

Toronto
1965
Dec. 15
1966
Feb. 15

BETWEEN:

HER MAJESTY THE QUEEN PLAINTIFF;

AND

INTER-PROVINCIAL COMMERCIAL
DISCOUNT CORPORATION LIM-
ITED } DEFENDANT.

*Sales tax—Excise Tax Act, R.S.C. 1952, c. 100—Sections 48(4), 50(9), (10)—
British North America Act, ss. 91(3) and 92(13)—Assignment of book
debts of licensees to third party—Recovery of tax from assignee.*

Book debts arising from transactions subject to sales tax were assigned by
three licensed manufacturers to the defendant company.

The Minister demanded that the defendant pay the sales tax out of the
amounts collected on the assigned debts under section 50(9) and (10)
of the *Excise Tax Act*. The defendant refused to pay.

The defendant contended that subsections (9) and (10) of section 50 of the Act were *ultra vires* the Parliament of Canada since the legislation infringed the authority conferred upon the provinces by *The British North America Act*.

Held: That there should be judgment for the plaintiff against defendant for the amount of the sales tax and penalties.

2. That section 50(9), (10), in providing authority for the collection of tax imposed by the Act, were an integral part of legislation in relation to a matter within a class of subject specifically assigned to the Parliament of Canada and were accordingly *intra vires* the Parliament of Canada.
3. That once it is accepted that a tax upon the manufacturer who sells goods is valid, it is obvious that Parliament can incorporate in the taxing law a provision to make the assignee of the purchase price pay an amount equal to the tax.
4. That powers in relation to matters normally within the provincial field, especially property and civil rights, are inseparable from a number of the specific heads of section 91 of *The British North America Act*.

INFORMATION of the Deputy Attorney-General of Canada.

C. R. O. Munro, Q.C. and *D. G. H. Bowman* for plaintiff.

W. D. Goodman for defendant.

CATTANACH J.:—In this action the Crown seeks to recover the sum of \$9,282.81 as monies payable under subsection (10) of section 50 of the *Excise Tax Act*, R.S.C. 1952, chapter 100 as amended, and the *Old Age Security Tax Act*, R.S.C. 1952, chapter 200, together with penalties provided by section 48(4) of the *Excise Tax Act* incurred by the defendant by reason of its default in payment of the above sum.

Prior to trial the parties agreed upon a Statement of Facts which is reproduced hereunder:

1. The Defendant is a company incorporated under the laws of the Province of Ontario and has its head office at the City of Toronto in the Province of Ontario.

2. At all material times Toronto Table (1961) Limited, Vend-Craft Gum Limited and G.M.T. Toys Limited were licensees pursuant to the provisions of the *Excise Tax Act*, R.S.C. 1952, c. 100.

3. The Defendant received from the said Toronto Table (1961) Limited, Vend-Craft Gum Limited and G.M.T. Toys Limited, assignments of book debts or of negotiable instruments of title to such debts, which debts arose out of transactions in respect of which a tax was imposed by the *Excise Tax Act* and by section 10 of the *Old Age Security Act*, R.S.C. 1952, c. 200.

4. By registered letter dated April 25, 1963, addressed to the Defendant, pursuant to subsection (9) of section 50 of the *Excise Tax Act*, the

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Minister of National Revenue demanded that the Defendant pay over to the Receiver General of Canada out of any moneys received by the Defendant after the receipt of the said letter, a sum equivalent to the amount of any tax imposed by the Excise Tax Act, upon the transactions giving rise to the debts assigned by the said Toronto Table (1961) Limited.

5. By registered letter dated August 1, 1963, addressed to the Defendant, pursuant to subsection (9) of section 50 of the Excise Tax Act, the Minister of National Revenue demanded that the Defendant pay over to the Receiver General of Canada out of any moneys received by the Defendant after the receipt of the said letter, a sum equivalent to the amount of any tax imposed by the Excise Tax Act, upon the transactions giving rise to the debts assigned by the said Vend-Craft Gum Limited.

6. By registered letter dated June 6, 1963, addressed to the Defendant, pursuant to subsection (9) of section 50 of the Excise Tax Act, the Minister of National Revenue demanded that the Defendant pay over to the Receiver General of Canada out of any moneys received by the Defendant after the receipt of the said letter, a sum equivalent to the amount of any tax imposed by the Excise Tax Act, upon the transactions giving rise to the debts assigned by the said G.M.T. Toys Limited.

7. After the receipt by the Defendant of the said letters referred to in paragraphs 4, 5 and 6 hereof, the Defendant received up to and including the 25th day of November, A.D. 1963, certain moneys on account of the said debts referred to in paragraph 3 hereof. Subject to the determination by this Honourable Court of the question stated in paragraph 10 hereof, the sums claimed to be owing by the Defendant to the Receiver General of Canada according to the demand contained in the said letters, out of moneys so received by it up to and including the 25th day of November, A.D. 1963, in accordance with subsection (10) of section 50 of the Excise Tax Act, are calculated as follows:

- (a) Out of the moneys received by the Defendant up to and including the 25th day of November, A.D. 1963, on account of the debts assigned to the Defendant by Toronto Table (1961) Limited, the Defendant was required to pay to the Receiver General of Canada the sum of \$2,220.70.
- (b) Out of the moneys received by the Defendant up to and including the 25th day of November, A.D. 1963, on account of the debts assigned to the Defendant by Vend-Craft Gum Limited, the Defendant was required to pay to the Receiver General of Canada the sum of \$4,508.65.
- (c) Out of the moneys received by the Defendant up to and including the 25th day of November, A.D. 1963, on account of the debts assigned to the Defendant by G.M.T. Toys Limited, the Defendant was required to pay to the Receiver General of Canada the sum of \$2,553.46.

8. The Defendant agrees, if this Honourable Court should determine that the question stated in paragraph 10 hereof is to be answered in the negative:

- (a) that it is liable to the Plaintiff for the sum of \$9,282.81 being the total of the amounts referred to in paragraph 7 hereof;
- (b) that it is liable to pay to the Plaintiff the penalties provided by subsection (4) of section 48 of the Excise Tax Act as alleged in paragraph 9 of the Information herein;

(c) that the said penalties, as computed until the 30th day of September, 1965, amount to \$1,492.71 and that the said penalties further accrue at the rate of $\frac{3}{4}$ of one percent of the said sum of \$9,282.81 in respect of each month or fraction of a month during which default in payment occurs after the 30th day of September, 1965; and

(d) that Judgment may be granted against the Defendant for the said amount of \$9,282.81 together with the said penalties.

9. The Defendant was not in any way or degree party to any attempt to evade or avoid payment of tax by the assignors, and its refusal to pay the sums claimed was made *bona fide* and on the advice of its solicitors.

10. The Parties hereto agree that the sole question in issue between them for determination by this Honourable Court is as follows:

"Are subsections (9) and (10) of section 50 of the Excise Tax Act *ultra vires* the Parliament of Canada as being beyond the powers conferred upon the Parliament of Canada by section 91 of the British North America Act, 1867, 30 and 31 Victoria, Ch. 3 and Amendments thereto?"

It has been readily conceded by counsel for both parties that all essential elements to render the defendant liable are present, assuming the constitutional validity of subsections (9) and (10) of section 50 of the *Excise Tax Act*. There were taxable transactions, that is the sales of goods manufactured or produced in Canada by Toronto Table (1961) Limited, Vend-Craft Gum Limited and G.M.T. Toys Limited, all of whom were licensed manufacturers; there were assignments to the defendant of the vendors' rights to the purchase moneys arising from such taxable transactions and demands, as contemplated by subsection (9) of section 50, were made to the defendant, as assignee, by the Minister to pay over a sum equivalent to the amount of the taxes out of the moneys received by the defendant on account of such debts after receipt of such notices. All such facts are asserted in the Agreed Statement of Facts.

Moreover, it will be observed from paragraph 10 of the Agreed Statement of Facts that it was also agreed that the sole question in issue between the parties for determination is whether subsections (9) and (10) of section 50 of the *Excise Tax Act*, are *ultra vires* the Parliament of Canada. Those subsections read as follows:

(9) When the Minister has knowledge that any person has received from a licensee any assignment of any book debt or of any negotiable instrument of title to any such debt, he may, by registered letter, demand that such person pay over to the Receiver General of Canada out of any moneys received by him on account of such debt after the receipt of such notice, a sum equivalent to the amount of any tax imposed by this Act upon the transaction giving rise to the debt assigned.

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(10) The person receiving any such demand shall pay the Receiver General according to the tenor thereof, and in default of payment is liable to the penalties provided in this Act for failure or neglect to pay the taxes imposed by Parts II to VI.

By section 30 of the Act there is imposed, levied and collected a consumption or sales tax on the sale price of all goods produced or manufactured in Canada. Every manufacturer or producer is required by section 34 of the Act to obtain a licence and by section 48 to make monthly returns of all taxable sales. The tax is one that is imposed upon and collected from the manufacturer who in turn, in the ordinary course of events, may be expected to recoup himself from his purchaser. It is, therefore, an indirect tax because the probability is that it will ultimately be borne by the consumer.

There is no question whatsoever that the imposition of such an indirect tax is within the exclusive legislative powers of the Parliament of Canada under the provisions of section 91 of the *British North America Act, 1867*. It is convenient at this point to quote from section 91 the portion thereof that is relevant to the matter in issue:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

...

3. The raising of Money by any Mode or System of Taxation.

...

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The contention of counsel for the defendant, as I understand it, is that if subsections (9) and (10) are justifiable Federal legislation at all, they can only be justified on the ground that they are necessarily incidental to the exercise

by the Parliament of Canada of the power conferred upon it by head 3 of the section 91 of the *British North America Act* above quoted, which he submits they are not, and, if such is so, then the legislation infringes the authority conferred upon the Provinces by section 92, head 13 to "exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,— '13. Property and Civil Rights in the Province'."

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In support of such contention the defendant relied strongly on a decision of Dysart J. of the Manitoba King's Bench in *Northwest Mortgage Co. v. Commissioner of Excise*¹. In that case section 169 of the *Excise Act* provided for the forfeiture to the Crown of an automobile illegally used by a person to transport liquor and the section also forfeited any interest in the automobile held by a person innocent of any wrong doing under the Act.² There was, however, a section of the Act whereby the innocent person might obtain an order exempting his interest from forfeiture upon proof of certain exculpatory facts.

Dysart J. had this to say at page 276:

It is admitted, of course, that the Dominion has the power to enact all provisions which are necessarily incidental to effective legislation upon any subject falling within any of the classes expressly enumerated in s. 91: *A.-G. Ont. v. A.-G. Can.*, [1894] A.C. 189; *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348; *A.-G. Can. v. Cain*, *A.-G. Can. v. Gilhula*, [1906] A.C. 542.

It will be admitted also that the *Excise Act* would carry with it, as incidental thereto, the right to punish offenders against the Act, by all legitimate means, including forfeiture of their automobiles, or of their interest in automobiles, used in violations of the Act.

But is it difficult to find justification for the forfeiture of property belonging to people who are entirely free and innocent of a violation of the Act. These people have their rights to property established by the Province, under its exclusive jurisdiction over "Property and Civil Rights"; s. 92 of the *B.N.A. Act*. If such confiscation of the property of persons can be justified as being incidental to the punishment of offenders, then it is difficult to understand where the limit must be drawn. If a man's car were stolen, for instance, and used in contravention of the *Excise Act*, the forfeiture would be maintainable,—but at the same time would be an outrage on justice. What essential difference is there between such a case and this present one?

There is nothing in the principles of law or justice that can support this provision of the *Excise Act*, and while the right of the Dominion should be supported, in so far as its legislation is necessarily incidental to

¹ [1944] 3 D L R. 273.

² [1932] S.C.R. 134 *The King v. Krakowec, et al.*

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the enforcement of the *Excise Act*, it seems impossible to understand or to justify the punishment of innocent persons under pretence of enforcing the Act against guilty persons. I am not aware that this point has ever been raised, or strongly supported, or adjudicated upon, and therefore I feel at liberty to express my opinion of it. In my opinion, the legislation here in question affects the exclusive provincial property rights of innocent persons, and is *ultra vires* of the Dominion.

Cattanach J. This decision was confirmed by the Manitoba Court of Appeal¹ but on grounds other than the constitutional issue upon which question the Court of Appeal expressed no opinion.

The view expressed by Dysart J. was, to all intents and purposes, overruled by the Supreme Court of Canada in *Industrial Acceptance Corporation Limited v. The Queen*². Section 21 of a Federal statute, *The Opium and Drug Act*, 1929 provided for forfeiture of a vehicle used in connection with a narcotics offence where a conviction results, without any exculpation opportunity to innocent persons as was the case in the section of the *Excise Act* under review in *Northwest Mortgage Co. v. Commissioner of Excise (supra)*. It was contended that section 21, insofar as it operated to forfeit the innocent person's interest in the motor car was *ultra vires* the Parliament of Canada as not being necessarily incidental to the effective exercise of the legislative authority of Parliament over the criminal law. Kerwin J. as he then was, had this to say at page 275:

...The mere fact that s. 21 of the Opium and Narcotic Drug Act affects property and civil rights is of no concern since in pith and substance it does not attempt to invade the provincial legislative field. It provides for the forfeiture of property used in the commission of a criminal offence and is, therefore, legislation in relation to criminal law.

The fallacy in the reasoning of Dysart J. in *Northwest Mortgage Co. v. Commissioner of Excise (supra)* and, as I see it, in the contention of the defendant herein, lies in failing to distinguish between legislation "affecting" property or civil rights in the Province and legislation "in relation to" property and civil rights. Powers in relation to matters normally within the provincial field, especially of property and civil rights, are inseparable from a number of the specific heads of section 91 of the *British North America Act* under which scarcely a step can be taken that do not involve them. In each such case the question is

¹ [1945] 1 D.L.R. 561.

² [1953] 2 S.C.R. 273.

primarily not how far Parliament can trench on section 92, but rather to what extent property and civil rights are within the scope of the paramount power of Parliament. See *Gold Seal Ltd. v. A.G. Alta.*¹, *A. G. (Can.) v. C.P.R. & C.N.R.*² and *Tennant v. Union Bank*³.

A first reading of subsections (9) and (10) of section 50 of the *Excise Tax Act* conveys the impression that this is somewhat uncommon and drastic legislation, but such impression is not borne out by a more mature consideration of the legislation. There is no question that the "matter" of raising money by any mode or system of taxation comes within a class of subjects declared by section 91 of the *British North America Act* to be within the exclusive legislative authority of the Parliament of Canada. It follows logically that the authority to levy and impose the tax must of necessity include the authority to collect the tax so imposed and to legislate effectively to secure that end. Once it is accepted that a tax upon the manufacturer who sells goods is valid, it is obvious that Parliament can incorporate in the taxing law a provision to make the assignee of the purchase price pay an amount equal to the tax so as to forestall attempts to frustrate collection of the tax by putting the proceeds of sales in the hands of a third person (innocent or otherwise) and so beyond the reach of the tax collector. (In so saying, I presume that subsection (9) of section 50 only operates when the taxpayer has not paid the tax and any payment under subsection (9) operates to extinguish the tax liability *pro tanto*).

This, in my opinion, is the precise purpose of subsection (9) of section 50 of the Act. Subsection (10) thereof provides a penalty for failure to comply with subsection (9) after notice as required therein has been given. If subsection (9) is *intra vires*, then so too is subsection (10).

I have been occasioned concern by the decision of Angers J. in *The King v. Imperial Tobacco Co. of Canada Ltd.*⁴. Angers J. there considered section 119 of the *Special War Revenue Act 1927 R.S.C. c. 179* providing:

Everyone liable under this Act to pay to His Majesty any of the taxes hereby imposed, or to collect the same on His Majesty's behalf, who

¹ 62 S.C.R. 424.

² [1958] S.C.R. 285.

³ [1894] A.C. 31.

⁴ [1938] Ex. C.R. 177.

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collects, under colour of this Act, any sum of money in excess of such sum as he is hereby required to pay to His Majesty, shall pay to His Majesty all moneys so collected, and shall in addition be liable to a penalty not exceeding five hundred dollars.

This section is re-enacted in the same terms as above quoted by section 61 of the *Excise Tax Act*.

Cattanach J.

He held it was not shown that section 119 came within the powers given by section 91 of the *British North America Act* or that it was ancillary to the exercise of some power set forth in said section 91 and accordingly, (except for the provision imposing the penalty of \$500 or less), the section is *ultra vires* the Parliament of Canada.

On appeal to the Supreme Court of Canada¹, the decision of Angers J. was upheld on the ground that the respondent company had not infringed section 119. In view of such finding it was unnecessary for the Supreme Court to deal with the question of the validity of the section.

Since Angers J. was considering a different section, I do not consider myself bound to apply his decision in determining the validity of the provisions in issue here.

For the reasons above recited, I am of the opinion that subsections (9) and (10) of section 50 of the *Excise Tax Act* are an integral part of legislation in relation to a matter within a class of subject specifically assigned to the Parliament of Canada by section 91 of the *British North America Act*, to wit, head 3 thereof being the raising of money by any mode or system of taxation, and the subsections in question are accordingly *intra vires* the Parliament of Canada.

It follows that there shall be judgment for Her Majesty against the defendant in the sum of \$9,282.81, and for the penalties provided by subsection (4) of section 48 of the *Excise Tax Act* computed to the date of this judgment, together with the costs of this action.

¹ [1939] S.C.R. 322.