1947
Nov. 20
Dec. 8

BETWEEN:

THE BORDEN COMPANY LIMITED, APPELLANT,

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Excess Profits Tax Act, 1940, s. 4(2)—"Taxpayer who acquired his business as a going concern after January 1, 1938"—Ownership of assets rather than stock control implied in "acquired"—Taxpayer must have commenced business after January 1, 1938, and not be one in business before that date who acquired an addition to his business thereafter—Appeal dismissed.

Appellant company, incorporated in 1912 and in business since that date, in 1937 acquired all the outstanding shares of the capital stock of three limited companies, each of which was engaged in business similar to that of appellant. On January 1, 1941, appellant purchased all the business and assets, as going concerns, of two of those companies and, on June 1, 1942, of the third company. Thereafter the business of the purchased companies was merged in that of appellant and conducted by it as part of its business.

In its return under the Excess Profits Tax Act for the tax year 1942 appellant added to its own standard profits those of the two companies acquired by it in 1941, and a proportionate part of the standard profits of the company acquired in 1942. These additions were disallowed by the respondent. Appellant appealed to this Court. Appellant is not a "component company" as defined in s. 4A(4) of the Act.

Held: That while appellant had complete control of the three companies prior to January 1, 1938, through share ownership, it did not acquire their businesses as going concerns until 1941 and 1942, prior to which time the companies were separate legal entities, and to acquire a business within the meaning of s. 4(2) of the Excess Profits Tax Act ownership of assets rather than stock control is implied.

2. That "a taxpayer who acquired his business as a going concern after January 1, 1938", as set forth in s. 4(2) of the Act refers to the commencement of business by a new taxpayer who has acquired his business as a going concern after January 1, 1938, and not to a taxpayer in business before January 1, 1938, but who acquired an addition to his business after that date.

APPEAL under the Excess Profits Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

H. C. F. Mockridge and *J. G. Osler* for appellant.

G. Beaudoin and *E. S. MacLatchy* for respondent.

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

CAMERON J. now (December 8, 1947) delivered the following judgment:

This is an appeal from an assessment under the Excess Profits Tax Act for the taxation year 1942. The appellant is a company incorporated under the Dominion Companies Act, with head office at Toronto, and carries on business in Ontario and elsewhere in Canada. On May 8, 1937, it acquired all the outstanding shares of the capital stock of Laurentian Dairy Ltd., Moyneur Co-operative Creamery Ltd., and Caulfield's Dairy Ltd. As of January 1, 1941, by an exchange of letters between the appellant and Laurentian Dairy Ltd. and Moyneur Co-operative Creamery Ltd., and as of June 1, 1942, by a similar exchange of letters with Caulfield's Dairy Ltd., the appellant purchased all the business and assets, as a going concern, of each of the said three companies and thereafter the business of the said three companies was merged in the business of the appellant and conducted by it as part of its business.

For the tax year 1942, the appellant, in its return under the Excess Profits Tax Act, added to its own standard profits those of Laurentian Dairy Ltd., amounting to $1,694.75, those of Moyneur Co-operative Creamery Ltd., amounting to $552.42, and a proportionate part of the standard profits of Caulfield's Dairy Ltd., from June 1, 1942, amounting to $32,785.57. For the entire year the standard profits of Caulfield's Dairy Ltd. were $55,191.32.

The respondent disallowed these additions to the standard profits of the appellant company and notice of assessment was given on August 21, 1945. An appeal was taken and the assessment was affirmed by the Decision of the Minister. Then followed a notice of dissatisfaction and the Minister's reply was as follows:

1. Denies the allegations in the notice of appeal and notice of dissatisfaction in so far as they are incompatible with the statements contained in his decision.

2. Affirms the assessment as levied.

The appellant is not a "component company" as defined in section 4A (4).

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The appeal is based on the provisions of section 4 (2) of the Excess Profits Tax Act, as follows:

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

Several contentions are advanced by the appellant: (1) that because of the purchase of the assets of the three named companies in 1941 and 1942, as going concerns, the appellant is "a taxpayer who acquired his business as a going concern after June 1, 1938"; (2) that the evidence establishes that the business of the appellant is not substantially different from the business of its predecessors. Counsel for the respondent stated at the trial that he would not argue that the business carried on by the appellant in 1942 was substantially different from that of the three amalgamated companies; (3) that because of the foregoing, the assessment should be amended so as to take into account the standard profits of the three amalgamated companies and by "take into account" is meant, I assume, to add the standard profits of the three companies to that of the appellant company as was done in its tax return and as was requested in its notice of appeal.

The first problem, therefore, is whether under the circumstances related above the appellant "acquired its business" as a going concern after January 1, 1938. Omitting for the moment any consideration as to the meaning of the word "its", I think it is clear that while the appellant had complete control of the three companies before January 1, 1938, by reason of owning all their shares, the appellant did not "acquire" their businesses as going concerns until 1941 and 1942 when it took over all their assets and business and merged them in its own. Prior to turning over their assets to the appellant, they were separate legal entities, conducting their own businesses, having their own payrolls, bank account and Boards of Directors. Each had established its own standard profits and no doubt had paid excess profits tax in 1940 and 1941. In the sense in which the word "acquired" is here used, I think that ownership of assets, rather than stock control, is implied.

The interpretation of the words "acquire its business" is not without difficulty. So far as I am aware, the words have not been considered judicially, nor has any part of this subsection. For the Crown it is contended that the subsection has no application to a case such as this one, but that it refers solely to a new taxpayer whose operations commenced after January 1, 1938, when it took over or acquired the business of its "predecessor", which had established standard profits by being in business in the standard period as defined in section 2 (1) (*i*), and that the predecessor's business when taken over was the only business of the taxpayer.

The appellant company had been in existence for many years. It was incorporated under the Dominion Companies Act in 1912 under the name of Borden Milk Company Ltd., as a wholly owned subsidiary of an American Firm, Bordens' Condensed Milk Company (now the Borden Company). Shortly thereafter it commenced the manufacture of milk products and also carried on a fluid milk and dairy products business. In 1919 its name was changed to the Borden Company Ltd.

In 1917 it sold its fluid milk business to another subsidiary of the Borden Company and thereafter carried on a manufacturing business only until 1937. In that year, it purchased from Borden's Limited (another wholly owned subsidiary of the Borden Company) all the shares in 26 operating companies with the view of merging all the operating companies into one company. In 1937 it bought the assets and business of one of its subsidiaries, Hamilton Pure Milk Dairies Limited, thus re-entering the fluid milk business. In continuation of that policy it continued to take over the assets and businesses of other subsidiaries in 1938 and 1939. Then, in 1941, it acquired the assets of Laurentian Dairy Ltd. and Moyneur Co-operative Creamery Ltd., and on June 1, 1942, the assets of Caulfield's Dairy Ltd., as I have above mentioned.

For the year 1940, the standard profits of the appellant were $717,802.00. For that year its total sales were $13,919,000.00. In the same year, the sales of Moyneur Co-operative Creamery Ltd. amounted to $105,710.00, and of Laurentian Dairy $40,000.00. In 1941 the standard profits of the appellant were the same as in 1940, and its total

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sales $16,753,516.00. In that year the sales of Caulfield's Dairy Ltd. were $1,588,517.00. These facts, relating to the history of the appellant company and the relative sales of all companies here concerned have been outlined in some detail merely to indicate their relation to each other.

From a consideration of these facts, I do not think it can be said that the appellant company "acquired its business" after January 1, 1938. It had its business long before that date. By the purchase of the assets of these three subsidiaries it merely increased its own activities and operations to a relatively small extent. There is no question but that the appellant, as of the taxation year 1942, had acquired parts of its business after January 1, 1938. But that is quite a different thing from "acquiring its business as a going concern after January 1, 1938". In my opinion, these words, read with the subsection as a whole, refer to the commencement of business by a new taxpayer who has acquired his business as a going concern after January 1, 1938, and not to a taxpayer in business before January 1, 1938, but who acquired an addition to his business after January 1, 1938.

Reading section 4 (2) as a whole, it becomes apparent that it has to do with an application of a taxpayer to *ascertain* his standard profits. The concluding words are:

> He (i.e. the Minister) may direct that the standard profits of the said predecessor may be taken into account in *ascertaining the standard profits of said taxpayer.*

And by "direct" is meant, I think, "direct the Board of Referees", appointed under section 13 of the Act. The Board alone is authorized on the direction of the Minister to "ascertain" the standard profits of the taxpayer. In the case of taxpayers who were in business throughout the standard period, the standard profits are established under the first part of section 2 (1). Then, by section 4 (1), the Minister is given authority in his discretion to *adjust* the standard profits in certain cases. By section 4A the standard profits of certain "component" companies are *determined* as therein provided, but the appellant does not fall into this category. Section 13 authorizes the Minister to appoint a Board of Referees "and such Board shall exercise the powers conferred on the Board by the Act and other powers and duties assigned to it by the Governor-in-

Council". These powers are set out in section 5. The marginal note to this section is "ascertainment of standard profits by the Board of Referees". Throughout the section use is made of the words, "the Minister may direct that the standard profits be *ascertained* by the Board of Referees". The "ascertainment" of standard profits, as distinguished from the adjustment or determination thereof, is therefore solely the duty of the Board, upon reference to it by the Minister, but subject to approval of the Minister or the Treasury Board as provided by subsection (5), or by former subsection (4) as it was in effect in 1942.

A perusal of the powers given to the Board by section 5 indicates that it has no power to "ascertain" the standard profits of such a company as the appellant which had been in business long before and throughout the standard period; which was neither abnormally depressed itself, nor in a class of business which was depressed during the standard period; and whose class of business remained the same throughout all the relevant years. Nor is the Minister given authority under section 5 to refer the application of such a taxpayer, as the appellant here, to the Board of Referees.

In my view, the provisions of section 4 (2) are applicable only to cases where the the Board has powers to ascertain the standard profits. When such power exists, and when the conditions laid down by section 4 (2) also exist, the Minister may direct the Board to ascertain the standard profits of the taxpayer, not only in the manner laid down in section 5, but also by taking into account the standard profits of the predecessor.

The intent of section 4 (2) may be gathered from consideration of the whole Act. Section 4 (2) becomes effective only on the application of the taxpayer himself. If he commenced business on or after January 2, 1939 (the last year of the standard period) then, by section 5 (2), and whether or not he has made application, the Minister shall direct that the standard profits be ascertained by the Board in the same manner as for any taxpayer not carrying on business during the standard period—that is, as a new business. The reason for that provision is that, at the most, the taxpayer would have been carrying on his business for less than one year of the standard period and so it would not have been possible to average the yearly

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profits in the standard period (section 2 (1)). If, on the other hand, the business was commenced after the 31st day of December, 1937, but before the 1st day of January, 1939, the taxpayer could accept the standard profits as determined by the first part of section 2 (1); or, alternatively, he could apply under section 5 (2) on the grounds that the profits of the standard period were so low that it would not be just to determine his liability by reference thereto, and on such application the Minister is then required to direct that the Board ascertain the standard profits. That this is so is apparent from the statement found in the Explanatory Brochure on the Excess Profits Tax Act, issued by the Department of National Revenue in 1941, the applicable part of which is as follows:

> If he has been in business less than two years (if he has commenced business since January 1, 1938) then he is entitled to rank as a new business and apply to the Board of Referees under section 5, subsection (2), of the Act.

But in any of these cases where the taxpayer acquired his business as a going concern after January 1, 1938, and where, at the most, he would have been in operation for less than two years of the standard period of four years, and the Minister is satisfied that the business is not substantially different from that of the predecessor, the Minister may direct that the Board will ascertain the standard profits, not only on the basis provided for in section 5, but also by taking into account an additional factor—that is, the standard profits of the predecessor.

Since the Act, in my view, does not give the Minister the power to "adjust" or "vary", or the Board power to "ascertain", the standard profits of the appellant under the circumstances here disclosed, it must follow that, in my view of the intent of section 4 (2), that subsection does not apply to the appellant.

The appellant company has undoubtedly suffered a substantial loss by reason of the integration of these businesses into its own. The aggregate of their standard profits was substantial and cannot now be added to those of the appellant, although the appellant's business after the amalgamation was at least as extensive as the sum of all four businesses had previously been. But the result would have been the same had the appellant, without any increase

in the capital employed, or by an equivalent alteration in its capital stock, purchased the same assets in the ordinary market rather than from a predecessor company.

It is to be noted also that with reference to taxpayers whose standard profits are not established by the average yearly profits in the standard period, that by section 4 (1) the Minister's power to adjust the standard profits is based on the alteration of the capital employed (except in the special cases of the operation of gold mines or oil wells); and that by section 5 the Board of Referees ascertains the standard profits by reference to the capital employed except in the special cases where a capital standard is inapplicable, and in the special cases of gold mines and oil wells which have come into operation since January 1, 1938. In the instant case, there was no change in the amount of capital employed during any of the relevant years.

Having found, therefore, that the appellant did not acquire its business after the first day of January, 1938, and that in any event subsection 4 (2) has no application to the appellant, there will be judgment dismissing the appeal and confirming the assessment for the taxation year, 1942. The respondent is entitled to be paid his costs after taxation.

Judgment accordingly.