

BETWEEN:

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

PLAINTIFF;

AND

NOXZEMA CHEMICAL COMPANY }
OF CANADA LIMITED.....

DEFENDANT.

1940
Oct. 28, 29
& 30.
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1941
April 1.

Revenue—Sales Tax—Excise Tax—Special War Revenue Act, R.S.C., 1927, c. 179, Secs. 80 (1), 85 (a), 86, 98, 106 & 108—Manufacturing company selling to independent trading company for distribution to dealers—“Fair Price” as determined by the Minister of National Revenue not conclusive against taxpayer—Taxpayer sued for taxes as a debt is not precluded from raising any defence to action—Method of determining “Fair Price.”

The Special War Revenue Act, R.S.C., 1927, c. 179, s. 86, imposes a sales tax on “the sale price of goods produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.” S. 85 (a) of the Act defines “Sale Price” as:

“(a) ‘Sale Price’ for the purpose of calculating the consumption or sales tax shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto and shall include any charges for advertising, financing, servicing, warranty or any other charges of a similar nature contracted for at the time of sale whether these items be charged for separately or not and shall also include the amount of other excise duties when the goods are sold in bond; and in the case of goods subject to the taxes imposed by Parts X and XII of this Act, shall include the amount of such taxes; and in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof;”

S. 80 (1) of the Act provides:

“1. Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned. (a) In Schedule I,

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at the rate set opposite to each item in the said Schedule computed on the duty paid value or the sale price, as the case may be; (b) In Schedule II, at the rate opposite to each item in the said schedule."

S. 98 of the Act provides:

"Where goods subject to tax under this Part or under Part XI of this Act are sold at a price, which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined."

Defendant, a United States corporation, has carried on in Canada, since 1932, the business of manufacturing and selling toilet articles and medicated preparations. In 1938 it entered into an agreement with Better Proprietaries Limited, a company incorporated under the laws of Ontario for the purpose, *inter alia*, of dealing in proprietary and patent medicines, pharmaceutical and toilet preparations and other articles generally dealt in by drug stores, whereby Better Proprietaries Limited became the sole distributor in Canada of the products of defendant company. One, Shaw, was manager of defendant's Canadian business and also of Better Proprietaries Limited. The agreement became effective on January 1, 1939.

Better Proprietaries Limited paid to defendant for its products the prices stipulated in a certain schedule and sold these products at the prices formerly charged by defendant to its dealers, which prices were approximately 12½ per cent greater than the prices paid by Better Proprietaries Limited to defendant. This difference consisted of a certain cash discount, and charges for freight and selling cost, all of which were defrayed by Better Proprietaries Limited.

Defendant paid the sales tax and excise tax calculated on the prices at which it sold its products to Better Proprietaries Limited. The Minister of National Revenue ruled that these prices were not the fair prices for the sale of such products and he determined the fair prices to be those which Better Proprietaries Limited charged its dealers.

The Crown now seeks to recover from defendant sales tax under s. 86 of the Special War Revenue Act, R.S.C., 1927, c. 179, and excise tax under s. 80 of the Act imposed on such fair prices as determined by the Minister for the period commencing January 1, 1939, and ending July 31, 1939.

The Court found that the business arrangement entered into between the two companies and the association of Shaw with each of them, was conceived, entered into and at the material time was being carried out in good faith for what seemed to the parties concerned as fair and sound business reasons, and that it was in no way designed to avoid the taxes in question, or to defeat the public revenue.

Held: That the determination of the sale price by the Minister under s. 98 of the Act is not conclusive against the taxpayer, nor is the taxpayer, when sued for the taxes so determined as a debt, precluded from contesting the validity of such tax levy or raising any defence thereto.

2. That s. 98 of the Act contemplates the case where the producer has sold his goods to a dealer below the normal market prices, below the average of the prices of other manufacturers of the same class

of goods, and does not empower the Minister to fix the sale price of defendant corporation so as to include items of cost and expense which it has not incurred and which could not enter into the computation of its production costs or its sale prices.

3. That the Minister was not empowered to determine that the sale prices of defendant corporation should be those of the independent trading corporation, Better Proprietaries Limited, and that defendant is not liable to pay taxes on the sale price determined by the Minister.

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INFORMATION exhibited by the Attorney-General of Canada to recover from defendant sales tax and excise tax alleged due to the Crown under the provisions of the Special War Revenue Act, R.S.C., 1927, c. 179 and amendments thereto.

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

J. C. McRuer, K.C. and *J. J. Glass, K.C.* for plaintiff.

C. F. H. Carson, K.C., *J. L. Wilson, K.C.* and *J. L. Grogan* for defendant.

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

THE PRESIDENT, now (April 1, 1941) delivered the following judgment:

This is an Information, exhibited by the Attorney-General of Canada, for the recovery of sales tax under s. 86 of the Special War Revenue Act, and of excise tax under s. 80 of the same Act, from the defendant, Noxzema Chemical Company of Canada Ltd. (hereafter called "Noxzema"), an American corporation carrying on in Canada the business of manufacturing and selling articles commercially known as toilet articles and medicated preparations, since 1932, its head office being in the City of Toronto, in the Province of Ontario.

During the period commencing January 1, 1939, and ending July 31, 1939, Noxzema made sales of toilet articles and medicated preparations manufactured by it, to a company known as Better Proprietaries Limited, thereby incurring liability for the sales and excise tax thereon, but it is claimed by the Minister of National Revenue (hereafter called "the Minister") that the said sales were made at prices which, in his judgment, were less than the fair

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prices on which the said taxes should be imposed, within the meaning of s. 98 of the Act, and, accordingly, the Minister, in September, 1939, acting under the power claimed to be vested in him by s. 98 of the Special War Revenue Act, determined the fair prices on which the said taxes should be imposed, and this determination was in the following terms:

Whereas the Noxzema Chemical Company of Canada Limited did, prior to January 1st, 1939, sell the whole of its manufactured products to various wholesalers and chain stores, tax-included, and account for excise and sales tax on the basis of such sales to the trade;

And whereas, commencing January 1st, 1939, the Noxzema Chemical Company of Canada Limited entered upon an arrangement with Better Proprietaries Limited whereby the latter company obtained exclusive selling rights of the products of the Noxzema Chemical Company of Canada, Limited;

And whereas, during the period January 1st to July 31st, 1939, the Noxzema Chemical Company of Canada sold or purported to sell to Better Proprietaries Limited the whole of its manufactured products for resale to the wholesalers and chain stores aforesaid;

And whereas, in the judgment of the undersigned, the prices obtained by the Noxzema Chemical Company of Canada Limited from sales to Better Proprietaries Limited were less than the fair prices on which sales tax and excise tax should be imposed.

The undersigned, therefore pursuant to the powers vested by Section 98 of the Special War Revenue Act, does hereby determine that the prices at which Better Proprietaries Limited sold the goods in question to the wholesalers and chain stores were the fair prices on which the taxes payable by the Noxzema Chemical Company of Canada should be imposed.

If the Minister is empowered under the Act, and upon the state of facts here, to determine the fair prices on which the taxes should be imposed on the goods manufactured and sold by Noxzema within the period in question, and Noxzema is found liable for the said taxes upon the sale prices determined by the Minister, then, as I understand it, there is no dispute as to the quantity of the goods sold and liable for the taxes, or as to the rates of taxation imposed upon such sales, for the sales and excise tax respectively.

It is claimed by Noxzema that it paid all the sales taxes and excise taxes for which it, as a licensed manufacturer and wholesaler, was liable in respect of its sales within the period in question, the amount paid being \$18,494.86; that the prices at which the said sales were made were fair and *bona fide* prices of sale and not less than the fair prices on which the said taxes should be imposed; and that, in any event, the Minister erred in determining that

the said prices of sale were less than the fair prices on which the sales tax and excise tax should be imposed, and that there was no foundation for the judgment or discretion he purported to exercise.

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It will be convenient to mention at once those provisions of the Special War Revenue Act which are relevant to the controversy here. The sales tax is imposed by s. 86 of the Act, and the important part of that provision reads:

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

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof

“Sale price” is defined by s. 85 (a) of the Act and that is as follows:

(a) “sale price” for the purpose of calculating the amount of the consumption or sales tax shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto and shall include any charges for advertising, financing, servicing, warranty or any other charges of a similar nature contracted for at the time of sale whether these items be charged for separately or not and shall also include the amount of other excise duties when the goods are sold in bond; and in the case of goods subject to the taxes imposed by Parts X and XII of this Act, shall include the amount of such taxes; in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof;

The excise tax is imposed by s. 80 of the Act, and s. 80 (1) reads as follows:

1. Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned.

(a) in Schedule I, at the rate set opposite to each item in the said Schedule computed on the duty paid value or the sale price, as the case may be;

(b) In Schedule II, at the rate set opposite to each item in the said schedule.

Schedule I is the relevant one here as the goods there enumerated include those of the class manufactured and sold by Noxzema, and the rate of the excise tax thereon is ten per cent, and, as stated in subs. (a), is to be computed on the duty paid value or the “sale price,” as the case may be.

The next provision to be mentioned is s. 98, the important one in this case, the one under which the Minister

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purported to act in determining the fair price on which the sales tax and the excise tax should be imposed in respect of the goods manufactured and sold by Noxzema, and it reads:

Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

The principal issue here is such that it becomes necessary to narrate carefully certain facts relating to the business affairs of Noxzema, and of another corporation known as Better Proprietaries Limited (hereafter called "Proprietaries"), a Canadian company incorporated under the laws of the Province of Ontario, and the business relations of a Mr. Shaw with both of these companies. The controlling interest in Noxzema is owned by Noxzema Chemical Company of Baltimore, an American corporation, the parent company of Noxzema. It is unnecessary to explain the capital structure of Noxzema except to say that its capital shares are divided into what are known as Class A shares, and Class B shares. When Noxzema determined to establish a factory and sales office in Canada, in 1932, it selected Shaw, whose name I have just above mentioned, to manage the manufacture and sale of its products in Canada, and the terms of his employment became the subject of a written contract. The principal terms of that contract were that Shaw was to manage the manufacture and sale of the products of Noxzema in Canada for a period of five years and he was not to engage in any other employment without the consent of Noxzema; Shaw was to be paid a salary of \$7,500 for the first year, and any upward change was to be at the discretion of the Directors of Noxzema, but as the contract was based upon the fulfilment of a planned schedule of operations, which if not fulfilled at the end of three years, it was provided that the contract was subject to termination at the option of Noxzema; and Shaw was to receive as a bonus or additional compensation a specified number of the B shares of the capital stock of Noxzema each year during the term of the contract, but if the employment of Shaw ceased at any time during such term then the said bonus or additional compensation was to cease. In due course, under

the terms of this contract, Shaw became the owner of 2,325 of the B shares of Noxzema. Such were the principal terms of the contract of employment, and this was renewed in 1937 for a further period of five years, but the terms of the renewal need not be stated.

On December 31, 1938, or a few days thereafter, Proprietaries was organized for the purpose, *inter alia*, of dealing in proprietary and patent medicines, pharmaceutical and toilet preparations, and all articles and things which are commonly or may conveniently be dealt in by drug stores. The capital of Proprietaries was divided into four thousand non-voting preference shares of the par value of \$10, and four thousand common shares without any nominal or par value. Shaw, with the consent of Noxzema, became President and General Manager of Proprietaries and a shareholder therein, while at the same time continuing his employment with Noxzema under the terms of the contract mentioned. Noxzema then entered into a contract with Proprietaries whereby the latter was to take over, and did take over, the Canadian sales of Noxzema products, as from January 1, 1939. By the terms of that contract, which was to run for one year, Proprietaries was to become the sole distributor in Canada of the products of Noxzema and it was to maintain an adequate sales force at all times; Proprietaries was to pay Noxzema for its products the prices stipulated in a certain schedule and was to charge its dealers the prices stipulated in another schedule for such products which, I understand, were the prices formerly charged by Noxzema, to its dealers. The contract was renewable by mutual consent for such period as might be agreed upon, and it was a term thereof that if Shaw should at any time during the term of the contract, or any renewal thereof, cease to be the President and General Manager of Proprietaries, then Noxzema should have the right, upon notice, to cancel the contract. The prices which Noxzema was to charge for its products sold to Proprietaries were such as to net Noxzema approximately what it had been previously receiving from its sales to dealers, the prices to Proprietaries being about 12½ per cent below that previously charged to the dealers of Noxzema. The difference between the prices at which Noxzema had sold its goods to its dealers and those at which it sold the same goods to Proprietaries, approximately 12½

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per cent, was determined after a careful analysis of the sales of Noxzema for the year 1937, and of the expenses and cost of selling the same. The details of that difference are expressed in one Exhibit as follows: "2% cash discount, approximately 2 $\frac{8}{10}$ % freight, and approximately 7 $\frac{8}{10}$ % selling cost," and these items of expense of business Noxzema was relieved of by reason of its contract with Proprietaries. The prices which Proprietaries charged its dealers were, I understand, the prices which Noxzema had been charging its dealers, which were the "fair prices" fixed by the Minister on the sales from Noxzema to Proprietaries for taxation purposes, and which is the subject of this appeal. I should mention, if I have not already done so, that Shaw became a common shareholder in Proprietaries, holding one share therein, as did, I think, all the other common shareholders, four in number, one of whom was F. J. Andrews to whom I shall presently refer as Dr. Andrews. The preferred shareholders of Proprietaries were five in number, consisting, I think, of the five salesmen employed by Proprietaries, three of whom were formerly in the employ of Noxzema in the same capacity.

Concurrently with the arrangement entered into between Noxzema and Proprietaries an arrangement was entered into between Proprietaries and Bromo-Seltzer Ltd., a Canadian corporation carrying on business at Toronto, whereby the former was, on much the same terms as with Noxzema, to become the sole distributor in Canada of the goods manufactured by the latter, and of which concern Dr. Andrews was the directing head. I think I am correct in saying that the only product produced by Bromo-Seltzer Ltd. was the well known preparation called "Bromo-Seltzer." In 1937, Bromo-Seltzer Ltd. had an arrangement with McGillivray Bros. Ltd. (hereafter called "McGillivray"), a selling and marketing agency carrying on business at Toronto, to sell and distribute its product in Canada on much the same terms, if not precisely the same, as with Proprietaries, that is, the prices to McGillivray were at specified wholesale prices, and it in turn was to invoice its customers at specified prices. The occasion for referring to this business arrangement between Bromo-Seltzer Ltd. and McGillivray is that Bromo-Seltzer Ltd. was assessed by National Revenue for the sales tax on its sale prices to McGillivray, and not on the sale prices of McGillivray to

its customers. Proprietaries, on entering into this arrangement with Bromo-Seltzer Ld., took over the selling organization of Bromo-Seltzer Ld., just as in the case of Noxzema. Proprietaries also became the sole distributors in Canada for two other preparations or articles known as "Rem" and "Rel" respectively. As the customers for the products of Noxzema and Bromo-Seltzer Ld. were largely druggists and chain stores, it was expected that a saving would be effected in the sale and distribution of such products through the one selling organization of Proprietaries, and the latter expected to secure from time to time the sole selling rights in Canada of the products of other producers, the customers for which would be largely those who were the customers for the goods Proprietaries were already distributing under the arrangements mentioned.

The idea of creating such an organization as Proprietaries originated with Dr. Andrews, of Bromo-Seltzer Ld. He had some years earlier proposed to Shaw the organization of such a selling and distributing agency as Proprietaries, with a view to acquiring the exclusive selling rights for Canada of the products of Noxzema and Bromo-Seltzer Ld., believing that advantages to all concerned would accrue therefrom, but he was unable at that time to induce his associates to look with favour upon this suggestion or proposal. Later Dr. Andrews again approached Shaw with this proposal, which after a time resulted in the organization of Proprietaries, and Shaw became its President and General Manager, with the assent of Noxzema and the parent company. As already mentioned, while Shaw is associated with and interested in Proprietaries, and from which he receives a salary of \$2,500 a year, he still continues to be the General Manager of the manufacturing business of Noxzema, under the terms of his contract with Noxzema; he devotes the major portion of his time to the business affairs of Noxzema, but the working portion of Saturdays he devotes entirely to the affairs of Proprietaries, at its business office which is quite distinct and separate from that of Noxzema, and an hour or two on other days in supervising its business operations.

I have felt obliged to explain at length all these matters pertaining to the business affairs of Noxzema and Proprietaries in order to disclose fully their relations the one to

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the other, and the relations of Shaw to each of them, all of which matters were prominently mentioned during the course of the trial. The conduct of the business relations between Noxzema and Proprietaries is in some respects rather unusual, and in an issue of this kind they are liable to fall under suspicion. However, after hearing all the evidence, I have no difficulty whatever in finding that the business arrangement entered into between those two companies, and the association of Shaw with each of them in the capacities I have described, were conceived, entered into, and at the material time were being carried out, in good faith, for what seemed to the parties concerned as fair and sound business reasons, and that it was in no way designed to avoid the taxes in question, or to defeat in any way the public revenues. It is not possible, in my opinion, to reach any other conclusion upon the evidence. Whether this arrangement was a prudent engagement for the parties concerned to enter into, or whether the results are likely to be financially fruitful, is something with which the Court is not concerned. The arrangement was not an unusual one, and was one often made in this country and other countries, and illustrations of corresponding arrangements in Canada are shown in one of the exhibits put in evidence. It simply means that a manufacturer of goods contracts to sell his products to a selling and distributing organization instead of doing that himself. Bromo-Seltzer Ld. had the same arrangement with McGillivray prior to its arrangement made with Proprietaries. Such an arrangement cannot be condemned because, as was alleged, it creates an administrative problem in imposing the sales tax, that is, because the volume of the tax would vary in the case where a manufacturer himself disposes of his own products on the market from the case where another manufacturer sells the same class of goods to a selling and distributing organization. I am not at all sure that this does in fact constitute what might be called an administrative problem. In this case there is no ground, in my opinion, for doubting that the arrangement between Noxzema and Proprietaries was entered into in good faith and without any ulterior purpose, or that the sales to Proprietaries were not made at fair prices and were not based on the usual cost and profit factors determining the prices at which a manufacturer might transfer his products to

a purchaser, which is a selling and distributing organization. The fact that Shaw was an officer and employee of both concerns is not, I think, such an element in the combined facts here as should justify the conclusion that the relations of Noxzema and Proprietaries were of a character different from what I find them to be. There appears to have been the utmost frankness on the part of Noxzema and Proprietaries, and Mr. Wilson their solicitor, in disclosing to the tax authorities, prior to the bringing of this action, all the facts relating to the origin of the trading arrangement between them, and the manner in which that arrangement was being carried out. Such are my conclusions as to the facts of this phase of the case and probably I shall have occasion to revert to such facts in discussing other points which have been raised.

Before proceeding to a discussion of the main point for decision there are one or two matters of a preliminary nature to which I should refer, and the first is the memorandum, or judgment as it was called by Mr. Carson, wherein the Minister determined the "fair price," and which I have already recited fully. I think it is correct to say that where by statute a power is given a member of the executive government, in his administrative capacity, to determine what is the "fair price" under s. 98 of the Special War Revenue Act, he is to act judicially, and the judicial act must be performed upon proper principles, which Mr. Carson contends the Minister failed to do here. In this connection Mr. Carson referred to *Pioneer Laundry & Dry Cleaners Ltd. v. The Minister* (1), and the authorities therein mentioned, wherein that principle is discussed. I do not think it is necessary to discuss further that principle or to refer to the many other authorities touching it. The memorandum of the Minister recites that Noxzema, prior to January 1, 1939, sold the whole of its manufactured products to various wholesale dealers, the sale prices for which included the sales tax, and it accounted for the sales and excise tax on the basis of such sales to the trade; that commencing January 1, 1939, Noxzema entered into an arrangement with Proprietaries whereby the latter obtained the exclusive selling rights of the products of the former, in Canada, and during the period from January 1st to July 31st of 1939, Noxzema "sold or purported to

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(1) (1939) S.C.R. 1; (1940) A.C. 127; (1939) 4 D.L.R. 481.

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sell" the whole of its manufactured products to Proprietaries for resale to wholesalers and chain stores; that the prices received by Noxzema from such sales to Proprietaries were less than the fair prices on which the sales tax and excise tax should be imposed; and the final paragraph declares that the prices at which Proprietaries sold the goods in question to wholesalers and chain stores were the fair prices on which the taxes payable by Noxzema should be imposed. Such a formal presentment of the reasons for the Minister's determination was not, I think, imperative though perhaps desirable. Mr. Carson endeavoured in many ways to ascertain the evidence upon which the Minister acted, and its source. An administrator is, I think, in a relatively free position so far as the evidence upon which he acts is concerned. It has been said by some text-book writers on administrative law that he may act without evidence, he may act against what evidence there is, or he may accept as evidence testimony of a kind which would not for a moment be admissible in a court of law, and all this, I think, is in a general way correct. He may obtain the necessary material from any source to which he desires to resort. When Parliament entrusts a Department with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow its own particular methods of procedure, which is necessary if it is to do its work efficiently. In a large Department like that of National Revenue, where a large volume of work is entrusted to the Minister, he cannot be expected to do much of that work himself. As was said by the Lord Chancellor in *Local Government Board v. Arlidge* (1): "He is expected to obtain his material vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly Unlike a judge in a court, he is not only at liberty but is compelled to rely on the assistance of his staff." It may, I think, be said safely that the "fair prices" determined by the Minister were reached by adopting the distributor's prices, the prices of Proprietaries. I think the fair inference to be drawn from the written document is that the "fair prices" were determined by the Minister, on the ground of some association existing between the

(1) (1915) A.C. 120 at 133.

two companies, or that Proprietaries was but the selling agent of Noxzema, or that they both had a common interest in such sales, otherwise the sale prices of Proprietaries were entirely irrelevant. The sale prices of Proprietaries were, I think, adopted only because of a belief in the existence of some such relationship between the two companies, but if such there were not, the prices of Proprietaries cannot, I think, be translated into the prices at which Noxzema sold its goods. All the evidence introduced or brought out by Mr. McRuer at the trial supports such an inference, and plainly points to the fact that the taxing authorities were under the belief that the relations between Noxzema and Proprietaries were such that the Minister was warranted in holding that the sale prices of the latter were for taxation purposes the sale prices of the former. While perhaps Mr. McRuer did not unequivocally argue that Proprietaries was the mere selling agent of Noxzema, and was not an independent concern, yet he persistently suggested that idea. He urged, to use almost his exact words, that when the Minister found such a relation between Noxzema and Proprietaries as he did, when he found Proprietaries interposed between Noxzema and dealers in the trade, when he found the General Manager of Noxzema was the General Manager of Proprietaries, and when he observed the circumstances surrounding the set-up of both companies, all these, he said, were elements for the Minister to take into consideration when determining the sales price under s. 98. I cannot avoid the conclusion that the determination of the Minister here was induced by the fact that he had reached the conclusion, or was so advised by his officers, that the business relations between Noxzema and Proprietaries were such as to justify the conclusion that the sale prices of Proprietaries were the fair sale prices of Noxzema, and that the sale prices of Proprietaries should be treated as the "fair prices" of Noxzema, and the exposition of facts preceding the final paragraph in the Minister's determination would appear to support that inference; and without hearing all the evidence which I heard, the conclusion reached by the Minister is one that may be readily understood, but any such presumption I exclude by my findings upon the facts disclosed at the trial. That the "fair prices" were reached by the Minister in the manner

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I have indicated is, I think, a fair inference from the composition and form of the written determination, and that idea runs like a red thread throughout the whole of the case of the Crown. That, I think, was wrong. I have not been able to see how the Minister could determine the "fair prices" of Noxzema to be those of the sale prices of Proprietaries except upon the theory of the existence of the relationship which I have mentioned, because I think it is clear that Noxzema did sell its goods to Proprietaries at fair prices, considering the conditions of sale, and there was no suggestion that those prices were below the prices which such goods would fetch on a sale in the open market at the time, or below the sale prices of other manufacturers for similar goods, if sold for delivery at the factory.

Another matter, one of the most difficult points raised in this case is the following, and it is of general importance. It was contended that the Minister having determined the sale prices under s. 98, that determination is conclusive against the taxpayer, and further, that even if Noxzema is sued for the taxes so determined as a debt, it is precluded from contesting the validity of such tax levy, and virtually from raising any defence thereto, on the ground that the Court is without jurisdiction to entertain any claim to set aside or vary the determination made by the Minister under s. 98 of the Act. The real defence raised here by Noxzema is that it is not liable for the taxes sued upon at all, computed at any sale prices, and it claims that in fact and in law no such liability ever existed, that any taxes for which it was liable were already paid and at prices not less than the fair prices, and that the sale prices of Proprietaries are utterly irrelevant here, it being an independent trading unit and in no way associated with Noxzema, except as a purchaser of its goods. The Information here is based on the written determination of sale prices by the Minister, and it is contended that in this action for debt the determination of the fair prices under s. 98 is conclusive of the liability of Noxzema for the taxes sued upon. If that be so then there is a serious obstacle in the path of Noxzema in attempting to resist the claim of the Minister, even though this proceeding be an action for a debt alleged to be due the Crown.

While there appears to be no remedy by way of appeal available to the taxpayer from the determination made by the Minister under s. 98 of the Act still I do not think that precludes the taxpayer from raising any proper defence to this action. I do not think that any provision of the Act, expressly or by necessary implication, excludes the exercise of that common law right. The Special War Revenue Act makes no provision for an appeal from the imposition of the sales tax under s. 86, or from any sales price determined by the Minister under s. 98, in fact there does not appear to be any provision for an appeal by the taxpayer under any of the Parts of the Act. And probably it was on practical considerations that it was deemed undesirable to make any provision for appeals where a tax on sales of goods is imposed by reference to their value, and where the tax has so wide an application. Sec. 106 of the Act requires every person liable for the sales tax to make a return of his taxable sales monthly, verified by statutory declaration, and the tax is payable within a month of the time prescribed by the Act or by regulations established thereunder. Considering the large number of returns to be made and the small number likely to be seriously contested, on the ground of the sale price, it was likely deemed prudent to provide that any denial of liability by the taxpayer for the tax, in whole or in part, would be heard and determined when and if the tax levied were sued upon by the Crown. Sec. 108 (1) provides that all taxes or sums payable under the Act shall be recoverable at any time after the same should be accounted for and paid, as a debt due to or as a right enforceable by the Crown, in the Courts there mentioned. This would preserve the legal rights of the taxpayer and afford him an opportunity of presenting and establishing any defence as to his legal liability for the tax. It was in such circumstances that this proceeding was initiated, which is an action for debt, and so far as I know such has been the usual practice where the tax is unpaid and its validity is in dispute between the taxpayer and the revenue authorities. One can hardly imagine the Crown designedly refraining to provide some procedure whereby the subject might at some stage contest his liability for a tax imposed by the Crown, if such were his desire. In such cases as *The King*

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v. *Rice Mills* (1), *The King v. B.C. Brick & Tile Co.* (2), *The King v. The Palmolive Manufacturing Co.* (3), and *The King v. Plotkins* (4), the sales taxes claimed were sued upon as a debt, and the debt claimed by the Crown was in each case the difference between the prices at which the defendant and some other party sold the same goods, it being alleged by the Crown in each case that the defendant and the other party were so associated in connection with the manufacture or the sale of the goods in question, that the defendant was liable for the sales tax at the selling prices of that other party, just as in this case; the exact facts as they developed in each of those cases I need not pause to explain. It is true that in none of the cases mentioned did the Minister determine the fair price under s. 98 of the Act before action was brought, but the issues there were in principle nevertheless exactly the same as here, that is to say, the prices at which the other party sold the goods were said to be the fair prices upon which the defendant should be taxed because of its business association with that other party. But in none of such cases was it suggested or urged that the taxpayer could not be heard to say that the tax imposed was invalid, on grounds other than what was the fair sale price. In an action by the Crown for a debt, I think, it is the right of the subject to plead any proper and available defence thereto and to sustain the same by evidence if he can, and my attention has not been directed to any authority to the contrary, and I do not think that right has been taken away by any of the terms of the Special War Revenue Act. Nor do I think that in such a case as this the Court is without jurisdiction to entertain the defences here submitted by Noxzema, by reason of the determination of the "fair price" by the Minister under s. 98 of the Act. Sec. 108 (4) provides for the filing of a certificate of default in the payment of the tax and this operates as a judgment obtained upon the filing of such certificate in a Court. This section provides a summary procedure for obtaining judgment where there has been a default in the payment of the tax and this procedure is availed of in hundreds of cases annu-

(1) (1938) Ex. C.R. 257; (1939)
 2 D.L.R. 45 & 544.
 (2) (1936) Ex. C.R. 71; (1936)
 3 D.L.R. 23.

(3) (1932) Ex. C.R. 120; (1933)
 S.C.R. 131.; (1933) 2 D.L.R.
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 (4) (1939) Ex. C.R. 1; (1939) 4
 D.L.R. 128.

ally in this Court, by the taxing authorities, but, I assume, usually in cases where liability for the tax claimed is not in dispute. It is the equivalent of a judgment entered in default of pleading by a defendant in the ordinary action in any Court, and would be readily opened up by that Court on cause being shown. Here the real issue is whether Noxzema is liable at all for any portion of the amount sued upon, on the ground which I have already stated and need not repeat. I am of the opinion that Noxzema is entitled to present that defence in answer to the Information.

I come now to a consideration of the provisions of the Special War Revenue Act relevant to the matter to be decided here. The principal provisions of the Act with which we are concerned are found in Part XIII of the Act, consisting of sections 85 to 98 inclusive. Sec. 86 imposes the sales tax "on the sale price of all goods produced or manufactured in Canada," and the tax is made payable by the producer or manufacturer "at the time of the delivery of the goods to the purchaser thereof." Noxzema, as a manufacturer, was therefore liable for the sales and excise taxes on the sale price of goods produced by it and sold to Proprietaries, and the same were paid. But it is contended that the prices at which Noxzema sold the goods in question to Proprietaries were, in the judgment of the Minister, "less than the fair price on which the tax should be imposed," and s. 98 provides that in such a case the Minister "shall have the power to determine the fair price," and "the taxpayer shall pay the tax on the price so determined." What then is the "fair price" in the facts of this case, or within the meaning of the Act? Sec. 85 states that the "sale price," for the purpose of calculating the amount of the sales tax, means the price before the sales tax is added thereto, and includes any charges for advertising, financing, servicing, or any other charges of a similar nature contracted for at the time of the sale; the "sale price" therefore means the price at which such goods are sold by the manufacturer, plus such of those other charges just mentioned if they form a term of the contract of sale, but charges of that nature do not enter into this case. Ordinarily, the sale price would be

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the "fair price." The phrase "fair price" is a commercial term and not a legal term, and it involves a question of fact, into which many considerations may enter. The sale price of one manufacturer may not be the sale price of another manufacturer of the same class of goods, and the statute does not, I think, contemplate such a thing, and in fact could not in fairness and reason do so, because production costs vary with manufacturers. Business agencies organized for the purchase, sale and distribution of the goods of producers are well known, and in such cases such organizations purchase goods from producers and assume the expenses incidental to the selling and distribution of the same, whereas in other cases the producer who sells and distributes his own products assumes that expense, and that of course enters into the computation of his sale price. While Noxzema belongs to the first group, yet it is being held liable for the tax as if it belonged to the second group, and is asked to agree that its sale price should be the same as in the case of those of the second group who must bear all the expenses incurred in selling and distributing their products, which those of the first group do not incur. That does not seem to me the thing that the statute means, or that the legislature intended it to mean. No evidence was introduced on behalf of the Minister to show what were the sale prices charged by producers other than Noxzema, for goods of the class in question here, if sold to a sales and distributing organization, but it need not be doubted that they would be substantially the same; I have mentioned the case of the sales of Bromo-Seltzer Ld. to McGillivray, and I have no doubt other similar examples might be found. If the sales prices of Noxzema to Proprietaries were the normal prices of all manufacturers of a comparable class of goods to independent dealers, and such I think they were, I do not see how it can be said that the prices of Noxzema were less than the fair prices, as contemplated by the Act. That brings me to the definite question as to whether in the state of facts here the statute empowers the Minister to fix the sales prices of Noxzema so as to include items of cost and expense which it has not incurred, and which could not enter into the computation of its

production costs or its sale prices. Did the Act, in the circumstances here, empower the Minister to fix the sale prices of Noxzema at other than its actual sale prices, when they were not below the fair prices as between a manufacturer and a dealer, the dealer being an independent trading corporation? I think not. There is no evidence to show that the sale prices of Noxzema were less than the fair prices, in fact the evidence indicates that its prices were the fair prices when sold to a selling and distributing organization which had to assume the expenses of sale and distribution. I do not think the statute can be construed to mean that the Minister might arbitrarily advance the sale prices of Noxzema for the purposes of the tax, without evidence that such prices were less than the fair prices, when sold in the circumstances I have described. A test of the fairness of the prices at which Noxzema sold its goods to Proprietaries is that they were the same prices as those at which it had previously sold its goods to the trade, less the expenses of sale and distribution which were now to be borne by Proprietaries. The trading position of Noxzema was not adversely affected so far as net profits were concerned, and in fact its gross sales increased about thirty per cent in the first eighteen months of the arrangement with Proprietaries. I think that s. 98 contemplates the case where the producer has sold his goods to a dealer below the normal market prices, below the average of the prices of other manufacturers of the same class of goods, and was not designed or intended to meet the facts developed in the case under consideration. I am therefore of the opinion that the Minister was not empowered in this case to determine that the sale prices of Noxzema should be those of the independent trading corporation, Proprietaries, and that Noxzema is not liable to pay the taxes in question on the sale prices determined by the Minister.

The Information is therefore dismissed and with costs to the defendant.

Judgment accordingly.

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