 of the agreement:—

> 1. Sales. The Company hereby grants to the distributor upon the terms and conditions hereinafter set forth, the right to sell Firestone pneumatic passenger and truck type casings and tubes, solid tires, all types, tire accessories, repair materials and repair equipment, hereinafter referred to as "Firestone Products", in the following territory:

It will be noted that the Company does not agree to sell any of its products to the distributor. Clause 2 merely provides for the territory to be covered. By clause 3:—

> 3. Consideration. In consideration whereof the distributor agrees to receive from the Company and to warehouse in accordance with the terms and conditions herein contained and maintain a sufficient stock of Firestone products to meet the requirements of his territory; to vigorously push the sale and distribution of Firestone products within the said territory; to sell to all commercial accounts, to persons, firms or corporations known as national accounts (a list of which will be furnished to the distributor by the Company) who qualify for and are entitled to special prices under the Company's regulations from time to time made; to sell or upon the order of the Company to deliver to the Dominion Government departments or their servants holding certificates, Provincial Government departments, and in special cases to automobile and truck manufacturers, and their agents, Firestone products under the terms and conditions and at the prices set forth and provided for in the Company's regulations from time to time made and furnished to the distributor.

It will be noted that by this clause the distributor does not agree to buy any of the Company's products. By clause 4:—

> 4. Lien. The right, title, ownership and property of in and to all Firestone products which have been heretofore or may hereafter be ordered by the distributor from the Company or shipped by the Company to the distributor shall be and remain in the Company notwithstanding delivery either actual or constructive of the said Firestone products or any part thereof to the distributor so long as the same or any part thereof shall remain in the said warehoused stock and shall not have been *bona fide* sold or otherwise disposed of to dealers or consumers in accordance with the terms and provisions hereof.

Clause 5 provides for a list price to be established by the Company, below which the distributor may not sell but, as considerable weight is attached to the word "resell", the clause is reproduced:—

5. Resale. The distributor may, subject to the terms, provisos, conditions and agreement herein contained resell in the usual and ordinary course of his business but not otherwise any of the Firestone products delivered or to be delivered by the Company provided, however, that no article shall be sold by the distributor at a price less than the list price established hereafter from time to time to be established by the Company as the list price for the sale thereof by the distributor less such discounts as may be authorized from time to time in connection with the prices so fixed or to be fixed by the Company. The mailing by the Company to the distributor of such price lists from time to time shall be conclusive evidence of the establishment from time to time of such prices.

It may at once be stated that, in my view, the word "resell" does not merit the importance it has received, in view of such words in clause 5 as "deliver", "sold", and "sale", and also in view of subsequent clauses in the agreement. By them a report is to be made on the 23rd day of each month, made up as of the 20th of that month, on the followng basis: to the inventory of the 20th of the previous month is to be added all goods received, and the new inventory as of the 20th of the current month is to be deducted from the total, to give the items to be charged to the distributor. Provision is made whereby any increase in value of any portion of the stock shall inure solely for the benefit of the Company, while in the event of a price decline the Company agrees to compensate the distributor by a merchandise credit. The word "resold" appears in clause 7 dealing with price increase but, for the reasons already advanced, it does not affect the construction to be placed upon the document when read in its entirety. The agreement is for five years with provision for an earlier termination and I agree with O'Halloran, J., that in the event of such termination the Firestone products warehoused with the distributor would belong to the Company.

Further carrying out the idea that the distributor is not a purchaser, the agreement provides that it shall account to the Company for the goods in question as set forth in the schedule of covenants and conditions attached to, and forming part of, the agreement. Paragraph 1 of this schedule states:—

The distributor shall pay to the Company for Firestone products purchased from the Company, the following prices, namely: For pneumatic passenger and truck type casings and tubes, accessories, repair materials and repair equipment, the Company's list price in force at the time the order is received and accepted. Provided that such list prices are subject to change without notice.

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Kerwin J.

The word "purchased" as here used refers to the purchase by a purchaser from the Company through the distributor. Because of the significance attached to paragraph 10 by Murphy, J. (with whom the two dissenting judges in the Court of Appeal agreed), it is reproduced:—

> 10. The distributor has the exclusive right to sell Firestone products to dealers in the territory specified but this contract is not to be construed as constituting the distributor the agent of the Company for any purpose.

The contention of the latter part of this paragraph is merely to insure, so far as possible, that the distributor should not undertake on behalf of the Company to make terms and conditions when selling that would be binding upon the Company. Paragraph 14 providing that the products in the distributor's warehouse or in his possession should be at the sole risk of the distributor, who has to carry insurance thereon in the name of the Company, was varied by a letter of March 1st, 1934, whereby the distributor was relieved of all responsibility as to fire insurance.

What is the effect of this agreement? It has been urged that the agreement is similar to the one considered in *John Deere Plow Company* v. *Agnew* (1). In my view the two agreements are entirely dissimilar and the judgment of O'Halloran, J., deals with the difference in such a satisfactory manner that I am content to adopt his remarks on that point. After consideration of all the arguments to the contrary, I have concluded that the effect of this agreement is to make the distributor merely an agent of the Company for the sale of the goods that are in issue in this appeal. It is perhaps unnecessary to state that the distributor does not take orders for Firestone products to be sent to the head office of the Company in Ontario, but sells the goods direct and receives the purchase price therefor in British Columbia. The system of monthly inventories provides the method of calculating the remuneration of the distributor as agent, for its services. In this connection there remains but to add that the carrying out of the agreement strengthens the above conclusion, particularly the fact that in the general financial balance of the Company the goods warehoused with the distributor are included on the asset side under the heading of "inventories".

(1) (1912) 48 Can. S.C.R. 208.

No question was raised as to the constitutional validity of the provision in subsection 1 of section 3 of the Act that

the income earned within the Province of persons not resident within the Province shall be liable to taxation

but it was argued that, assuming that the Company earned income in British Columbia, the assessments were invalid because they were made indiscriminately on income earned in the Province and that earned outside. This question is not the same as that which arose in *Commissioners of Taxation* v. *Kirk* (1). By section 15 of the New South Wales Act there under review, an income tax was to be paid at a rate to be fixed on all incomes exceeding £200 per annum:—

(1) Arising or accruing to any person wheresoever residing from any profession, trade, employment or vocation carried on in New South Wales, whether the same be carried on by such person or on his behalf wholly or in part by any other person.

(3) Derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown.

(4) Arising or accruing to any person wheresoever residing from any kind of property except from land subject to land tax as hereinafter specifically excepted, or from any other source whatsoever in New South Wales not included in the preceding subsections.

By subsection 3 of section 27:—

No tax shall be payable in respect of income earned outside the Colony of New South Wales.

Two companies had made profits from their business operations, which Lord Davey, speaking for the Judicial Committee, divided into four processes:—

(1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale.

As to the first, it was held that it came within the income derived from lands of the Crown under subsection 3 of section 15, and that the second, or manufacturing process, if not under subsection 1, at least fell within the words "any other source" in subsection 4.

As Lord Davey pointed out at page 592:—

The real question, therefore, seems to be whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony.

(1) [1900] A.C. 588.

1942

FIRESTONE TIRE AND RUBBER CO. LTD. v. COMMISSIONER OF INCOME TAX.

Kerwin J.

In determining that question their Lordships treated the word "derived" as synonymous with "arising or accruing", and a decision that some income was earned in New South Wales, where it arose or accrued from a trade carried on therein or was derived from lands of the Crown, or arose or accrued from any other source, can, in my view, have no application to the consideration of a statute which imposes a tax upon "the income earned within the province." In fact, the entire scope of the British Columbia Act is quite different from that of the New South Wales Act and also from that of the Saskatchewan Act in *International Harvester Company of Canada, Limited* v. *The Provincial Tax Commission* (1). In that case, with respect to a person residing outside of Saskatchewan but carrying on business there, the Saskatchewan Act imposed a tax on

> "the net profit or gain arising from the business of such person in Saskatchewan."

The reasoning in *Lovell* v. *Commissioner of Taxes* (2) is illuminating although I am not unmindful of the difference in the matters there under consideration from those at bar. At page 52, it was stated:—

> The decisions do not seem to furnish authority for going further back for the purpose of taxation than the business from which profits are directly derived and the contracts which form the essence of that business.

Referring to this statement and to a statement in *Grainger* v. *Gough* (3), Isaacs J. in *Commissioner of Taxation* v. *Meeks* (4) remarks:—

> Now, in my opinion, what is meant by those observations is this: where a business is carried on of which contracts are "the essence", then you look to the place where those contracts are made. And, if antecedent operations, whether manufacture, or purchase, or requests, are not part of "the essence" of the business carried on, but preparatory only, then, however necessary they may be to the very existence of the business, they are not part of it, in the sense at all events required for income tax purposes. In applying the principles enunciated in *Lovell's* case (2), the judgment proceeds: "In the present case their Lordships are of opinion that the business which yields the profit is the business of selling goods on commission in London." And it is pointed out that the earlier arrangements entered into in New Zealand were "transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit."

I adapt, if I may, that statement to the facts in this case. The manufacture in Ontario of the appellants' goods,

(1) [1941] S.C.R. 325.
(2) [1908] A.C. 46.
(3) [1896] A.C. 325.
(4) (1915) 19 C.L.R. 568 at 588.

however necessary to the existence of its business, does not earn income. The goods are manufactured for the purpose of sale and the income is earned when the goods are sold and all the income, therefore, was earned within British Columbia.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *C. L. McAlpine.*

Solicitor for the respondent: *H. Alan Maclean.*