
1932

April 25.
May 12.

BETWEEN:—

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

AND

COLGATE-PALMOLIVE-PEET COMPANY, LIMITED, and THE PALMOLIVE MANUFACTURING COMPANY (Ontario) LIMITED..... DEFENDANTS.

Revenue—Sales Tax—Market Price—Special War Revenue Act

The shares of both the defendant companies, outside of qualifying shares, were owned and held by Palmolive Company of Delaware, U.S.A. Previous to 1924, Colgate-Palmolive-Peet Co., Ltd., manufactured and sold soap and toilet articles at Toronto and in that year Palmolive Manufacturing Co. (Ontario) Limited, was organized to take over the manufacturing end of the business. The business of both companies was carried on in the same premises and the officers of both were the same. The manufacturing company sells the major portion of its products to the selling company on the basis of costs plus 15 per cent profit. The Crown claims that the manufacturing, or alternatively both companies, are liable for the sales tax upon the basis of the sales price to the public by the selling company, namely, the market price.

Held, that the selling price arranged between the two defendant companies is not the sale price within the meaning of the statute.

2. That in a taxing statute where the tax is based on the selling price of goods, sale price can only mean the market price unless there are express words saying it is some other kind of price.

ACTION by the Crown to recover a certain amount alleged to be due by the defendants for sales tax.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

H. H. Davis, K.C., and *D. Guthrie* for plaintiff.

W. N. Tilley, K.C., G. M. Clark, K.C., and *R. W. Hart* for defendants.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (May 12, 1932), delivered the following judgment:

This is an action for the recovery of sales tax under sec. 19BBB of the Special War Revenue Act, 1915, which in part reads as follows:—

19BBB. 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

The facts of the case may be briefly stated. In 1914 a corporation known as B. J. Johnson Soap Co. Ltd., was engaged in the manufacturing of soap and toilet preparations at Toronto. In 1917 the name of the company was changed to Palmolive Company of Canada Ltd., and in 1928 it was again changed to Colgate-Palmolive-Peet Co. Ltd., the first named defendant. In January, 1924, there was organized The Palmolive Manufacturing Company (Ontario) Ltd., one of the defendant companies, for the purpose of manufacturing goods similar to that which had been both manufactured and sold by Palmolive Company of Canada, Ltd., and thereafter the former named company, which I shall hereafter refer to as the manufacturing company, manufactured very largely if not entirely, the pro-

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ducts sold by the latter company, later to be known as Colgate-Palmolive-Peet Company, Ltd., and which I shall hereafter refer to as the selling company. The shares of both defendant companies, outside of qualifying shares, are owned by the Palmolive Company of Delaware, a United States company, holding, I understand the capital shares of similar companies throughout the world. The business of the manufacturing company and the selling company is carried on in the same premises, at Toronto, the President, the Vice-President, and the General Manager of each company are the same persons. The manufacturing company sells the major portion of its products, about seventy per cent, to the selling company, on the basis of cost plus fifteen per cent profit, the remaining products are sold to the public directly by the manufacturing company in the ordinary way. The manufacturing company has accounted for the sales tax in respect of its sales to the public, and also in respect of its sales to the selling company upon the basis of cost plus fifteen per cent profit, as already mentioned. The Crown claims that the manufacturing company, or alternatively both companies, are liable for the sales tax upon the basis of the sale price to the public by the selling company, otherwise the market price, less the amounts already paid by the manufacturing company, the difference amounting to something over $100,000. And that is the controversy here. The amount here claimed as sales tax relates to sales made between January, 1924, and April, 1927. The defendant manufacturing company claims that it is only liable for the sales tax upon the selling price of its goods to the selling company, in respect of the period mentioned, but beyond that it is contended that the statute fails the revenue; the other defendant, the selling company, claims it is not liable for any sales tax because the statute, it contends, imposes such a tax upon the producer or manufacturer only.

It may be that the selling company was created partially for the purpose of preventing the full blow of the sales tax falling upon the manufacturing company, but the creation of the former was within the law, and the point in issue cannot well be determined upon the motives prompting the trading arrangement reached between the two companies, and which I have described. In the end we are driven to

an enquiry as to the meaning and construction of the statute in question, and whether the amount of the tax sought to be recovered is one imposed by the statute. The tax is leviable on the "sale price of all goods produced or manufactured in Canada," and the question is, against which sale price is the tax to be levied, the sale price arranged between the manufacturing company and the selling company, or the sale price to the public by the latter company. The tax is imposed upon the producer or manufacturer of goods; it was plainly the intention of the statute, in the case of a producer or manufacturer, that the tax was to be captured at the point of production of any goods subject to the sales tax, when sold. Here, the sale price of the manufacturing company to the selling company was fixed by the managing director of both companies, being the same person, after consultation with the management of the parent company which, as I have stated, owned all but the qualifying shares of the manufacturing and the selling companies. While the invoicing of goods, accounting, banking, etc., may appear in the records of each company just as if they were utter strangers to each other, still the relations of the one to the other were so close that for the purposes of the statute in question they might be regarded as partners in the joint enterprise of producing and selling certain goods, even though they were distinct beings in contemplation of the law, or the selling company might be regarded merely as the selling agent or representative of the manufacturing company, just as if it was an individual salesman appointed upon terms by the manufacturing company to sell its goods to the purchasing public. But, I think, the revenue is not concerned with the question as to how a manufacturer's goods reaches the public, it is concerned only with the matter of the quantity of taxable goods produced and sold by the manufacturer and the market price of such goods. The sale of goods from a manufacturing company to an allied selling company is perfectly permissible, if upon any grounds whatever, it is deemed desirable or prudent by such companies so to do. That arrangement might well continue indefinitely, but yet, I think, the manufacturing company would still be liable for the sales tax upon all taxable goods sold by it, at the current market price; the liability to the sales tax com-

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mences immediately upon the sale of goods by the producer, and the sale price for the purposes of the taxing statute in question, is the fair market value of the goods sold. I do not think that the selling price arranged between the two defendant companies is the "sale price" referred to in the statute, which in the circumstances could not be called free sales, nor sales made at the fair market prices in the ordinary course of trade. It is rather clear to me that the statute is not designed to permit the manufacturing company to avoid the sales tax, to defeat the policy of the taxing statute, by the arrangement entered into with the selling company. In a taxing statute, where the tax is based on the selling price of goods, sale price can only mean the market price, unless there are express words saying it is some other kind of price, otherwise all producers of goods could make arrangements with second parties, similar to that made between the defendants, and the statute would utterly fail the revenue. The sale price of any thing means the bona fide price at which that thing is sold to the wholesale trade, the retail trade, or to the individual consuming purchaser. I think, therefore, that the words "sale price," as used in the statute, means the price normally charged, in this case by a producer or manufacturer, to a wholesaler or a large retailer for his goods, and if I am correct in this, then the producer must pay the sales tax upon the wholesale price, or the retail price, as the case might be, current at the time and place of sale, and that obligation cannot be avoided by introducing an intermediate distribution agency between the producer and the purchaser. If the manufacturing company sells some of its goods at the market price to the public, and some to an allied company at an arbitrary price and below the market price as here, that does not relieve it of its liability to pay the sales tax upon the latter goods at the fair market price prevailing at the place and time of sale. That is the sale price which, I think, the statute speaks of. If that is not so, then as I have already stated, the provisions of the statute relevant here would be rendered nugatory and of no effect.

My interpretation of section 19BBB of the Act, is, that it is the producer or manufacturer who is to pay the sales tax; that the "sale price" means the fair market price for

goods produced or manufactured in Canada and sold by the producer or manufacturer in his market. The manufacturing company, so far as the revenue is concerned, is in the same position as if its goods were sold by a travelling salesman in the usual way. It was to the manufacturing company that the revenue looked for the payment of the sales tax, and that was to be calculated on sales at the current market prices in its usual market, subject to time and place fluctuations.

Furthermore, it will be seen from Sec. 19BBB of the Act that two classes of goods are liable for the sales tax, first, goods produced or manufactured and sold in Canada, secondly, goods imported into Canada; in the case of imported goods the tax is upon the " duty paid value " of the goods and is payable by the importer, or by the transferee who takes the goods out of bond for consumption at the time when the goods are imported or when taken out of warehouse for consumption. Sec. 18AA of Part IV of the Act states that the " duty paid value " of any article means the value of the article as it would be determined for the purpose of calculating an ad valorem duty upon importation of the same into Canada under the Customs Act, which would be chap. 48 R.S.C., 1906, whether such article was subject to ad valorem duty or not, and in addition the amount of the customs duties, if any, payable thereon. Turning now to the Customs Act. Section 40 of the Customs Act provides that when any duty ad valorem is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption in the principal markets of the country of origin at the time the goods were exported to Canada. Sec. 41 states that such market value shall be the fair market value of such goods, in the usual and ordinary commercial acceptance of the term, and as sold in the ordinary course of trade. The Customs Act then proceeds to prescribe means for determining the fair market value where particular and special difficulties arise; sec. 46, for instance, is practically the same as s. 13 of the Special War Revenue Act and from which the latter was doubtless taken.

Now it seems perfectly obvious that if imported goods are liable for the sales tax upon the duty paid value, that is the fair market value of the goods in the country of

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origin, plus the duty thereon, then the sales tax must be applied in the domestic market on the fair market value of goods there produced and sold. Part IV of the Act, or Sec. 19BBB thereof, could not be fairly administered if domestic goods liable to the sales tax were not taxable at the fair market value, but on a purely arbitrary price fixed by a producer or manufacturer. The domestic producer and the importer were to be impartially treated, the latter had to pay the tax on the market value of the imported goods in the country of origin regardless of what he paid for them there, and the tax was also payable on the duty, altogether upon the " duty paid value " of the goods. When goods are imported into Canada free of customs duty, the Minister is empowered in order to place the domestic producer on a parity with the importer, to grant a refund or reduction of the sales tax on similar goods manufactured in Canada, upon satisfactory evidence being produced that such Canadian goods are at a disadvantage with respect to similar imported goods. The intention of the statute was to place the domestic producer and the importer, of taxable goods, on a parity so far as was possible. If the statute means what the defendants contend it to mean, then any producer in Canada might make some such arrangement as exists between the two defendant companies, and thus escape or minimize the tax; importers, domestic manufacturers not able or desirous of organizing and maintaining a separate selling corporation, would be at a disadvantage, and the whole purpose of the taxing statute would be defeated. The provisions of the statute to which I have just referred support, I think, the conclusion I have already expressed.

My view of the case therefore is, that the defendant, The Palmolive Manufacturing Co. (Ontario) Ltd., the manufacturing company is liable for the sales tax upon any taxable goods produced and sold by it within the period material here, the selling price of such goods to be calculated at the fair market price as and when sold. The precise amount recoverable by the plaintiff under this judgment, I reserve, but I trust that the parties may be able to agree upon the amount without a further hearing or reference. The plaintiff will have his costs of the action.

Judgment accordingly.