1930
Dec. 11.
1931
Jan. 3.

HIS MAJESTY THE KING.....PLAINTIFF;

VS.

FRASER COMPANIES LIMITED.....DEFENDANT.

Revenue—Sales Tax—Manufacturer using its goods in its business—Special War Revenue Act (R.S.C., 1927, c. 179—Sec. 87, ss. (d).

The defendant at all times material herein was engaged, *inter alia,* in the production and manufacture of lumber, and of its sale to the trade, and was the holder of a sales tax licence, duly issued. During the said period it was also engaged, in the course of the development of its business, in the construction and building of pulp mills and the repair thereof; and in the building and repair of houses, etc., for its employees, and for said purposes used and consumed some of the lumber manufactured by it for sale. Such lumber was taken from stock in the yards and in no instance had said lumber been manufactured especially for the purpose for which the same was used. The plaintiff now claims to be entitled to recover sales tax on the value of the lumber so used, under Sec. 87 ss. (*d*) of the Special War Revenue Act.

Held, that the goods intended to be taxed under section 87 ss. (*d*) of the Special War Revenue Act, are only goods expressly manufactured for the use of the manufacturer and wholly used for the purpose for which they were made.

This provision of the statute was not intended to relate to goods produced for sale but partially diverted to the producer's use for purposes not contemplated when the same were produced.

INFORMATION exhibited by the Attorney-General of Canada to recover a certain sum for Sales Tax alleged to be due to the Crown by the defendant company.

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

No witnesses were heard, the parties filing a statement of the facts admitted, signed by counsel for both parties. The facts material herein are set forth in paragraphs 2 and 3 of said statement, which paragraphs are cited in the Reasons for Judgment which follow.

F. P. VARCOE, K.C., for the plaintiff argued: That the true construction of section 87 of the Special War Revenue Act is to apply the tax to all goods manufactured and used. The object of the legislation was to equalize the burden of taxation as between those who purchase the goods they use and those who, for any reason, have themselves produced the goods used. The tax is a consumption and sales tax, and extends over the whole field of production and consumption. The tax is payable in the event of manufacture and use, and not in the event of manufacture for use. Therefore, the intention of the taxpayer at the time of manufacture is of no importance.

The construction claimed for by the defendant, that goods taken out of stock were not manufactured for use, and are therefore not taxable, would result in discrimination.

The case undoubtedly falls within the introductory words of section 87, because the value for tax is always difficult to determine when there is no sale price, as in the case of goods consumed by the manufacturer.

The case of *The King* v. *The Bank of Nova Scotia* (1929, Ex. C.R. 155) was cited.

R. B. HANSON, K.C., for the defendant, argued that the question of "sale" was the only one contemplated at the inception of this legislation. "Consumption" was not then in mind. That although later the tax was described a "consumption or sales" tax, yet the section only imposes a "sales" tax. No "sales" tax is affirmatively imposed under section 86 (*a*). That the word "consumption" is only descriptive. In no part of the statute is there any tax made payable on "consumption." Section 87 does not apply, because the goods were not manufactured under circumstances rendering it difficult to determine the value —and they were not produced for the use of the producer. That the Act does not provide for taxing goods manufactured for sale, put in stock, and then taken into consumption. That if there is a consumption tax no time is fixed for payment. He cited *Crawford* v. *Spooner,* 6 Moo. P.C. 9; *Pinkerton* v. *Easton,* (1873) L.R. 16 Eq. 490; *Whitely* v. *Chappell,* (1868) L.R. 4 Q.B. 147; *Gwynne* v. *Burnell,* (1840) 7 Cl. & F. 572, at p. 696; Craies, Statute

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Law, p. 105; *Oriental Bank* v. *Wright,* (1880) 5 A.C. 842 at p. 856; *In re Micklethwaite,* (1855) 11 Ex. 452; *Partington* v. *Attorney-General,* (1869) 38 L.J. Ex. 205; *Attorney-General* v. *Selborne,* (1902) 1 Q.B. at 396; *Whitely Limited* v. *Burns,* (1908) 1 K.B. 705; *Lord Advocate* v. *Fleming,* (1897) A.C. 145, at p. 152; *Tenant* v. *Smith,* (1892) A.C. 150; *Pryce* v. *Monmouthshire Canal Co.,* (1879) 4 A.C. 197; *Attorney-General* v. *Carlton Bank,* (1899) 2 Q.B. 158 at 164; *Ormond Investment Co.* v. *Betts,* (1928) 97 L.J., K.B. 342.

THE PRESIDENT, now (January 3, 1931), delivered judgment.

This is a special case stated for the opinion of the Court. The plaintiff seeks to recover from the defendant an assessment levied against the latter under the provisions of the Special War Revenue Act, now Chap. 179, R.S.C., 1927. The facts material here are set forth in paragraphs 2 and 3 of the Stated Case and are as follows:

Para. 2: During the period from the 1st day of February, 1924, to the 31st day of August, 1928, the Defendant was engaged, *inter alia,* in the production, manufacture and sale to the lumber trade of long and short lumber and was in possession of a sales tax licence issued to it under the provisions of Section 5 of Chapter 68, 14-15 George V (1924) An Act to amend the Special War Revenue Act, 1915, (now section 95 of the Special War Revenue Act, Chapter 179, Revised Statutes of Canada, 1927).

Para. 3: During the said period the Defendant was also engaged in the course of the development of its business in the construction and building of pulp and other mills and in the repair thereof and in the construction, building and repair of houses and other structures for employees of the company, and in the course of such construction, building and repairing the Defendant during the period aforesaid used or consumed certain quantities of long and short lumber in such work. All of such long and short lumber was taken from stock in the yards of the company, and produced and manufactured for sale and in no instance had been produced or manufactured especially for the purpose for which the same was used.

It is under sec. 87 of the Special War Revenue Act that the assessment levied against the defendant is sought to be sustained. That section in its entirety is as follows:—

87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

(*a*) A lease of such goods or the right of using the same but not the right of property therein is sold or given; or

(*b*) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or

(*c*) such goods are manufactured by contract for labour only and not including the value of the goods that enter into the same, or under any other unusual or peculiar manner or conditions; or

(*d*) such goods are for use by the manufacturer or producer and not for sale;

the minister may determine the value for the tax under this Act and all such transactions shall for the purpose of this Act be regarded as sales.

It is only ss. (*d*) together with the first and last clauses of the section that are relevant here. It is possible, as was contended, that ss. (*d*) was drafted and inserted after the balance of the section had been settled upon, as most of the words in the first clause seem of little importance when read with ss. (*d*). Ordinarily there should be no real difficulty in determining the value of goods produced by a manufacturer or producer for his own use and not for sale, whereas there might be difficulty in so doing where the goods were manufactured under the conditions set forth in subsections (*a*), (*b*) and (*c*). On the other hand it is conceivable that in some instances, in applying ss. (*d*), considerable difficulty would be encountered in fixing the value of the goods for the purposes of the Act. However, this point is of no importance in construing the section. For present purposes the language of the statute might, with strict accuracy I think, be restated in the following words: Whenever goods are manufactured or produced in Canada and such goods are for use by the manufacturer or producer and not for sale, the Minister may determine the value for the tax under this Act, and all such transactions shall for the purposes of this Act be regarded as sales.

I have no doubt that ss. (*d*) was intended to strike at some particular class of cases, which the authors of the section had in mind, and the statute in terms limits that to goods manufactured or produced for the use of the manufacturer or producer and not for sale. This did not refer to partially manufactured goods, that is, goods that were to be wrought into other goods which were subject to the tax, for the statute provides that in such cases the tax does not apply, or, provision is made for a refund. So then ss. (*d*) must have been intended to refer to something else. Some business concerns do manufacture or produce goods solely for their own use and not for sale, and usually in such cases the goods are required in connection with some major business activity of the producer. In my opinion it was only in cases of such a character that the legislature intended to apply the tax. That is in fact how the statute

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Maclean J.

reads. It was to have application to cases where the goods were specifically produced for the producer's own use, and of course the goods must go into use before the tax would apply; I do not think it was intended that the manufacturer was required to pay the tax when the goods were manufactured because that would be contrary to the spirit of the whole Act. In the case under consideration, it is agreed that the goods in question were not manufactured primarily for the defendant's use, they were taken from a mass of lumber manufactured for sale; they were used by the defendant, accidentally it may be said, because the defendant company had decided upon a program of business expansion involving capital expenditures and necessitating the erection of additional manufacturing plant, and houses for its workmen. The Crown's case involves the proposition that if a manufacturer or producer appropriates to his own use, a small or a large quantity of goods, from a stock of goods manufactured for sale, at irregular periods that the manufacturer is liable for the sales tax upon such goods when used. Was that the intention of the Act?

It is only by putting a forced construction upon the language used that the conclusion can be reached that if a producer uses his own goods as in the circumstances of this case that the same are taxable, and one is not warranted in importing into the statute words that are not there, and words which I do not think were intended to be there, in order to make the goods subject to the tax. It is my interpretation of the statute that it was not intended by the legislature to impose the sales tax upon a casual or occasional use of a producer's own goods in the conduct of his business, and that construction of the statute is not weakened if it does transpire that the use of his goods by the producer was substantial in quantity or value or otherwise. It is hardly necessary to state that there is a wide distinction between an enactment saying that goods manufactured for the manufacturer's use, and used, shall be taxable, and saying that a manufacturer producing goods for sale shall be liable for the sales tax upon any portion of such goods as may be diverted to his own use; if the legislature intended to impose the sales tax as in the latter case, it might easily have been expressed, but there is no hint

whatever of such an intention. It seems to me that it would be as reasonable to assume that an intention to do so was considered by the taxing authorities and abandoned on account of the manifest administrative difficulties inherent in its adoption, as to say that the language of ss. (*d*) was intended to express such an intention. I think that ss. (*d*) was deliberately designed to meet the plain case of a person or business concern definitely producing goods for his or its own use, the use running concurrently with the production, because if there was no user there would be no production. And that use, for the purposes of the Act, was to be treated as a constructive sale. It is the case of a manufacturer or producer primarily producing goods for sale, who occasionally diverts a portion of such goods to his own use, that the statute has not dealt with at all. And if the statute does not provide for such a case, it is not for the Court to do so. It may be discriminatory in its incidence to tax one producer using his own goods and not another, or, it may be sound public policy to refrain from taxing a producer's goods occasionally used in the expansion of his own business, thereby increasing his sales and accordingly the volume of revenues deriveable from the sales tax, but all such considerations are for the legislature. There is nothing strange in the fact that the statute does not in express language cover the case of the defendant. The Act has only a limited application as will be observed from the numerous exemptions which are made by the statute. The Act was bound to contain many seeming inconsistencies in that regard, but that has to do with public policy, and not with the construction of a provision of the statute.

I think it is quite clear that the goods intended to be taxed under ss. (*d*) are only goods expressly manufactured for the use of the manufacturer and wholly used for the purpose for which they were made. This provision of the statute was not intended to relate to goods produced for sale, but partially diverted to the producer's use for purposes not contemplated when the goods were produced. It is therefore my opinion that the defendant is not liable for the assessment levied against it.

The defendant will have its costs of the action.

Judgment accordingly.