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BETWEEN:

ROTHSTEIN THEATRES LIMITED. . . . APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

*Revenue—Income Tax—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(n), 6(1)—Dividends received by one corporation from another—Depreciation—Excess Profits Tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended—Investments producing tax-exempt income—Changes in capital during taxation period—Increase in standard profits computed on basis of capital employed not on basis of capital stock of company—Appeal dismissed.*

From assessments for income and excess profits tax for the year 1945 the appellant appealed to the Court and, by its statement of claim, sought a revision of certain items of depreciation and an increase in the standard profits awarded in 1944 by the Board of Referees under the Excess Profits Tax Act. The respondent, by his statement of defence, allowed the amount claimed for depreciation and also an increase in the standard profits by adding thereto 7½ per cent of the amount of increase in the appellant's capital between July 1, 1939, being the commencement of its last fiscal period in the standard period, and January 1, 1945. On the hearing of the appeal the appellant claimed a further adjustment in the amount of standard profits on the ground that its capital stock was increased on the 31st day of January, 1944, by the sum of \$60,000.

*Held:* That the appellant is not entitled to have taken into account, in arriving at the proper standard profits pursuant to the Excess Profits Tax Act, 1940, 4 Geo. VI, c. 32, either the \$100,000 that it invested in Rothlish Investment Limited because this investment is a deduction under the Act, nor the \$60,000 which was issued to Nathan Rothstein on the 31st day of December, 1944, as capital stock in the appellant company because any increase in the standard profits pursuant to the Act is computed on the basis of the *capital employed* not on the basis of the *capital stock of the company*.

2. That the Minister, in determining the amount of the refundable portion, properly employed the 1st day of July, 1939, as the date from which to base his calculations.
3. That the claim for additional allowance in the amount of the standard profits is dismissed.

APPEAL under the Income War Tax Act and the Excess Profits Tax Act, 1940.

The appeal was heard before the Honourable Mr. Justice Archibald at Winnipeg.

*C. E. Finkelstein* and *D. A. McCormick* for appellant.

*Samuel Freedman, Q.C.* and *D. K. Petapiece* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ARCHIBALD J. now (October 1, 1952) delivered the following judgment:

1952  
 ROTHSTEIN  
 THEATRES  
 LTD.  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE

The appellant was assessed for income and excess profits tax for the year 1945 and appealed from said assessment, which said appeal was disallowed by the Minister and the appellant duly served and filed his notice of dissatisfaction from the decision of the said Minister.

On the 28th day of October, 1949, the Minister adjusted the said assessment and a revised assessment was filed. There was some dispute between counsel as to the correct date on which said revised assessment was served on the appellant. However, having regard to the proceedings which followed, it is not necessary for me to determine the exact date.

The Statement of Claim, pursuant to an order issued out of this Court, was filed on the 8th day of March, 1951. The said Statement of Claim included a claim for revision of certain items of depreciation and for an increase in the standard profits under The Excess Profits Tax Act.

On the 23rd day of June, 1951, the Statement of Defence was filed, in which appears an allowance for depreciation totalling \$940, the amount which the appellant claims: also an amendment in the allowance for standard profits. No notification was given to the respondent by the appellant subsequent to the filing of the Statement of Defence.

This appeal was heard before me at Winnipeg on the 17th day of March, 1952.

On the hearing of said appeal, it was urged, by counsel on behalf of the appellant, that the appellant was entitled to a further adjustment in the amount of standard profits, because the capital stock of the company was increased on the 31st day of January, 1944. Subsequently, an amount of \$100,000 was invested by Rothstein Theatres Limited in Rothlish Investments Limited. The investment of \$100,000 in that company is, however, a deduction under The Excess Profits Tax Act, in computing the proper amount for standard profits, and cannot therefore be taken into account, as urged by counsel for the appellant. Neither is appellant entitled to claim that the standard profits are to be computed simply by the addition of the sum of \$60,000 (the amount added to the capital stock on the 31st day of January, 1944), because any increase in the standard profits pursuant to The Excess Profits Tax Act

1952  
 ROTHSTEIN  
 THEATRES  
 LTD.  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE  
 Archibald J.

is computed on the basis of the *capital employed* not on the basis of the *capital stock of the company*.

George Christie Scrimgeour of Winnipeg, a chartered accountant, residing in Winnipeg and now in the service of the Inspector of Income Tax, explained in detail the manner in which the excess profits were computed. He impressed me as a competent, careful and accurate witness, and I accept, without hesitation, the evidence which he offered. Having regard to his evidence and the provisions of The Excess Profits Tax Act, I am satisfied the appellant is not entitled to have taken into account, in arriving at the proper standard profits pursuant to the Act, either the \$100,000, which was invested in the manner hereinbefore described, nor the \$60,000 item which was issued to Nathan Rothstein on the 31st day of December, 1944, as capital stock in Rothstein Theatres Limited. Moreover, I am of opinion also, that Scrimgeour, in determining the amount of the refundable portion, properly employed the 1st day of July, 1939, as the date from which to base his calculations. In doing so, the standard profits were increased to the amount shown in the Statement of Defence. This amount I accept as correct and the claim for additional allowance in the amount of the standard profits, as made by the appellant, is dismissed. The appellant, however, is entitled to the depreciation allowance and the increase in excess profits allowed and specified in paragraphs 6 and 13 of the Statement of Defence filed by the respondent on the 23rd day of June, 1951.

I am of opinion, also, that neither party is entitled to any costs of these proceedings. Counsel for the appellant contends that owing to the action of the respondent in adjusting the assessment and refusing to make any adjustment for the depreciation items, these proceedings were taken. He calls attention to the fact that not until the 23rd day of June, 1951, was an examination of the Statement of Defence possible. Counsel for the respondent, on the other hand, while conceding that the appellant may be entitled to costs up to a certain point, is emphatic that the appellant is entitled to no costs after the Statement of Defence was filed by the respondent, but he added, not without significance, that "it may be decided is not a case for costs at all."

I agree that in all the circumstances of this appeal, neither party is entitled to any costs.

*Judgment accordingly.*