1950

Sept. 25
Oct. 4

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Deputy Attorney General of Canada, ... PLAINTIFF;

AND

PACIFIC BEDDING COMPANY, LIMITED, ... DEFENDANT.

Revenue—Sales tax—Excise Tax Act R.S.C. 1927, c. 179, s. 86, 108 (8 & 9), 113(8)—Assessment—Amendment dealing with procedural matter is retroactive—Res judicata—Admissibility of evidence—Liability for tax.

The action is one for sales tax Plaintiff's evidence consisted *inter alia* of exhibit 1 being an assessment dated September 18, 1948, made by the Minister of National Revenue under the provisions of s. 113(8) of the Excise Tax Act and the certificate of the Deputy Minister dated August 31, 1948, made under s 108(9) of the Act

Defendant contended that exhibit 1 was inadmissible because the liability of defendant for sales tax, if any, had arisen before s. 108(8 & 9) of the Act came into effect and further that plaintiff was estopped from alleging exhibit 1 was an assessment by virtue of a judgment of the Court of Appeal of the Province of British Columbia which was *res judicata* and binding on this Court The judgment dealt with the prosecution of the defendant in the Police Court at Vancouver, B C. for the recovery of penalties incurred for violation of the Excise Tax Act

Held: That s. 108 (8 & 9) of the Excise Tax Act R S C. 1927, c 179, as enacted by 13 George VI, c 21, s 8, relates to a matter of procedure and is retroactive *Rex* v. *Kumps* (1931) 39 M R 445 and *The King* v *Allison* (1950) Ex. C.R 269.

2. That where a plea of *res judicata* is raised it is necessary for the Court to have recourse to the record and the judgment and such pleadings and other proceedings as tend to show what particular questions of law or issues of fact must necessarily have been determined by the tribunal of first instance in adjudicating the matter before it.

3. That the plea of *res judicata* fails because there has been no adjudication upon the merits of the question now before this Court

4. That the assessment made by the Minister and certificate by the Deputy Minister are admissible in evidence and the assessment purported to have been made by the document is in fact the assessment.

INFORMATION to recover sales tax alleged owing by defendant.

The action was tried before the Honourable Mr. Justice Cameron at Vancouver.

G. F. Murray for plaintiff.

H. R. Bray, K.C. and *W. C. Thompson* and *M. F. Bray* for defendant.

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

CAMERON J. now (October 4, 1950) delivered the following judgment:

In this matter the plaintiff claims from the defendant company the sum of $1,366.70 said to be due and owing for sales tax under the provisions of section 86 of The Excise Tax Act, R.S.C. 1927, c. 179, and amendments thereto, together with interest thereon.

The evidence adduced by counsel for the plaintiff consisted of (*a*) the examination for discovery of an officer of the defendant corporation; (*b*) the letter written by the Assistant Deputy Minister of National Revenue to the defendant dated August 17, 1948, in which the defendant was notified that the Department had under consideration a proposed assessment against the defendant for sales tax for the period November 1, 1947, to May 31, 1948; that full details of the proposed assessment could be obtained at the Vancouver office of the Department; that the defendant could make such representations in regard thereto as it thought fit until September 8, 1948; and that thereafter and following consideration of the matter an assessment would be made under section 113(8) of the Act for such amount of sales tax as might be payable.

Counsel for the plaintiff also tendered Exhibit 1, consisting of an "Assessment" made by the Minister under the provisions of section 113(8) of the Act and dated September 18, 1948, and the certificate of the Deputy Minister made under the provisions of section 108(9) and dated August 31, 1950. Counsel for the defendant submitted that Exhibit 1 was inadmissible on two grounds. In view of the nature of these objections, I reserved my opinion as to the admissibility of Exhibit 1 until I had had the advantage of hearing argument on the case itself.

The first objection taken was that subsections (8) and (9) of section 108 of the Act could not apply to this case, that they could not be construed as retroactive in effect, and that the liability of the defendant for sales tax, if any, had arisen prior to the two subsections coming into effect.

Subsections (8) and (9) were enacted by section 8 of c. 21, Statutes of Canada, 1949, assented to on December 10,

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1949, and by virtue of section 14(1) thereof were deemed to have come into force on March 23, 1949. Section 8 is as follows:

8. Section one hundred and eight of the said Act is amended by adding thereto the following subsections:—

(8) Where any question arises in a proceeding under this Act as to whether the Minister has formed a judgment or opinion or made an assessment or determination, a document signed by the Minister stating that he has formed the judgment or opinion or made the determination or assessment is evidence that he has formed the judgment or opinion or made the determination or assessment and of the judgment, opinion, determination or assessment.

(9) In any proceedings under this Act a certificate purporting to be signed by the Deputy Minister that a document annexed thereto is a document or a true copy of a document signed by the Minister shall be received as evidence of the document and of the contents thereof.

The proceedings now before me were commenced on March 4, 1950, almost one year after the amendment was deemed to have come into effect. Moreover, the amendment in my opinion is entirely one relating to procedure. Its purpose was to deal with a matter of evidence and evidence has been held to be a procedural matter, *Rex* v. *Kumps* (1).

In Craies on Statute Law (Third Edition), at p. 332 it is stated, "But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions unless a contrary intention is expressed or clearly implied."

Reference may also be made to *The King* v. *Allison* (2), where Kelly J., acting as Deputy Judge of this Court, reached the same conclusion. The objection on this ground must fail.

The second objection was that the "Assessment" dated September 18, 1948, was not in fact an assessment at all and that the plaintiff was estopped from alleging that it was an assessment by reason of the decision of the Court of Appeal of the Province of British Columbia. It was submitted that such decision was *res judicata* and binding on this Court.

In support of his plea, counsel for the defendant tendered in evidence certified copies of certain proceedings originat-

(1) (1931) 39 M.R. 445. (2) (1950) Ex. C.R. 269.

ing in the Police Court at Vancouver in which the defendant herein was charged with "Being a person required to pay sales tax pursuant to the Special War Revenue Act and amendments thereto and to the Excise Tax Act and amendments thereto, unlawfully did fail to pay within the time prescribed by the said Act, sales tax in the total amount of $1,388.75 for the period between November 1, 1947, and May 31, 1948, both dates inclusive."

The evidence tendered consisted of the following records:

(1) Exhibit D, the Information and Complaint.

(2) Exhibit E, the Certificate of Conviction of the Defendant.

(3) Exhibit B, the case stated by the Magistrate.

(4) Exhibit A, copy of the Appeal Book, containing also the judgment of Manson, J., who had affirmed the decision of the Magistrate.

(5) Exhibit C, a certified copy of the Judgment of the Court of Appeal, which by majority reversed the judgment of Manson, J.

Counsel for the plaintiff, while not objecting to the form in which these records were produced, submitted that they were irrelevant and therefore inadmissible. Again I felt it advisable to defer my opinion on this point until I had heard full argument on the case.

I have now reached the conclusion that in this case—where the parties are the same as in the other proceedings—these records constitute admissible evidence. The defendant in his defence has pleaded *res judicata* and for the purpose of ascertaining the subject matter of the decision relied upon as *res judicata,* it is necessary to have recourse to the record and the judgment and such pleadings and other proceedings as tend to show what particular questions of law or issues of fact must necessarily have been determined by the tribunal in adjudicating as it did, Spencer Bower on *res judicata* 1924 Ed. 113. To deny the defendant the right to introduce such documents might be to deprive it of the only evidence that might be available in proof of its defence of *res judicata.* I therefore find that these exhibits are admissible in evidence, *Marginson* v. *Blackburn Borough Council.* (1).

(1) (1939) 1 A.E.R. 273 at 278.

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Exhibit C is the formal judgment of the Court of Appeal. It answered in the negative the three questions set out in the stated case submitted by the Magistrate, which questions were as follows:

(1) Was I right in holding that the said paper writing was admissible as evidence?

(2) Was I right in holding that the said paper writing was evidence of the facts therein stated?

(3) Was I right in holding that the said paper writing was the assessment of the Minister of National Revenue within the meaning of section 113, subsection (8) of the Excise Tax Act (Canada)?

Counsel for the defendant submits that the finding of the Court of Appeal that the "paper writing" (which is the identical assessment forming part of Exhibit 1 herein) was not the assessment of the Minister within the meaning of section 113(8) of the Act concludes the matter and that Exhibit 1 is therefore inadmissible.

I am of the opinion that this objection must also fail. In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action is the same, but also that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. (Halsbury 2nd Ed., Vol. 13, p. 411). The proceedings in the Police Court at Vancouver were for the recovery of penalties incurred for violation of the Excise Tax Act and that Court had jurisdiction to hear the matter by reason of the provisions of section 108(2) (*b*) of the Act. The taxes now claimed could not have been recovered in the proceedings in the Police Court, but only in the Exchequer Court, or in any other Court of competent jurisdiction, section 108(1), or by proceeding under section 108(4). It is the case that in proceedings in the Police Court the penalties assessed for a non-payment of taxes could include an amount equal to the unpaid taxes, but section 109(2) makes it abundantly clear that even if the penalties assessed included an amount equal to the unpaid tax, the taxpayer is not absolved from liability to pay the taxes which are properly due.

Moreover, there has been no adjudication upon the merits of the question now before me, that is, is the defendant liable for the sales tax now claimed? It is a fact that the defendant in the Police Court proceedings

could not have been found guilty unless it was established that it had failed to pay the tax. It is apparent, however, from the exhibits placed in evidence before me and from the reasons for judgment of the Court of Appeal (*Rex* v. *Pacific Bedding Co. Ltd.* (1)) that the only matter disputed before the Magistrate and in the Court of Appeal was the admissibility of the "Assessment" in evidence, and the proof of the statements made therein. I think that there can be no doubt that the Court may look at the reasons for judgment, as well as at the formal judgment itself. (*Marginson* v. *Blackburn Borough Council, supra*).

In the Court of Appeal, Sloan, C.J.B.C., after considering the admissibility of the document, said at p. 581:

> I do not think it is required of me to express any view as to the manner in which the assessment under said sec. 113(8) of the Excise Tax Act might properly be proved. It is sufficient for me to say in this case that in a criminal proceeding and in the absence of any express legislative provision authorizing its use the mere production of a signed document of this character cannot, in my view, be regarded as either conclusive or *prima facie* proof of the facts contained therein. That being so the document has no evidentiary value and ought not to have been admitted in evidence.
>
> In my opinion then, with deference, this appeal ought to be allowed and the three questions answered in the negative.

I think, therefore, that while question 3 of the stated case was answered in the negative, the reasonable interpretation to be put upon the matter was that it constituted a finding that the evidence in the Police Court was insufficient to prove that an assessment had been made. Reference may also be made to *Bureau* v. *The King* (2), *La Fonciere Compagnie D'Assurance de France* v. *Perras et al.* (3), *Kantyluk* v. *Graham and Kostick* (4).

There is still another reason why the defence of *res judicata* is not now available to the defendant; following the decision of the Court of Appeal of British Columbia the Excise Tax Act was amended in 1949 by adding subsections (8) and (9) to section 108 (*supra*). As I have pointed out above, Exhibit 1 filed by counsel for the plaintiff consists of the "Assessment" and the certificate of the Deputy Minister provided for in subsection (9). The assessment is as follows:

> I, James Joseph McCann, of the City of Ottawa, Minister of National Revenue for the Dominion of Canada, having considered an audit report

(1) (1949) 2 W.W.R., 575.
(2) (1949) S.C.R. 367.
(3) (1943) S.C.R. 165.
(4) (1948) 3 D.L.R. 464.

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made by Excise Tax Auditor C. Privat and no reply having been received to departmental letter of August 17, 1948, to Pacific Bedding Co. Ltd., Vancouver, B.C., for representations regarding or objections to a proposed assessment for sales tax in the amount of $1,388.75 for the period from November 1, 1947, to May 31, 1948, and after making further enquiries and having given full consideration to the matter and being of the opinion that the said Pacific Bedding Co. Ltd., while carrying on business in the City of Vancouver, B.C., has in my opinion failed to maintain adequate records of account for the purpose of the Excise Tax Act during the period from November 1, 1947, to May 31, 1948, by virtue of the powers vested in me do hereby assess pursuant to the provisions of Section 113(8) of the Excise Tax Act, R.S.C. 1927, Chapter 179 and amendments thereto, the said Pacific Bedding Co. Ltd., for the said period, the sum of $1,388.75 for sales tax exigible under the said Act, which sum shall be deemed to have been payable as follows:

1947	November	$ 348.78
	December	274.74
1948	January	172.15
	February	119.55
	March	131.26
	April	213.19
	May	129.08
		$1,388.75

This assessment of $1,388.75 shall be in addition to the sales tax already paid.

Dated at Ottawa, this 18th day of September, 1948.

(Sgd.) James J. McCann
Minister of National Revenue.

The certificate of the Deputy Minister is as follows:

I hereby certify that the document dated the 18th day of September, 1948, annexed hereto, is a document signed by the Honourable the Minister of National Revenue.

(Sgd.) D. Sim
Deputy Minister of National Revenue
for Customs and Excise.

Under the provisions of subsection (9), therefore, the effect of the Deputy Minister's certificate is that the document attached thereto (which is the Assessment) is a document signed by the Minister and that it shall be received as evidence of the document and of the contents thereof. Moreover, it follows from the provisions of subsection (8) that the statements in the Assessment, that the Minister has formed the opinion that the defendant has failed o maintain adequate records of account for the purpose of the Excise Tax Act for the period mentioned, and that he has assessed the defendant for the sum now claimed, constitute admissible evidence that he has formed

the opinion and made the Assessment and of the opinion and Assessment. It follows, therefore, that whatever weight would have had to be given to the judgment of the Court of Appeal that the "Assessment" was not an assessment of the Minister, *before* the law was amended by adding subsections (8) and (9) to section 108, the result of the amendment is that upon production of the certificate of the Deputy Minister attached to the document signed by the Minister, that certificate and document (Exhibit 1) are admissible in evidence and that the assessment purported to have been made by the document is in fact the assessment. My finding is, therefore, that Exhibit 1 is to be admitted as evidence on behalf of the plaintiff, the objections of counsel for the defendant being overruled.

The authority of the Minister to make the assessment when a person has failed to keep the required records or books of account is as follows:

Section 113(8). Where a person has, during any period, in the opinion of the Minister, failed to keep records or books of account as required by subsection one of this section, the Minister may assess

(*a*) the taxes or sums that he was required, by or pursuant to this Act, to pay or collect in, or in repect of, that period; or

(*b*) the amount of stamps that he was required, by or pursuant to this Act, to affix or cancel in, or in respect of, that period,

and the taxes, sums or amounts so assessed shall be deemed to have been due and payable by him to His Majesty on the day the taxes or sums should have been paid or the stamps should have been affixed or cancelled.

The assessment having been admitted in evidence, it follows that the taxes, sums or amounts so assessed shall be deemed to have been due and payable by the defendant and payable to His Majesty on the dates mentioned. There is, therefore, before me *prima facie* evidence that the amount claimed by the plaintiff is payable by the defendant. The only defence raised by the defendant was that of *res judicata* and having rejected that defence it follows that there must be judgment for the plaintiff for the amount claimed in the Information filed, namely, $1,366.70, for sales tax, together with interest thereon, as provided by section 106(4) of the Excise Tax Act, up to the date hereof. The plaintiff is also entitled to be paid his costs, after taxation.

Judgment accordingly.