Privy Council Appeal No. 12 of 1942

International Harvester Company of Canada, Ltd. – *Appellants*

v.

The Provincial Tax Commission and others – – *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER, 1948

Present at the Hearing :

LORD PORTER
LORD SIMONDS
LORD OAKSEY
LORD MORTON OF HENRYTON
LORD MACDERMOTT

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal, by special leave of His Majesty in Council, from so much of the judgment of the Supreme Court of Canada dated 22nd April, 1941, as is adverse to the appellant. The appeal relates to three assessments of income tax made against the appellant on 23rd August, 1938, by the Commissioner of Income Tax of the Province of Saskatchewan, as follows:—

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(*a*) for the taxation year 1934	4,382.07
(*b*) for the taxation year 1935	11,541.07
(*c*) for the period of ten months ending 31st October, 1936	10,136.60
Total	$26,059.74

The appellant is a corporation incorporated under the Companies Act of the Province of Ontario, having its head office at the City of Hamilton, Ontario. The appellant's business is the manufacture and sale of agricultural implements and parts thereof and business incidental thereto. The manufacturing operations of the appellant are carried on entirely outside the Province of Saskatchewan and its selling operations are carried on partly in Saskatchewan and partly in other provinces and countries. The appellant has no directors resident in Saskatchewan, no meetings of its Board of Directors are held in Saskatchewan, and its central management and control abide at its head office in Hamilton, Ontario. The appellant's selling business in Saskatchewan is carried on at branch offices. All monies received by the appellant in Saskatchewan are deposited in separate bank accounts and remitted in full to the appellant's said head office, which sends to the Saskatchewan branches such monies as are required for operating and incidental expenses. On these facts it is common ground that, for income tax purposes, the appellant resides outside of Saskatchewan, and this has been assumed in the Courts in Canada.

The Province of Saskatchewan had no income tax statute till the Income Tax Act, 1932, was passed, applying to incomes earned or received after 1st January, 1931. That Act was amended by Acts of 1933, 1934 and 1934-5. In 1936 the Income Tax Act, 1936, was passed, applying to incomes earned or received in the year 1935 or subsequently. This Act was mainly a consolidation of the Act of 1932 and the subsequent amending Acts. It will be observed that, of the three assessments in question on this appeal, the first arises under the 1932 Act, as amended, while the second and third arise under the 1936 Act. It happens, however, that the language of the sections of the 1932 Act (as amended) which are relevant for the present purpose is identical with the language of the corresponding sections of the 1936 Act. For the sake of simplicity, their Lordships will refer by their numbers to the sections of the 1932 Act as amended, without specifying the numbers of the corresponding sections of the 1936 Act.

In order that the questions arising on this appeal may be fully and accurately stated, it will be necessary to set out a number of the relevant sections, and to quote in full certain regulations purporting to have been made under section 7 (4) of the 1932 Act; but as the main controversy centres on s. 21a of that Act, it will be convenient to quote that section at once. It is as follows:—

> " The income liable to taxation under this Act of every person residing outside of Saskatchewan who is carrying on business in Saskatchewan, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Saskatchewan."

" Person " under both Acts includes a corporation.

The main contention of the appellant is that the method adopted by the Commissioner in ascertaining the " net profit arising from the business of the appellant in Saskatchewan," for the purposes of s. 21a, is incorrect, in that it makes no allowance for a " manufacturing profit " earned outside Saskatchewan. The phrase " manufacturing profit," used throughout the argument before their Lordships' Board, is inaccurate in the sense that no company makes an actual profit merely by manufacturing goods; the profit does not come to the company's hands until the goods are sold. The phrase can, however, conveniently be used for the present purpose. If an article is sold at a profit to a member of the public by a company which has manufactured the article and has also sold it through its own selling organisation, it may be said that there are two stages in the production of the net profit (1) the manufacture of the article (2) the sale of the article, and that part of the net profit should be attributed to each stage, the part attributed to the earlier stage being described as a manufacturing profit. To quote from the judgment delivered by Sir Lyman Duff, C.J., in the present case, in the Supreme Court of Canada:

> " The Appellant Company is admittedly resident outside of Saskatchewan, within the meaning of this provision; and the business of the Company in Saskatchewan is limited to making contracts of sale by its agents and by them receiving the proceeds of such sales. The profits of the Company are derived from a series of operations, including the purchase of raw material or partly manufactured articles, completely manufacturing its products and transporting and selling them, and receiving the proceeds of such sales. The essence of its profit making business is a series of operations as a whole. That part of the proceeds of sales in Saskatchewan which is profits is received in Saskatchewan, but it does not follow, of course, that the whole of such profit ' arises from ' that part of the Company's business which is carried on there within the contemplation of section 21a."

Thus, according to the argument for the appellant, that portion of the money received in Saskatchewan which represents net profit should be subdivided, and part of it should be treated as a " manufacturing profit "

arising from the manufacturing business of the appellant outside Saskatchewan.

Their Lordships understand that, if the principle for which the appellant contends is well-founded, there will be no insuperable difficulty in determining what portion of the net profit represents manufacturing profit. They will now proceed to set out the relevant sections of the Act of 1932, as amended, and to state, so far as may be necessary, the history of the case.

Section 3 of the Act of 1932, so far as it is material for the present purpose, provides as follows:—

> " For the purposes of this Act, ' income ' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be, whether derived from sources within Saskatchewan or elsewhere; and includes the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not."

The words " whether derived from sources within Saskatchewan or elsewhere " are qualified, in the case of a non-resident person, by s. 21a, already quoted.

Section 4 provides " The following incomes shall not be liable to taxation hereunder:—

. . . . . .

> (*m*) profits earned by a corporation or joint stock company, other than a personal corporation, in that part of its business carried on at a branch or agency outside of Saskatchewan."

It is clear that the appellant is not a " personal corporation " in the sense in which that phrase is used in the Act.

Section 7 imposes the tax, and the following portions of it must be quoted:—

> " (1) There shall be assessed, levied and paid upon the income during the preceding year of every person:—
>
> . . . . . .
>
> (*d*) who, not being resident in Saskatchewan, is carrying on business in Saskatchewan during such year;
>
> . . . . . .
>
> a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first schedule to this Act, upon the amount of income in excess of the exemptions granted by this Act; provided that the said rates shall not apply to corporations and joint stock companies, other than personal corporations.
>
> . . . . . .
>
> (3) Save as herein otherwise provided, every corporation and joint stock company, no matter how created or organised, residing or ordinarily resident or carrying on business within the province, shall pay a tax, at the rate applicable thereto set forth in the first schedule to this Act, upon its income during the preceding year.
>
> (4) Where the commissioner is unable to determine or to obtain the information required to ascertain the income within the province of any corporation or joint stock company or of any class of corporations or joint stock companies, the Lieutenant Governor in Council may, on the recommendation of the commissioner, make regulations for determining such income within the province or may fix or determine the tax to be paid by a corporation or joint stock company liable to taxation."

Section 21 is as follows:—

" 21. Where any corporation carrying on business in Saskatchewan purchases any commodity from a parent, subsidiary or associated corporation at a price in excess of the fair market price, or where it sells any commodity to such a corporation at a price less than the fair market price, the minister may, for the purpose of determining the income of such corporation, determine the fair price at which the purchase or sale shall be taken into the accounts of the corporation."

This section is immediately followed by s. 21a which has already been quoted. Sections 22 to 25 are also of importance:—

" 22. The income liable to taxation under this Act of every person residing outside of Saskatchewan, who derives income for services rendered in Saskatchewan, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Saskatchewan, shall be the income so earned by such person in Saskatchewan.

23.—(1) Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything within Saskatchewan and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business in Saskatchewan and to earn within Saskatchewan a proportionate part of any profit ultimately derived from the sale thereof outside of Saskatchewan.

(2) The minister shall have full discretion as to the manner of determining such proportionate part.

24.—(1) Any non-resident person soliciting orders or offering anything for sale in Saskatchewan through an agent or employee, whether any contract or transaction which may result therefrom is completed within Saskatchewan or without Saskatchewan, or partly within and partly without Saskatchewan, or any non-resident person who lets or leases anything used in Saskatchewan, or who receives a royalty or other similar payment for anything used or sold in Saskatchewan, shall be deemed to be carrying on business in Saskatchewan and to earn a proportionate part of the income derived therefrom in Saskatchewan.

(2) The minister shall have full discretion as to the manner of determining such proportionate part.

25. Nothing in sections 23 and 24 shall in any way affect the generality of the term ' carrying on business ' as used elsewhere in this Act."

Regulations were made by the Lieutenant-Governor in Council, in purported exercise of the power conferred upon him by s. 7 (4) of the 1932 Act. They are in the following terms:—

" 1. Interest, dividends, rents and royalties less their proportionate share of deductions allowed shall be separately determined or ascertained, and if they are received in connection with the trade or business of the taxpayer in the Province, shall be income liable to taxation.

2. The income referred to in regulation 1 having been separately determined and ascertained, the remainder of the income of the taxpayer liable to taxation shall be taken to be such percentage of the remainder of the income as the sales within the Province bear to the total sales.

The sales of the taxpayer shall be measured by the gross amount which the taxpayer has received during the preceding year from sales and other sources in connection with the said business, excluding, however, receipts from the sale or exchange of capital, assets and property not sold in the regular course of business and also receipts from interest, dividends, rents and royalties the income of which has been separately determined or ascertained under the provisions of regulation 1.

3. If for any reason the portion of income attributable to business within the Province cannot be determined under the provisions of regulation 2, the income referred to in regulation 1 shall first be separately ascertained or determined and for the purpose of ascertaining or determining the proportion of the remainder of the income of the taxpayer, such remainder of income shall be specifically allocated or apportioned within and without the Province by the Commissioner.

4. If a taxpayer believes that the method of allocation and apportionment herein prescribed or as determined and as applied to his business, has operated or will so operate as to subject him to taxation on a greater portion of his income than is reasonably attributable to business or sources within the Province, he shall be entitled to file with the Commissioner a statement of his objections and of such alternative method of allocation and apportionment as he believes to be proper under the circumstances, with such details and proof and within such time as the Commissioner may reasonably prescribe, and if the Commissioner shall conclude that the method of allocation and apportionment heretofore employed is in fact not applicable or equitable, he shall re-determine the taxable income by such other method of allocation and apportionment as seems best calculated to assign to the Province for taxation the portion of the income reasonably attributable to business and sources within the Province.

5. These regulations shall not be applied to determine the income within the Province of a corporation or joint stock company carrying on a trade or business within and without the Province where

(*a*) the method or system of accounting used by the taxpayer enables the Commissioner to determine or to obtain the information required to ascertain the income of the taxpayer liable to taxation.

(*b*) the income of the taxpayer liable to taxation can be determined or ascertained by allowing the exemption provided by paragraph (*m*) of Section 4 of the *Income Tax Act*, 1932."

It is common ground between the parties that in making the three assessments now in question the Commissioner acted upon Regulation 2. It is also common ground that the Commissioner, in making these assessments, had no evidence of and did not compute or ascertain any net profit or gain arising from or earned in the appellant's business in Saskatchewan, but, after computing the net income of the appellant everywhere, purported to fix the appellant's "income applicable to Saskatchewan" by applying the percentage mentioned in that Regulation. The "assessment" for 1936 is typical, reading in part as follows:—

	$
"Net income subject to allocation	1,148,239.88
Gross Sales of Company everywhere	11,489,313.45
Gross Sales of Company in Sask.	2,128,603.92
Percentage of Sask. Sales to Total Sales ...	18.5268%
Income applicable to Sask. 18.5268% of $1,148,239.88	212,732.11
Amount of tax at 5%	10,636.60
Less tax paid under Corporations Taxation Act	500.00
Net tax payable	10,136.60"

On 3rd September, 1938, the appellant appealed against each of the said three assessments to the Board of Revenue Commissioners, pursuant to section 40 (8) (*a*) of The Treasury Department Act, 1938. On the hearing of that appeal a written admission of facts was filed with the Board, with schedules and exhibits as therein referred to. The appellant put in the *viva voce* evidence of Arthur Brown, its Branch Manager at Regina, showing the conditions under which the appellant was carrying on business in Saskatchewan during the years in question. The appellant

also filed an affidavit of its Vice President, Frank M. Morton of Hamilton, Ontario, in order to show that the cost to the appellant of doing business in Canada varies greatly in different provinces and sections, and does not bear any fixed proportion to the amount of sales in any province or section. The respondents put in no evidence apart from the said Admission of Facts and schedules and exhibits thereto. The Board of Revenue Commissioners, after reserving its decision, gave a written decision on 27th January, 1939, dismissing the appellant's appeals from all three assessments and affirming the assessments.

On 25th February, 1939, the appellant appealed to a Judge of the Court of King's Bench of Saskatchewan from the decision of the Board of Revenue Commissioners respecting all three assessments, pursuant to section 41 of The Treasury Department Act, 1938. On the hearing of that appeal the appellant filed with the King's Bench Judge, Mr. Justice Anderson, under section 41 (6) of The Treasury Department Act, 1938, subject to the respondent's objection, three affidavits of Clarence B. Munger, General Auditor of the appellant, of Hamilton, Ontario. The first and third of these affidavits dealt mainly with the question of a reserve for bad debts, but in the second affidavit Mr. Munger submitted two different methods or tests directed to showing that the assessments were excessive and arbitrary and had the effect of taxing manufacturing profit arising outside Saskatchewan. Mr. Justice Anderson, after hearing argument, reserved judgment and on 10th August, 1939, delivered a written decision, dismissing the appellant's appeals with costs.

On 25th August, 1939, the appellant appealed to the Court of Appeal for Saskatchewan pursuant to section 42 of the Treasury Department Act, 1938, and before that Court the three appeals were, by consent, treated and argued as one appeal.

The Court of Appeal reserved judgment and on April 2nd, 1940, delivered judgment holding that it had no jurisdiction to entertain the appeal with respect to the assessment for 1934, but holding that the assessments for 1935 and 1936 were defective in not giving the appellant a deduction in respect of a reserve for bad debts. The assessments for those two years were set aside and referred back to the Commissioner for re-assessment, with instructions to reconsider the question of bad debt reserve, as stated in the judgment. In other respects the Court of Appeal dismissed the appellant's appeal, but allowed the appellant two-thirds of its costs of the appeals to the Court of Appeal and to the Judge of the King's Bench Court.

By special leave of the Court of Appeal, the appellant appealed to the Supreme Court of Canada from the judgment of the Court of Appeal, except those parts of the said judgment upon which the appellant succeeded. The respondents cross-appealed to the Supreme Court of Canada against those parts of the judgment of the Court of Appeal upon which the appellant succeeded. On 22nd April, 1941, the Supreme Court of Canada delivered judgment holding that there was a right of appeal respecting the 1934 assessment and allowing the appellant's appeal to the extent that the assessment for 1934 was set aside and referred back to the Commissioner and placed in the same position as the said assessments for the year 1935 and the taxation period of 1936. The Supreme Court of Canada dismissed the respondents' cross-appeal with costs and allowed the appellant one-half of its costs of appeal to the Supreme Court. In other respects the majority of the Supreme Court of Canada (Rinfret, Crocket, Kerwin and Hudson, JJ.), held that the appellant's appeal failed and was dismissed. Sir Lyman Duff, then Chief Justice of Canada, delivered a minority judgment, concurred in by Davis and Taschereau, JJ., in favour of allowing the appellant's appeal and setting aside the said assessments, with costs to the appellant throughout.

On 27th March, 1942, special leave was given to the appellant to appeal against so much of the judgment of the Supreme Court of Canada as is adverse to the appellant. The presentation of the appeal has been delayed by various causes which need not be set out. The first contention of

counsel for the appellant has already been indicated and may be summarised as follows: Since the appellant is a non-resident company, the only income of the appellant liable to taxation in respect of the three periods in question was the net profit or gain arising from the business of the appellant in Saskatchewan. The Commissioner did not ascertain that net profit or gain, but instead resorted to Regulation 2. By adopting the method already described, he taxed a percentage of the appellant's " manufacturing profit " all of which was earned outside Saskatchewan.

This is the argument which was accepted by the minority in the Supreme Court of Canada and Sir Lyman Duff, C.J., expressed himself as follows:—

> " Nowhere does the Statute authorise the Province of Saskatchewan to tax a manufacturing company, situated as the appellant company is, in respect of the whole of the profits received by the company in Saskatchewan. It is not the profits received in Saskatchewan that are taxable; it is the profits arising from its business in Saskatchewan, not the profits arising from the company's manufacturing business in Ontario and from the company's operations in Saskatchewan taken together, but the profits arising from the company's operations in Saskatchewan."

Their Lordships find themselves entirely in agreement with these observations. They think that there is to be found in sections 21 to 25 inclusive a scheme for dealing (*inter alia*) with the taxation of profits which are earned, or arise, or accrue or are derived—it matters not which phrase is used—from the activities of persons or corporations who carry on certain activities within the Province of Saskatchewan and other activities outside that Province. Section 21 applies both to resident and to non-resident corporations, and is plainly directed to preventing an artificial reduction of the net profit arising from the business of such corporations in Saskatchewan. Section 22 contemplates the case of a person residing and regularly employed outside Saskatchewan, who renders certain services within that Province. Sections 23 and 24 show that the legislature contemplated, in the case of a non-resident person, a charge of tax upon an apportioned part of income which, although it might be received outside the Province of Saskatchewan, could fairly be regarded as having been partially earned inside that Province. In their Lordships' view it would be reasonable to suppose that in the present case the legislature would regard a proportion of the profit received by the appellant in Saskatchewan as " arising " from its manufacturing business carried on outside that Province, and as being, in consequence, exempt from taxation under the Act. They think that no distinction is intended between income " earned " in the Province and income " arising " within the Province. The word " earn " is employed in ss. 23 and 24 merely because of the grammatical structure of the sections. In each case the intention is to bring within the ambit of s. 21a an apportioned part of the " profit " mentioned in s. 23 and the " income " mentioned in s. 24, because such part of the profit or income is regarded as being earned within the Province. Their Lordships think that if section 21a is construed as excluding from taxation a " manufacturing profit " earned outside the Province, effect is given to the general scheme of taxation set out in the Act. Further, this construction seems to their Lordships to result in a fair and reasonable scheme of taxation, in accordance with that comity which naturally prevails between one Province and another.

Although the sections under consideration in the case of *Commissioners of Taxation* v. *Kirk*, 1900 A.C. 588, differed in their language from the section now under consideration, the reasoning which appears in the judgment in that case is helpful to the appellant's contention in the present case. Lord Davey, in delivering the judgment of the Board, said:—

> " Their Lordships attach no special meaning to the word ' derived,' which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income—(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. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. . . . The fallacy of the judgment of the Supreme Court in this and in *Tindal's Case* is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income."

In their Lordships' view, the fallacy of regarding a profit as arising solely at the place of sale appears also in the arguments advanced on behalf of the respondents in the present case. Counsel on their behalf contended that when money was received by the appellant in Saskatchewan as a result of a sale in Saskatchewan the whole of the net profit on the sale " arose " from the business of the appellant in Saskatchewan, and no apportionment was necessary. They referred to certain cases in which various Courts have found no reason for treating a profit as being earned or as arising partly within and partly without a particular country. In no one of these cases, however, was the relevant section accompanied by other sections contemplating such an apportionment of profits as is provided for by sections 23 and 24 in the present case. Reference was also made to the judgment of the Supreme Court of Canada in *Wm. Wrigley Junior Company Ltd.* v. *The Provincial Treasurer of Manitoba,* 1947 S.C.R. 431, but as this case is at present the subject of an appeal to their Lordships' Board it would not be proper to make any observations upon it.

The result is that, in their Lordships' view, any part of the appellant's net profit which may fairly be attributed to its manufacturing operations outside the Province of Saskatchewan, referred to throughout the argument as its " manufacturing profit," is not profit arising from the business of the appellant in Saskatchewan within the meaning of s. 21a of the Act, and must be excluded in ascertaining the income of the appellant liable to taxation under that section. It was suggested in argument that the proper method of ascertaining the " manufacturing profit," was to estimate the net profit which the appellant would have obtained if, instead of selling goods retail through its own selling organisation in Saskatchewan, it had sold the same goods, direct from its factory, to a wholesaler. This method seems not unreasonable, but their Lordships do not desire to select any particular method as being the best, since this would appear to be a practical matter, not fully explored in argument. The assessments now in question have already been set aside and referred back to the Commissioner for re-assessment, with instructions to reconsider the question of bad debt reserve. They must be further reconsidered in the light of this judgment.

Turning to the other matters raised in argument, their Lordships see no reason why the Regulations made under section 7 (4) should be construed as applying only to persons or corporations resident within the Province of Saskatchewan, and they do not think that the Lieutenant-Governor exceeded his powers in making these Regulations. No objection to Regulation 1 has been raised in argument. Regulation 2 might well be open to objection, as being likely to tax income outside the Province, if it were not modified by Regulations 3, 4 and 5. So modified, it does not appear to contravene the provisions of the Statutes of 1932 and 1936. It merely provides a rough and ready way of measuring " the remainder of the income of the taxpayer liable to taxation " in cases coming within section 7 (4), and in some of such cases it may be a not inappropriate method of measuring such income. It is not, however, appropriate in the present case, because it pays no regard to the question of manufacturing profit. In their Lordships' opinion the present case falls within Regulation 3 and the Commissioner should have carried out the assessment under that Regulation, giving due regard to the question of manufacturing profit. They add that in their view the facts brought the present case within the terms of section 7 (4), as the appellant's system of keeping accounts during the three periods in question resulted in the Minister being " unable to determine the income within the Province " of the appellant without recourse to the Regulations.

Two other points raised by counsel for the appellant should be briefly mentioned. They contended that if the Acts of 1932 and 1936 or the Regulations purported to tax income of the appellant arising outside Saskatchewan, then they went beyond the power conferred upon the Province, by section 92 (2) of the British North America Act, 1867, to impose taxation " within the Province." This was an alternative argument, and as the appellant's main contention has succeeded the alternative argument does not arise. In their Lordships' view, neither the Acts of 1932 and 1936 nor the Regulations, correctly construed, purport to tax income of the appellant arising outside Saskatchewan. Counsel also contended that, apart altogether from the argument as to " manufacturing profit," the method followed by the Commissioner did not result in ascertaining the net profit arising from the business of the appellant in Saskatchewan, because the appellant's ratio of costs to sale was not uniform throughout Canada, and had been shown by evidence to be greater in Saskatchewan than in other parts of Canada. In their Lordships' view this contention cannot succeed, in regard to the three periods now in question, by reason of the view taken by the Board of Revenue Commissioners as to the evidence before that Board. It will be sufficient to quote one passage from that Board's decision. After referring to the evidence of Mr. Brown and Mr. Morton, already mentioned, the Board continued: " Both portions of said evidence compared certain factors in Saskatchewan with factors elsewhere but neither witness gave evidence or established that when all factors are taken into consideration the cost of doing business in Saskatchewan exceeds that of doing business elsewhere. The Board, therefore, while finding on this evidence that there are varying ratios of expense of sales in various parts of Canada cannot, on the evidence submitted, make any finding as to whether that ratio in Saskatchewan is higher, equal to or less than that ratio elsewhere. Certain special items of expense or loss in Saskatchewan were referred to by each witness. No findings can be made on such an incomplete picture. These special items of expense or loss may be offset or exceeded by favourable factors such as volume of sales in an agricultural province where a highly mechanised type of farming is engaged in. Insofar as the witness Arthur Brown in some of his replies suggested a comparatively unfavourable result in Saskatchewan, the Board finds his evidence inconclusive and not definitely enough linked up with the three taxation years under review. The Board further finds that it was not sufficiently shown that this witness had personal knowledge of all the facts in other provinces necessary to make a complete comparison. Frank M. Morton's affidavit is not directed to a complete comparison at all. It has not, therefore, been established that the tax levied in any of the three years is higher than it should have been."

This particular view of the facts is not shown to be vitiated by any incorrect view of the law, as no question of " manufacturing profit " outside Saskatchewan entered into it.

Counsel for the respondents sought to rely upon certain findings by the Commissioner of Income Tax, the Board of Revenue Commissioners and Anderson, J., as being findings of fact which concluded the matter in favour of the respondents. This argument was accepted by Rinfret, J. (as he then was). In his judgment in the Supreme Court with which Crocket and Kerwin, J. concurred, he said:—

> " At the outset, the appellant is met by the difficulty that the question whether profits or gains arose within or without Saskatchewan is really a question of fact already decided against it by the Commissioner of Income Tax, the Board of Revenue Commissioners and the Judge of the Court of King's Bench."

Hudson, J., who agreed with Rinfret, J. in dismissing the appeal to the Supreme Court, observed:—

> " Now it is claimed that the mode of allocation prescribed in the regulations, in its application to the assessments here, fails to take into account manufacturing profits which may have been earned by the appellants outside of Saskatchewan. This claim was made before the Board and, although it does not seem to have received as much con-

> sideration there as it did before us, it was considered by them. Apparently the Board thought that, while it was a factor to be considered, it formed only one of a group of imponderables, incapable of separate evaluation with any degree of certitude. . . .
>
> If it could be said that the Commissioner and the Board and Mr. Justice Anderson had misconstrued the statute or the regulations, or failed to direct their minds to the questions involved, then the Court would be justified in sending it back for reconsideration."

In their Lordships' view section 21a of the statute has been misconstrued, to the extent already indicated, and for this reason any findings of fact based upon this misconstruction cannot be treated as being binding upon the appellants.

In the result, their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the three assessments in question, already set aside and referred back to the Commissioner for re-assessment, should be further reconsidered in the light of the opinions expressed herein.

The appellant has already been awarded two thirds of its costs of the appeals to the Court of Appeal and to the Judge of the King's Bench Court and one half of its costs of the appeal to the Supreme Court of Canada. The respondents must now pay to the appellant the balance of all these costs and also the whole of the appellant's costs of this appeal.

(60634) Wt. 8062—31 100 11/48 D.L.

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