

20, 1932

No. 77 of 1931.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING in right of the
PROVINCE OF BRITISH COLUMBIA (Plaintiff) *Appellant*

AND

10 THE B.C. FIR AND CEDAR LUMBER COMPANY
LIMITED (Defendant) - - - - - *Respondent.*

Case for the Respondent.

1. This is an Appeal by special leave from a judgment of the Supreme Court of Canada dated the 13th May 1931, reversing a judgment of the Court of Appeal of British Columbia dated the 7th October 1930, which affirmed a judgment of the Supreme Court of British Columbia dated the 9th January 1930, given in favour of the plaintiff, the present Appellant.

RECORD
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p. 24.
p. 21.

20 2. The Respondent is a Company incorporated under the Companies Act of British Columbia and carrying on business in Vancouver as manufacturers and dealers in lumber products.

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3. On the 21st August 1923 the Respondent's plant and premises were destroyed by fire and the Respondent, being at that time (in addition to its ordinary insurances against fire) insured with several companies under so-called "Use and Occupancy" policies against the loss and damage which would be sustained in the event of its plant being shut down and its business suspended in consequence of fire, subsequently recovered from the said companies \$43,000 by way of indemnity for the loss of the net profits, which (it was estimated) would have accrued had

RESPONDENT'S CASE.

pp. 7, 8.

there been no interruption of business caused by the fire, during the period of such interruption, and \$52,427.90 by way of indemnity for the fixed charges estimated to have been incurred during the said period.

4. The question at issue in this Appeal is whether such of the insurance moneys referred to in the foregoing paragraph hereof as covered the loss of profits not earned because of the interruption of business due to the destruction by fire of the Respondent's plant and premises, do or do not constitute taxable income within the meaning of the British Columbia Taxation Act (R.S.B.C. Cap. 254).

5. Copies of the said Taxation Act are lodged with this Record. 10
It will be seen that it deals separately with (inter alia) Taxation of Land, Taxation of Incomes, and Taxation of Personal Property. Among the "General Provisions respecting Taxation" is Section 4 (1), whereby it is provided inter alia as follows:—

"4. (1) To the extent and in the manner provided in this Act, and for the raising of a revenue for Provincial purposes:—

"(A) All property within the Province, and all output and income of every person resident in the Province, and the property within the Province and the output produced and income earned within the Province of persons not resident 20
in the Province shall be liable to taxation."

and in Section 2 (the definition section), the expression "income" is defined as follows:—

"In this Act unless the context otherwise requires:—

"Income includes the gross amount earned, derived, accrued or received from any source whatsoever, the product of capital, labour, industry, or skill; and includes all wages, salaries, emoluments and annuities accrued due from any source whatsoever (including the salaries, indemnities or other remunerations of members of the Senate and House of Commons of the 30
Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, and Municipal Councils, Commissions or Boards of Management, and of any Judge of any Dominion or Provincial Court, whether the said salaries, indemnities, or other remunerations are paid out of the revenue of His Majesty in right of the Dominion or in right of any Province thereof or by any person); and includes all income, revenue, rent, interest, or profits arising, received, gained, acquired, or accrued due from bonds, notes, stocks, debentures or shares (including the stocks bonds or debentures of the 40

Dominion, or of any Province of the Dominion, or of any municipality), or from real and personal property, or from money lent, deposited, or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business, or profession of any kind whatsoever.”

The provisions relating directly to Taxation of Income, under which the Appellant here claims that the Respondent is liable, are contained in Sections 42 to 53 of the Act. These sections need not be quoted in
10 extenso here; it is sufficient to say that they provide under certain conditions for the taxation of “income” as defined in Section 2.

6. The use and occupancy policies under which the Respondent was insured were all in the form set out on pp. 10 to 14 of the Record—and the clauses thereof which appear to be most material to the present issue are the following:—

“ This policy being for \$2,500 covers its pro rata proportion viz. 2500/144000ths of each of the undermentioned amounts, covering the following specified subjects of insurance.

20 “ Item 1. \$60,000 on net profits, as hereinafter defined, and \$84,000 on the fixed charges, as hereinafter defined, which it is incumbent upon the assured to provide for during the period of inoperation, partial or total, due to loss or damage by fire of the premises and/or stock . . .

“ 4. NET PROFITS defined :

The term “ Net Profits ” as used in this contract shall be held to mean the net profits that would have accrued had there been no interruption of business caused by fire.

30 “ (5) The conditions of this contract are that if the above described premises and/or machinery, and/or equipment, and/or stock contained thereon be destroyed or damaged by fire occurring during the term of this policy so as to necessitate a total or partial suspension of business, this Company shall be liable under this policy for the actual loss sustained consisting of net profits on the business which is thereby prevented, such fixed charges and expenses pertaining thereto as must necessarily continue during a total or partial suspension of business, and such expenses as are necessarily incurred for the purpose of reducing the loss under this policy . . . for not exceeding such length of time as shall be required, with the exercise of due diligence and despatch, to

rebuild repair or replace such part of said premises and machinery and equipment and stock as may be destroyed or damaged commencing with the date of the fire and not limited by the date of expiration of this policy SUBJECT TO THE FOLLOWING CONDITIONS AND LIMITATIONS to wit :

* * * * *

“ (12) It is a condition of this insurance (1) that this Company shall not be liable for loss on account of damage to or destruction of the finished product, or for the time required to reproduce any finished product which may be damaged (2) that liability for suspension of business due to damage to or destruction of raw materials shall be limited to that period of time for which the damaged or destroyed raw materials would have furnished operating conditions for the plant ; but no liability shall exist on this account unless or until actual suspension of business shall have occurred through the insured’s inability to procure suitable materials to take the place of those damaged or destroyed.”

pp. 10, 11.

p. 3.

7. By writ issued on the 28th November 1927 the Appellant instituted proceedings against the Respondent in the Supreme Court of British Columbia for the recovery (inter alia) of the amount which the Appellant claimed to be due for income tax in respect of the insurance moneys referred to in paragraph 3 hereof, together with penalties and interest accrued thereon. The action came on for trial on the 12th September 1929.

p. 21.

p. 14.

8. The parties, in order to obviate the necessity of taking evidence, agreed a Statement of Facts and Admissions which will be found on pp. 7 to 9 of the Record. During the trial of the action the issue as to the incidence of the tax in relation to such portion of the said insurance moneys as represented payment of “ fixed charges ” and certain questions as to taxation of personal property were by agreement eliminated from the issues which the Court was called upon to decide ; and the only remaining issue before the Court was the question whether or not the said insurance moneys, in so far as they covered the loss of profits not earned because of the interruption, were as was contended by the Plaintiff (the present Appellant), taxable income within the meaning of the Taxation Act. The Respondent’s main contention was and is that the moneys in question are not caught by any of the provisions in the somewhat elaborate definition of “ income ” quoted in paragraph 5 of this Case. It is submitted that they cannot be regarded as “ the product of capital, labour, industry, or “ skill ” ; nor as “ income, revenue, rent, interest, or profits arising, “ received, gained, acquired, or accrued due from personal property or

p. 8.

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“ from money lent, deposited, or invested, or from any indebtedness secured
 “ by deed, mortgage, contract, agreement, or account, or from any venture,
 “ business, or profession of any kind whatsoever.”

9. On 9th January 1930 Mr. Justice W. A. Macdonald gave judgment ^{p. 21.}
 in favour of the Plaintiff (the present Appellant) and ordered the Respondent
 to pay to the Plaintiff (inter alia) \$3,265·94 being income tax on the said
 insurance moneys. The learned judge thought that the said moneys
 “ constituted profits which the defendant had secured to itself, by ^{p. 18.}
 “ precautionary measures, in the event of the capital investment, in the ^{il. 23-26.}
 10 “ shape of its plant and premises, lying dormant through destruction by
 “ fire.” There was, however, no evidence or finding that it was part of the
 business of companies such as the Respondent to take out “ use and
 occupancy ” insurances.

10. From this judgment the now Respondent appealed to the Court ^{p. 25.}
 of Appeal for British Columbia, and on the 7th October, 1930, that Court,
 consisting of J. A. Macdonald, C. J. Martin, Galliher, McPhillips and
 M. A. Macdonald, J.J.A., dismissed the Appeal, Martin, J.A., dissenting. ^{pp. 21, 22,}
 The majority judges adopted the reasoning of the trial judge. ^{23, 24.}

11. The now Respondent then appealed to the Supreme Court of
 20 Canada, and on the 13th May, 1931, the Supreme Court, consisting of
 Anglin, C.J., Newcombe, Lamont, Smith and Cannon, J.J., by unanimous
 judgment allowed the Appeal and dismissed the Action—on the ground that
 the British Columbia Taxation Act nowhere provided for taxation of moneys
 paid by way of indemnity for profits not earned but irretrievably lost, and
 that, profits being non-existent, nothing was to be found in the statute
 which warranted the taxing of money substituted for the profits by way
 of indemnity for their loss. ^{pp. 38-39.}

12. The Respondent submits that the present Appeal should be
 dismissed and that the judgment of the Supreme Court of Canada should
 30 be affirmed for the following (amongst other)

REASONS.

- (1) BECAUSE the insurance moneys received by the Respondent do not fall within any part of the elaborate and comprehensive definition of “ income ” in Section 2 of the Taxation Act.
- (2) BECAUSE no revenue statute should be construed to render taxable moneys which are not covered by express provisions in the statute.

- (3) BECAUSE the Taxation Act does not cover moneys paid by way of indemnity for the loss caused through inability to carry on business.
- (4) BECAUSE the terms "income" and "profits" do not cover payments accruing due solely because there is no income and no profit.
- (5) BECAUSE indemnity for loss of profit is not profit.
- (6) BECAUSE the said insurance moneys, although the amount thereof was based on an estimate of profits which might have been but were not earned, were in reality 10 nothing else than an indemnity for the temporary sterilisation of capital assets from which the earning of profits had been anticipated.
- (7) BECAUSE it is not part of the Respondent's business to insure against loss of profits.
- (8) BECAUSE the judgment of the Supreme Court of Canada is right and ought to be upheld.

D. N. PRITT.

J. W. SCOBELL ARMSTRONG.

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(Plaintiff) - - - *Appellant*

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Case for the Respondent

WHITE & LEONARD,
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Ludgate Circus, E.C.4,

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