1938
Feb. 17.
1939
March 14.

BETWEEN:

DOMINION BRIDGE COMPANY LIMITED .... SUPPLIANT;

AND

HIS MAJESTY THE KING.......... RESPONDENT.

Revenue—Petition of right to recover money paid to the Crown for Sales Tax—Special War Revenue Act, R.S.C., 1927, c. 179, secs. 86, 87, 104 and 105—Goods sold and delivered—Tax levied "on the sale price . . . at the time of delivery."

By certain contracts entered into between the suppliant and His Majesty the King, represented by the Minister of Public Works in His Majesty's Government for the Province of Quebec, the suppliant undertook to erect the structural steel superstructure of three bridges in the Province of Quebec, in consideration of the sums set out in each contract. The contracts provided that the suppliant was to furnish all the materials, merchandise, tools, labour, implements, carriages and scaffoldings, the requisite number of mechanics and workmen, and all things needful and proper for the due and proper performance and completion of the work undertaken and all matters and things incident to the same.

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. 179, and amendments. It paid, under protest, a proportion of the amounts so assessed, to the Commissioner of Excise by cheque made to the order of the Collector of National Revenue at Montreal.

Suppliant now claims 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.

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Respondent denies that the materials in question were sold to His Majesty the King in the right of the Province of Quebec and that the provisions of the Civil Code apply. Respondent further alleges that the materials in respect of which the suppliant was assessed for sales tax were manufactured or produced by the suppliant for the performance of the contracts mentioned and that suppliant became liable to pay sales tax in respect of such materials and was rightly assessed.

Held: That the materials supplied by the suppliant and incorporated by it in the superstructure of the three bridges are goods sold and delivered to His Majesty the King in the right of the Province of Quebec within the terms of s. 86 (*a*) of The Special War Revenue Act and are liable to sales tax.

2. That the goods were not purchased by His Majesty the King in the right of the Province of Quebec for purposes of resale, and suppliant is therefore entitled to a refund of the money paid to respondent, pursuant to s. 105, ss. 1, of The Special War Revenue Act.

PETITION OF RIGHT by suppliant herein to recover from the Crown certain sums of money paid to it by suppliant for sales tax.

The action was tried before the Honourable Mr. Justice Angers, at Ottawa.

L. A. Forsyth, K.C. and John deM. Marler for suppliant.

F. P. Varcoe, K.C. and *R. Gibeault* for respondent.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

ANGERS J., now (March 14, 1939) delivered the following judgment.

(Having stated the facts the learned Judge continued.)

There is no dispute about the amounts of the assessment; its validity alone is contested.

In opening, counsel for the suppliant declared that his client, for the purpose of raising the issue, had paid certain amounts on account and applied for a fiat for a petition of right to recover them so that the legal right to impose the tax might be decided.

Counsel for the suppliant submitted that the transactions in question are taxable under section 86 (*a*) of the Special War Revenue Act and that under section 105 thereof the taxpayer is entitled to a refund. Counsel for the respondent, on the other hand, urged that the said

transactions are subject to section 87 (*d*) and that section 105 does not apply.

It will be convenient to cite the relevant provisions of sections 86, 87, 104 and 105:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of six 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 . . . .

87. (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.

104. The taxes imposed by Parts X, XI, XII, and XIII of this Act shall apply to goods imported by

(*a*) His Majesty in the right of the Government of Canada;

(*b*) His Majesty in the right of the Government of any province of Canada, for the purpose of resale.

105. (1) A refund of the amount of taxes paid under Parts X, XI, XII and XIII of this Act may be granted to a manufacturer, producer, wholesaler, jobber or other dealer on goods sold to His Majesty in the right of the Government of any province of Canada, if the said goods are purchased by His Majesty, for any purpose other than purposes of resale. . . .

To bring the transactions which took place between His Majesty the King in the right of the Province of Quebec and the suppliant within the scope of section 86, one must conclude that the suppliant sold and delivered goods, produced or manufactured in Canada, to His Majesty the King. Counsel for the suppliant naturally contended that this is what had occurred. If that is the case, the refund clause contained in paragraph 1 of section 105 would apply: the superstructure of the three bridges in question erected by the suppliant with its materials on behalf of His Majesty the King in the right aforesaid was not acquired by the latter for purposes of resale.

Can it be said that the suppliant sold to His Majesty the King "goods," or, to use the word included in the French version of section 86 to which my attention was drawn, "marchandises"? Or is it more appropriate and judicious to say, as suggested by counsel for the respondent, that what the suppliant sold to His Majesty the King was an immovable property, viz., the superstructure of three bridges?

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Three cases were cited to which I deem it convenient to refer: *Dominion Press, Limited and Minister of Customs and Excise* (1); *His Majesty the King and Fraser Companies, Limited* (2); *His Majesty the King* v. *Henry K. Wampole & Company, Limited* (3).

In the case of *Dominion Press, Limited and the Minister of Customs and Excise,* the latter had brought an action against the former in the Superior Court of the Province of Quebec claiming arrears of sales tax under the Special War Revenue Act, 1915, and amendments. The Superior Court held that the company was not liable for the tax. An appeal, taken direct to the Supreme Court, was allowed unanimously. The Judicial Committee of the Privy Council affirmed the decision of the Supreme Court.

As appears from the reports, Dominion Press, Limited carried on business as job printers. Its operations consisted in printing to the order of individual customers stationery of a business character, such as cards, labels, order forms, price lists and statements. No privity of contract was created between the supplier of the paper used and the customers. The company supplied at a fixed price the material and the labour and delivered to its customers the finished article.

The judgment of the Judicial Committee of the Privy Council was delivered by Lord Hailsham, L.C.; it seems to me expedient to quote an extract therefrom (p. 341):

> The appellants contend that in these circumstances they do not come within the words of the taxing statute. The Act of 1922 imposes a tax of 2¼ per cent "on sales and deliveries by Canadian manufacturers or producers and wholesalers or jobbers," and it contains two provisos. First of all, there is a proviso which enacts that "the tax shall not apply to sales or importations of job-printed matter produced and sold by printers or firms whose sales of job printing do not exceed 10,000 dollars per annum." Secondly, there is a proviso that the taxes "shall not be payable on goods exported or on sales of goods made to the order of each individual customer by a business which sells exclusively by retail under regulations by the Minister of Customs and Excise, who shall be sole judge as to the classification of the business."
>
> The Act of 1923 imposes a tax of 6 per cent "on the sale price of all goods produced or manufactured in Canada"; and it does not reproduce the provisos.
>
> The first question to be determined is obviously whether or not these transactions are sales and deliveries by Canadian manufacturers or producers within the enacting words of this section. In their Lordships' opinion they do come within that language.

(1) (1927) S.C.R., 583; (1928) A.C. 340.
(2) (1931) S.C.R. 490.
(3) (1931) S.C.R., 494.

There has been a discussion before the Board as to whether or not the contract was a contract of sale and delivery within such cases as *Lee* v. *Griffin* (1861, 1 B. & S. 272), or a contract for work and labour done and materials supplied within the authority of *Clay* v. *Yates* (1856, 1 H. & N. 73).

In their Lordships' opinion the material matter to be considered is as to the meaning of the expression "sales and deliveries by Canadian manufacturers or producers" as used in this statute.

Having regard to the language of the first proviso and to the general scope of the enactment, their Lordships entertain no doubt that these contracts were contracts of sales and deliveries by Canadian manufacturers or producers, within the meaning of the taxing statute, and that the payments made under them constituted the sale price of goods produced or manufactured in Canada. That would be enough to dispose of the appeal with regard to the period after January, 1924.

The observations concerning the second proviso, which was not reproduced in the Act of 1923 (13-14 Geo. V, ch. 70) nor in the subsequent Acts, offer no interest in the present case.

The Honourable Mr. Justice Rinfret, who delivered the judgment of the Supreme Court, expressed himself as follows (p. 586):

On this evidence, the contract between the respondent and its customers is not one of lease and hire, but one of sale. It is a contract for the sale of a thing to be made ("chose à faire" or "chose une fois faite").

Such is the solution of the Roman law and of the old French law which the Commissioners have embodied in the Civil Code of Quebec. On this subject, a quotation from Pothier (Bugnet, 3rd edition, vol. 4, no. 394) is strictly in point:

Ce contrat (de louage d'ouvrage) a aussi beaucoup d'analogie avec le contrat de vente.

Justinien en ses Institutes, au tit-de Loc. cond., dit qu'on doute à l'égard de certaines contrats, s'ils sont contrats de vente ou contrats de louage, et il donne cette règle pour les discerner; "lorsque c'est l'ouvrier qui fournit la matière, c'est un contrat de vente; au contraire, lorsque c'est moi qui fornis à l'ouvrier la matière de l'ouvrage que je lui fais faire, le contrat est un contrat de louage."

Par exemple, si j'ai fait marché avec un orfèvre pour qu'il me fasse une paire de flambeaux d'argent, et qu'il fournisse la matière, c'est un contrat de vente que cet orfèvre me fait de la aire de flambeaux qu'il se charge de faire; mais si je lui ai fourni un lingot d'argent pour qu'il m'en fît une paire de flambeaux, c'est un contrat de louage.

Observez que, pour qu'un contrat soit un contrat de louage, il suffit que je fournisse à l'ouvrier la principale matière qui doit entrer dans la composition de l'ouvrage; quoique l'ouvrier fournisse le surplus, le contrat n'en est pas moins un contrat de louage.

On peut apporter plusieurs exemples de ce principe.

Lorsque j'envois chez mon tailleur de l'étoffe pour me faire un habit: quoique le tailleur, outre sa façon, fournisse les boutons, le fil, même les doublures et les galons, notre marché n'en sera pas moins un contrat de louage, parce que l'étoffe que je fournis est ce qu'il y a de principal dans un habit.

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Pareillement, le marché que j'ai fait avec un entrepreneur pour qu'il me construise une maison, ne laisse pas d'être un contrat de louage, quoique par notre marché il doive fournir les matériaux, parce que le terrain que je fournis pour y construire la maison, est ce qu'il y a de principal dans une maison, quum aedificium solo cedat.

The modern doctrine and jurisprudence in France should perhaps be accepted with caution, because article 1711 of the Code Napoléon contains the following definition:

Les devis, marchés, ou prix faits pour l'entreprise d'un ouvrage moyennant un prix déterminé sont aussi un louage lorsque la matière est fournie par celui pour qui l'ouvrage se fait;

which is not to be found in the Civil Code of Quebec. But the preponderating opinion is that the above passage of Pothier well expresses the state of the old law (Fuzier-Herman, Répertoire, verbo Louage d'ouvrage, de services et l'industrie, no. 1105). Planiol (Droit Civil 6th ed. vol. 2, no. 1902) calls it the "solution traditionnelle". On the authority of *Clay* v.*Yates* (1 H. & N. 73; 156 E.R. 1123) the situation would be the same under the common law.

According to the evidence before us, the respondent does not undertake to print on material (such as tags, cards, or paper generally) supplied by the client. It contracts to sell and deliver printed business cards, labels, order forms, price lists, statements and general stationery. The transactions described in the evidence and in respect of which the Minister seeks to recover taxes are sales. In the words of Pothier, "elles participent du contrat de vente."

In that case the goods involved were movables and remained so; in the present instance the goods, originally movables, were incorporated in an immovable property and are now an integrant part thereof. It was urged on behalf of respondent that the members which the suppliant fabricated and incorporated in the superstructure of the bridges were not sold and delivered to His Majesty the King but that the object of the sale, if there were a sale, was the superstructure of the bridges fully completed and erected. I do not think that it makes a particle of difference that, instead of being sold separately and distinctly, the members of the superstructures in question, manufactured expressly for His Majesty the King, were incorporated in the constructions which the suppliant had undertaken to make for him. The transactions which took place between the suppliant and His Majesty the King, in so far as the supply of the materials required for the erection of the superstructure of the bridges is concerned, constitute a sale.

The next case cited is that of *His Majesty the King* v. *Fraser Companies, Limited.* The defendant respondent was a manufacturer of lumber for sale; it consumed a portion of the lumber so manufactured in the construc-

tion and repair of pulp and other mills and of houses for its employees. The lumber so consumed was taken from stock in the yards produced and manufactured, in the ordinary course of the company's business, for sale and not produced or manufactured for the purpose for which it was used.

The majority of the Supreme Court (Newcombe, Rinfret, Lamont and Smith, JJ., Cannon, J., dissenting) held that the company was liable for sales tax on the lumber so consumed.

Smith, J., who delivered the judgment, after relating the facts and quoting sections 86 (*a*) and 87 (*d*), continued as follows (p. 492):

The learned President of the Exchequer Court, before whom the case was tried, dismissed the action (1931, Ex. C.R. 16), on the ground that the lumber so consumed was produced in the ordinary course of business for sale, and not specifically for use by the manufacturer, within the meaning of the above quoted s. 87 (*d*).

With great respect, I am unable to take this view of the meaning and effect of these provisions of the Act. To so construe them is to put a narrow and technical construction upon the precise words used in clause (*d*), without taking into consideration the meaning and intent of the statute as a whole. It seems to me clear that the real intention was to levy a consumption or sales tax of four per cent on the sale price of all goods produced or manufactured in Canada, whether the goods so produced should be sold by the manufacturer or consumed by himself for his own purposes.

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, 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.

It is quite clear that the lumber in question, although manufactured for sale, was used by the manufacturer for its own purpose and benefit. I do not think that this decision has any application in the present case.

The third case to which reference was made is that of *His Majesty the King* v. *Henry K. Wampole & Company, Limited.*

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The company, in the course of its business as manufacturer of pharmaceutical products, put up in small packages and distributed free among physicians and druggists samples of its products for the purpose of acquainting them with their character and quality.

A special case was agreed upon for the opinion of the Court, clause 4 of which was drafted as follows:

> 4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

After quoting this clause, Anglin, C.J.C., delivering the judgment of the majority of the Court (Anglin, C.J.C., and Rinfret, Lamont and Cannon, JJ., Newcombe, J., dissenting) said (p. 497):

> It is obvious to me that it cannot have been the intention of the Legislature to tax the same property twice in the hands of the manufacturer. Having regard to the admission of paragraph 4, above quoted, such double taxation would ensue were we to hold the samples here in question to be now subject to the consumption or sales tax, it being there admitted that the cost of producing such samples is included in the
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> > cost of production of articles manufactured and sold, in respect of which . . . . the company has paid sales tax.
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> If the cost or value of these goods used as samples has already been a subject of the sales tax in this way, it would seem to involve double taxation if they should now be held liable for sales tax on their distribution as free samples. But for the admission of paragraph 4, however, I should certainly have been prepared to hold that the "use" by the company of goods manufactured by it as free samples for advertising purposes is a "use" within clause (*d*) of section 87 of the Special War Revenue Act, R.S.C., 1927, ch. 179.

The dissent of Newcombe, J., related to the interpretation to be given to clause 4 of the special case aforesaid; the learned judge expressed the following opinion (p. 498):

> I am in agreement with my lord and my learned brethren as to the interpretation of the charging section; but I am not persuaded that the facts admitted by clause 4 of the case constitute payment, or operate to relieve the respondent company of its liability for the tax. If the sale price of the goods were increased by the company's method of bookkeeping, I do not doubt that the fact would have been stated.
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> I see nothing in the case to justify a finding of double taxation, or that the tax upon the samples, to which, in the view of the court, the Government was entitled, has been paid; . . . .

Here again it is evident that the goods upon which His Majesty the King wanted to impose a sales tax were used

by the manufacturer thereof for its own benefit and advantage, and I do not think that the decision has any bearing on the question at issue.

The underlying principle of the Act, to my mind, is that all goods produced or manufactured in Canada shall be subject to a consumption or sales tax on the sale price or value thereof, according as they are sold by the producer or manufacturer or consumed by him for his own purposes.

It was contended on behalf of the respondent that the matter in controversy herein is governed by section 87 (*d*) and not by paragraph (*a*) of subsection 1 of section 86, because there was no sale of the goods but use thereof by the suppliant. I cannot agree with this contention; I do not think that the members incorporated in the superstructure of the bridges can be considered as goods made for the use of the suppliant and not for sale.

Although I believe that the material matter to be determined is the meaning of the expression "on the sale price . . . . at the time of the delivery," I may perhaps note that, under the law of the Province of Quebec, the contracts entered into between His Majesty the King in the right of the Province of Quebec and the suppliant are not contracts of lease and hire but are contracts of sale: Mignault, Droit Civil, vol. 7, p. 401, par. 11; Pothier (ed. Bugnet) vol. 4, No. 394; Guillouard, Traité du Contrat de Louage, vol. 2, no. 772; Fuzier-Herman, Répertoire Général, vol. 26, no. 1105; Lyon-Caen & Renault, Traité de Droit Commercial, 4th ed., vol. 5, no. 152; Planiol, Traité Elémentaire de Droit Civil, 9th ed., vol. 2, no. 1902; Planiol & Ripert, Traité Pratique de Droit Civil Français, ed. 1932, vol. 11, no. 912.

After a careful perusal of the evidence and of the argument of counsel and the authorities cited, I have reached the conclusion that the materials supplied by the suppliant company and incorporated by it in the superstructure of the three bridges aforesaid must be considered as goods sold and delivered to His Majesty the King in the right of the Province of Quebec within the meaning of section 86 (*a*) of the Special War Revenue Act and are consequently liable to a sales tax thereunder.

As these goods were not purchased by His Majesty the King in the right of the Province of Quebec for purposes

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of resale, I am of opinion that subsection 1 of section 105 applies and that the suppliant is entitled to a refund of the sum of $1,503, without interest.

The suppliant will have its costs of the action.

Judgment accordingly.

Case No. 17528, *Eastern Canada Steel & Iron Works Limited* v. *The King,* was also decided by the Honourable Mr. Justice Angers, on March 14, 1939. The material facts and issues involved were the same as in the case of *Dominion Bridge Company Limited* v. *The King.* Judgment was rendered in favour of the suppliant.