BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF,

AND

DANTE ALBERT SARACINI and ALBERT SARACINI carrying on business under the style and name of SARACINI CONSTRUCTION COMPANY ..... DEFENDANTS.

1958
Nov. 24
Dec. 12

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, s. 30(1) and s. 31(1)(d)—Goods manufactured for use by defendants solely and not for sale to others attract sales tax.

Defendants carry on the business of building and selling houses. In the course of this business they produced or manufactured kitchen cabinets for the purpose of installing them in the houses then being constructed by them and which were later sold. The cabinets were not manufactured for sale to other buyers. They were constructed in a warehouse apart from and some distance from the site of the house construction because it was found more satisfactory to do so and install them in the houses as a separate unit rather than build them into and as a permanent part of the house being erected. The cabinets were made according to the precise specifications and measurements required by each house.

The Crown contends that such manufacture falls within the provisions of s. 31(1)(d) of the *Excise Tax Act*, R.S.C. 1952, c. 100 and brings this action to recover from defendants the amount of tax so imposed together with penalties.

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Held: That the kitchen cabinets were manufactured by the defendants at their warehouse where they were substantially completed, all that remained to be done was to install and repaint them after certain adjustments as to size were made. As such they attracted sales tax by virtue of the provisions of the *Excise Tax Act,* R.S.C. 1952, c. 100, s. 30(1) and also of the *Old Age Security Act,* R.S.C. 1952, c. 200, s. 10(1) and defendants do not escape tax because they were manufactured solely for their own use. *The King v. Dominion Bridge Co. Ltd.* [1940] S.C.R. 487, followed.

INFORMATION by the Crown to recover sales tax and penalties from defendants.

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

R. W. McKimm for plaintiff.

J. L. Lewtas for defendants.

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

CAMERON J. now (December 12, 1958) delivered the following judgment:

By this Information the Crown seeks to recover from the defendants the sum of $1,052.48, together with certain penalties. The defendants carry on a construction business at Toronto under the firm name of Saracini Construction Co., the greater part of its operations being that of building and selling houses.

The Information alleges that from January 1, 1956, to October 31, 1956, the defendants in the course of their business produced or manufactured at 9 Advance Road, Toronto, 188 kitchen cabinets, each consisting of a floor unit and a wall unit, for use by them in houses which they had constructed or were in the course of constructing. This fact is admitted.

The Information further alleges that by reason of such production or manufacture, the defendants became liable for consumption or sales tax under the provisions of the *Excise Tax Act,* R.S.C. 1952, c. 100 as amended, and for the tax prescribed by s. 10(1) of the *Old Age Security Act,* R.S.C. 1952, c. 200. The kitchen cabinets were manufactured by the defendants, not for sale as kitchen cabinets, but for the purpose of installing them in the houses then being constructed by them and which were later sold.

Pursuant to the provisions of s. 31(1) of the *Excise Tax Act,* the Minister of National Revenue on August 8, 1957, by Exhibit 1 determined that the value for tax of each kitchen unit was $55.77, and that determination of the value is not questioned. The amount claimed is made up of $1,048.48, representing the consumption or sales tax (including the tax imposed by the *Old Age Security Act*), and payment of license fees of $4 pursuant to s. 34(1) of the *Excise Tax Act*. Again, these amounts as such, are not in dispute, the only question being as to the defendant's liability to pay them.

The facts are simple and uncontradicted. For some years prior to the period in question, the defendants in constructing their houses were accustomed to having their own carpenters (or the firms to which they had sublet the carpentry work) build the kitchen cabinets piece by piece in the proper place in the kitchen of the house under construction, where it remained permanently. Constructed *in situ,* and in that fashion, the cabinet was built as part of the individual house and admittedly never was "goods" as that word is used in the *Excise Tax Act*.

It was found, however, that when so installed during the course of house construction, the results were not quite satisfactory. The walls on which the cabinet was attached were green walls and later, when the house was in use and the materials had dried, the installation was found to be unsatisfactory. Accordingly, it was decided to carry on the major part of the construction at 9 Advance Road—a fairly large building generally used for the storage of equipment, but part of which in the building season would be available for such work. The building was then owned by the defendants and may be seen in the photographs Exhibits 2 and 3. It was situated about three miles from the area where the defendants were engaged in building houses—a housing development of about 125 residences. It was found that better results were obtained both as to quantity and quality by producing the cabinets in this fashion. As I recall the evidence, not all the required cabinets were made at the warehouse, some still being made as before, and piece by piece in the house under construction.

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Under the new method, the defendants' carpenter would go to the several houses under construction and take careful measurements of the spaces into which each cabinet was to be installed. Then at the warehouse, where there was a staff of about six or eight carpenters doing this type of work, the cabinets would be made according to the precise specifications which had been ascertained. In general, the width of each was the same, but the height and depth varied according to the space available.

It is unnecessary to describe the cabinet in great detail. It consisted of two parts, the floor unit and an upper wall unit. Lumber was used except for those parts which were not exposed, these parts being masonite. The materials and tools were the same as those which had been used when the cabinet was constructed *in situ*. The units were practically completed at the warehouse. The sliding doors, shelves and drawers were also made at the warehouse and taken separately to the house where the cabinet was to be installed. Prior to removal to the house, the cabinet and its parts received one coat of paint.

The evidence is that when taken to the house for installation, the following steps were taken. The cabinets were placed in the proper location, any necessary trimming being done to ensure a correct fit. Moldings were installed between the cabinets and the ceilings and walls to close up any gaps, then the whole was repainted and drawers and doors would be placed in position. A laminated counter-top prepared separately at the warehouse was also installed on the top of the base unit, at the site.

The cabinets as such were not, of course, manufactured for sale, but for use by the defendants in the construction of their houses. For the plaintiff it is submitted that such manufacture falls within the provisions of s. 31(1)(*d*) of the *Excise Tax Act*. I think it advisable to quote not only that subsection, but also the general section, namely, s. 30.

30. (1) There shall be imposed, levied and collected a consumption or sales tax of 8 per cent on the sale price of all goods

(*a*) produced or manfactured in Canada.

31. (1) 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

(*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 purposes of this Act be regarded as sales.

For the defendants it is submitted that there is no material difference between the construction of the cabinets *in situ* as originally done and the construction carried on at the warehouse; that each cabinet was made essentially to fit a particular house and was substantially incomplete until installed; that in each case the cabinets were intended to be and did become a part of the house and were consequently never "goods" within the meaning of the Act.

Now in order to attract this tax it is clear that the goods need not be sold. If they are "goods" and consumed or used by the manufacturer, they are liable to the tax, unless especially exempted. Reference may be made to the case of *Bank of Nova Scotia v. The King*,[1] a case decided mainly under a section of *The Special War Revenue Act* which is similar to s. 31(1)(*d*) of the *Excise Tax Act*.

Counsel for the plaintiff relied on the case of *The King v. Fraser Companies, Ltd.*[2] a case also decided on the provisions of s. 87(*d*) of *The Special War Revenue Act*. The headnote reads in part:

Respondent was a manufacturer of lumber for sale, and consumed a portion in construction and building operations, carried on over a period of years, the lumber so consumed having been taken from stock in its yards, produced and manufactured in the ordinary course of its business of manufacturing for sale, and not produced or manufactured especially for the purpose for which it was used.

Held (Cannon J. dissenting): Respondent was liable, under the *Special War Revenue Act*, R.S.C., 1927, c. 179, ss. 86, 87, for sales tax on the lumber so consumed. The intention of the Act was to levy the tax on the sale price of all goods produced or manufactured in Canada, whether they be sold by the manufacturer or consumed by himself for his own purposes. Respondent could not avoid liability by invoking the wording of s. 87(*d*) of the Act.

In that case Smith J., in delivering the judgment for the majority of the Court, said at p. 493:

The view taken in the court below would result in the introduction of an exception to the general rule that all goods produced or manufactured are to pay a tax, and would amount to a discrimination in favour of a particular consumer. As an example, it is not unusual for a manufacturer engaged in the production and manufacture of lumber for sale to engage at the same time in the business of a building contractor. He manufactures his lumber for sale, and, as a general rule,

[1] [1930] S.C.R. 174. [2] [1931] S.C.R. 490.

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would not manufacture any specific lumber for use in connection with his building contracts, but would simply take lumber for these purposes from the general stock manufactured for sale, and might thus, under the view taken in the court below, escape taxation on all lumber thus diverted from the general stock manufactured for sale.

I am of opinion that, construing the provisions of the Act as a whole, the respondent is liable for taxes on the lumber consumed by him, as claimed.

That case is important as expressing the view that the general rule is that all goods produced or manufactured are to pay the tax, but that rule is now modified by the excepting provisions of s. 32 of the *Excise Tax Act* and the schedules thereto. The *Fraser* case, however, is to some extent distinguishable on its facts from the instant case in that there the taxpayer manufactured all its stock of lumber for sale and merely diverted a portion thereof (not specially manufactured for its building operation) for the purpose of constructing houses. That was not the case here as the defendants manufactured nothing for sale. The *Fraser* case was referred to and on this point followed in *The King v. Dominion Bridge Co. Ltd.*,[1] a case also decided under the provisions of s. 87(*d*) of *The Special War Revenue Act*. The facts are disclosed in the headnote which reads:

By certain contracts entered into between the suppliant and His Majesty the King, represented by the Minister of Public Works for the province of Quebec, the suppliant undertook to erect the structural steel superstructure of three bridges in that province, in consideration of the sums set out in each contract. The suppliant erected the three bridges and was paid according to the contracts. In respect of the materials incorporated in the bridges, suppliant was assessed for sales tax, alleged due under the terms of the Special War Revenue Act, R.S.C., 1927, c. 17 and amendments. It paid under protest a proportion of the amounts so assessed to the Commissioner of Excise. The suppliant then claimed by way of a petition of right before the Exchequer Court of Canada a return of the moneys so paid on the grounds that no tax was payable by it in respect of the materials supplied in virtue of the contracts or, alternatively, that, if the materials were taxable, suppliant was entitled to a refund by reason of the fact that the materials were sold, if sold at all, to His Majesty the King in the right of the province of Quebec.

Held, that the above transaction between the suppliant and the Crown in the right of the province of Quebec must, by force of section 87(*d*) of the Special War Revenue Act, be deemed to be a sale and that the suppliant was rightly chargeable accordingly for a sales tax.

(The King v. Fraser Companies, [1931] S.C.R. 490 applied):

[1] [1940] S.C.R. 487:

The Chief Justice of Canada, in delivering the judgment of the Court, after referring to that part of the judgment of Smith J. in the *Fraser* Case which I have cited, said at p. 489:

> This passage in the reasons of my brother Smith was not part of the ratio decidendi but it was the considered opinion of the four judges who constituted the majority of the Court. They said that, if a building contractor is also a manufacturer of building material, lumber or brick for example, and uses, for the purpose of executing a building contract, brick or lumber produced by himself, that is a case within section 87(*d*) and the transaction is, by force of that section, deemed to be a sale and he is chargeable accordingly. In the present case the members of the bridge produced were produced specially for the purposes of the contract.
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> I have fully considered the able argument addressed to us by Mr. Forsyth and my conclusion is that, when sections 86 and 87 are read together, this transaction falls within the category of cases described by section 87(*d*), and that the view expressed by my brother Smith in Fraser's case is the view which ought to govern us in the disposition of this appeal. I think, in this respect, the practice of the Department is right.

After careful consideration of that case, I am unable to distinguish it from the one now before me. There as here the bridge company was engaged in building contracts, in building bridges which became immoveables when completed, as were the houses constructed by the defendants. There the members of the bridge produced were produced specially for the purposes of the contract and I think would normally be quite unsuitable for any other purpose, certainly not without adjustment. That is the precise situation here. The decision in that case must have been based on a finding that the component parts of the bridge were in fact "goods" within the meaning of the Act.

In the present case it is admitted in the pleadings that the defendants manufactured or produced kitchen cabinet units at 9 Advance Road for use in houses which they had or were constructing. While that may be construed as an admission that they manufactured "goods" (which goods are not exempted from tax by any of the provisions of the Act), I prefer to rest my finding on the evidence adduced. That evidence makes it abundantly clear that the units were manufactured by the defendants at their warehouse, that they were substantially completed there and would

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no doubt be properly called "kitchen cabinets" at that stage. All that remained to be done was to suitably install and repaint them after completing the necessary small adjustments as to size.

My conclusion, therefore, must be that the plaintiff is entitled to succeed. I should add here that no question is raised as to the good faith of the defendants, this case being to some extent a test case.

Accordingly, there will be judgment for the plaintiff for $1,052.48, together with such penalties for non-payment as are provided for in ss. (4) of s. 48 of the *Excise Tax Act*. The plaintiff is also entitled to costs after taxation.

Judgment accordingly.