BETWEEN:

HIS MAJESTY THE KING..... PLAINTIFF;

AND

WILLIAM C. SHELLY..... DEFENDANT.

1934
Sep. 19.
1935
May 15.

Revenue—Special War Revenue Act, s. 87—Isolated act by person not a manufacturer or producer by trade—Sales Tax not payable.

Held: That the Special War Revenue Act, R.S.C. 1927, c. 179, does not impose any consumption or sales tax upon a person who, not being a manufacturer by trade, manufactures or produces, for his own use and with no intent of disposing of it by sale or otherwise, an object or article, which is not used in connection with any trade or business.

INFORMATION exhibited by the Attorney General of Canada, to recover from the defendant a certain sum for consumption or sales tax, under the Special War Revenue Act (R.S.C. 1927, c. 179).

The action was tried before the Honourable Mr. Justice Angers, at Vancouver, B.C.

No oral evidence was adduced, the facts material and relevant to the issue being admitted. Those particularly applicable are cited in the reasons for judgment.

C. M. O'Brian, K.C., for the plaintiff.

C. W. Craig, K.C., and *L. Ladner, K.C.*, for the defendant.

ANGERS J. now (May 15, 1935) delivered the following judgment:

This is an action for the recovery of a consumption or sales tax in the sum of $1,453.50, together with penalty interest thereon at the rate of two-thirds of one per cent per month from August 1, 1930, to October 31, 1933, namely, the sum of $377.91, and further penalty interest at the same rate from October 31, 1933, to the date of payment. The action is brought under the provisions of the Special

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War Revenue Act, R.S.C., 1927, chapter 179, and amendments thereto.

The defendant is a retired merchant and lives in the city of Vancouver, in the province of British Columbia.

In the years 1929 and 1930 the defendant built for his personal use a yacht which was called the *Cora Marie*. The yacht was launched in February, 1930, and was registered with the registrar of shipping at Vancouver, B.C., on or about April 17, 1930.

Admissions were made at the trial which may be summarized as follows:

the defendant built the *Cora Marie* which was completed in all respects on June 15, 1930;

the cost of the vessel, exclusive of fittings and furnishings, was $145,350;

the defendant sold the vessel in the fall of 1932;

the defendant was assessed for sales tax in respect of this vessel on the 20th of August, 1931;

a confirmatory notice of assessment was given to him on the 26th of August, 1933;

demand of payment on behalf of the Crown was duly made on the defendant and payment was refused;

the defendant was not and is not in the business of building boats or ships and the construction of the vessel *Cora Marie* was an isolated transaction;

the ship was not built for purposes of sale but for the personal pleasure of the defendant;

the defendant hired the workmen to do the work, paid their wages, purchased and paid for the materials and rented the place where the building operations were carried on;

the defendant sold the ship in the fall of 1932 for $80,000 cash and a boat which he subsequently sold for $6,000.

A document in the handwriting of defendant's solicitor containing these admissions was by consent filed as exhibit 1.

No evidence was adduced by either party at the trial.

The only question to determine is whether or not the defendant, in building a yacht for his personal use in the circumstances hereinabove set out, is to be considered a manufacturer or producer within the meaning of the Special War Revenue Act.

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Under section 86 of the Act, as amended by 18-19 Geo. V, ch. 50, s. 3; 19-20 Geo. V, ch. 57, s. 5, and 20-21 Geo. V, ch. 43, s. 2, there is imposed a consumption or sales tax of one per cent on the sale price of all goods (*inter alia*) "produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him."

"Sale price" is defined in subsections (*a*) and (*b*) of section 85.

Section 87, the first paragraph whereof was introduced into the statute by 13-14 Geo. V, ch. 70, s. 6, deals with cases where there is no fixed price of sale and where it is difficult to determine the value of the goods for the consumption or sales tax; the material portion of the section, as far as the present case is concerned, is as follows:

> Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because
>
> (*a*) .....
>
> (*b*) .....
>
> (*c*) .....
>
> (*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.

Subsection 2 of section 87 was inserted in the Act by 21-22 Geo. V, ch. 54, s. 12, which only came into force on the 3rd of August, 1931, subsequent to the date on which the yacht *Cora Marie* was completed; the said subsection is therefore inapplicable to the present case.

The Act contains no definition of the words "manufacturer" and "producer," with the exception, however, of the statement in subsection (*f*) of section 85 which can hardly be called a definition and which moreover has no relevancy to the issue herein.

It was submitted by counsel for defendant that his client was not a manufacturer or a producer within the meaning of the Act, for two reasons: firstly, because the word manufacturer or producer is not an adequate term to express the builder of a ship; secondly, because the word manufacturer or producer as used in the Act connotes manufacturing or producing in the way of a business and does not refer to an isolated transaction.

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"Producer" is defined:

In the Oxford Dictionary

1. One who or that which produces.

2. One who produces (grows, digs or manufactures) an article of consumption.

In the Imperial Dictionary

One who or that which produces or generates.

"Manufacturer," on the other hand, is defined as follows:

In the Oxford Dictionary

One who employs workmen for manufacturing; the owner of a manufactory.

In the Imperial Dictionary

One who manufactures; one who employs workmen for manufacturing; the owner of the manufactory.

As the verb "manufacture" is used in some of the definitions of the word "manufacturer," it is perhaps not inexpedient to quote the definitions of the verb, which are thus worded:

In the Oxford Dictionary

1. To work up (material) into forms suitable for use.

2. To make or fabricate from material; to produce by labour (now esp. on a large scale).

In the Imperial Dictionary

1. To make or fabricate from raw materials, and work into forms convenient for use, especially by more or less complicated processes; as, to manufacture cloth, nails or glass.

2. To work into suitable forms for use; as, to manufacture wool, cotton, silk or iron.

I think that the builder of a yacht is a manufacturer or producer in the broad sense of these words.

Counsel for the defendant submitted that the builder of a ship is in a position analogous to that of a man who builds a house. In support of this proposition, counsel relied on the definition found in Words and Phrases Judicially Defined, Vol. 5, manufacturer, p. 4356, under the heading "Repairer of vessel," where it is said:

> The term "manufacturer," within the meaning of Laws 1880, c. 542, s. 3, exempting manufacturers from certain taxes, does not include a

builder and repairer of vessels. Undoubtedly, using the word in its broadest sense, the builder and repairer of a vessel or a house, even, might be called a manufacturer. In either case such builder takes the raw material, and by the hand, or by machinery and tools, fashions it into form and shape for use. But this is not the ordinary and general meaning to be given to the word, and it is such general and ordinary meaning which words are to receive in the construction of statutes. *People* v. *New York Floating Dry Dock Co.* (N.Y.), 63 How. Prac. 451, 453.

I feel unable to agree with this contention. I can see no analogy between a shipwright and a builder of houses. I do not think that the verb "manufacture" can apply to immovables, i.e., to buildings in general and their accessories. The verb "manufacture," as the verb "fabricate," applies essentially, I would even say solely, to movables, i.e., to effects or goods of every nature and description.

Counsel also relied on the judgment in the case of *The People of the State of New York* v. *The New York Floating Dry Dock Company,* cited in the extract from Words and Phrases Judicially Defined hereinabove reproduced. This judgment was appealed and affirmed. (1)

In my opinion, the import of the judgment of the Court of Appeals in the case of *The People of the State of New York* v. *The New York Floating Dry Dock Company* is not as broad and absolute as the definition contained in Words and Phrases Judicially Defined would seem to intimate. The action was one for the recovery of taxes claimed to be imposed by chapter 542 of the Laws (of the State of New York) of 1880; paragraph 3 of the statute in question enacts (*inter alia*) that:

> Every corporation, joint-stock company, or association whatever, now or hereafter incorporated, organized, or formed under, by, or pursuant to law in this state or in any other state or country, and doing business in this state, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations, or companies wholly engaged in carrying on manufacture, or mining ores within this state, and agricultural and horticultural societies, associations or corporations, which exceptions, however, shall not include gas companies, trust companies, electric and steam heating, lighting and power companies, shall be liable to and shall pay a tax, as a tax upon its franchise or business, into the state treasury annually, to be computed as follows: . . . .

Miller, J., in delivering judgment for the Court of Appeals, after stating that the defendant company was incorporated "for the purpose of constructing, using and providing one or more dry-docks, or wet-docks, or other

(1) See 92 New York Reports, Court of Appeals (Sickels 47) 487.

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conveniences and structures for building, raising, repairing and coppering vessels and steamers of every description," said (at p. 488):

> The act under which the defendant was incorporated was of a special character, and the specification of the business which the defendant was authorized to carry on, under its charter, which states the general purpose and object of the incorporation, does not bring it within the provision of section 3 of said Act of 1880, which exempts manufacturing corporations from its provisions as to taxation. The term, 'manufacturing corporation,' cannot, we think, be considered as comprehending the business of the defendant, if the words employed are interpreted according to the common understanding of such language.
>
> While the act provides for the constructing, using and providing one or more dry- or wet-docks or other conveniences and structures for the purposes named, its main object evidently is building, raising, repairing and coppering vessels. The *principal portion of the work* which the corporation is authorized to perform *relates to the improvement of vessels which have already been constructed, and not to the construction of the same,* and taking all the parts enumerated together they cannot be considered as embraced within the term 'manufacturing,' and, if regarded separately, we think, they do not come within the definition of the term employed. According to Webster a manufacturer is one who works raw materials into wares suitable for use. The constructing, using and providing of one or more docks, as used in the act of 1880, is no more a manufacturing within the meaning of that word than would be the building of warehouses and elevators for the carrying on of the business of warehousemen or the erection of buildings or residences.

The judgment of the Court of Appeals is not quite as formal and explicit as that of the Court of first instance. Besides the Act on which it is based is materially different from the one with which we are concerned. The taxpayer, in the case of *The People of the State of New York* v. *The New York Floating Dry Dock Company,* was seeking to be exempted from taxation and, for that purpose, to be brought within the limits of an exception. The courts are not as a rule disposed to widen the scope of an exception; it is well settled law that exceptions must be construed strictly. However it may be, I may say, with all due respect, that I do not consider myself bound by this judgment and that, if it purports to decide that a builder of vessels is not a manufacturer within the common and usual acceptation of the word, I simply cannot agree with it.

The second reason invoked by counsel for the defendant is that his client is not a manufacturer or producer as described in the Act, inasmuch as the words manufacturer or producer in the statute connote manufacturing or producing in the way of a business, which would exclude an

isolated transaction, such as the building of a yacht by the defendant for his personal use.

The question, I must admit, is rather delicate and it offers more difficulty than the other; its solution may be far-reaching, as it is liable to affect a large number of people.

Was it the legislators' intention to tax only the manufacturers and producers who manufacture or produce in the way of trade, or was the tax imposed by section 87 aimed at persons producing or manufacturing for their own personal use? This is the first question which I have to determine.

The Supreme Court of Canada in the case of *Bank of Nova Scotia* v. *The King* (1) held that a bank, which maintained a stationery department, in which it had a printing plant with which it printed its ledger sheets, forms, note-paper, etc., required for its banking business, was, in respect of this printed material, a manufacturer or producer within the meaning of the Act and therefore liable to a consumption or sales tax on the value of the articles so printed.

The following remarks of Anglin, C.J., who delivered the judgment of the Court, are interesting (p. 179):

> We agree with the learned President of the Exchequer Court that as a printer, lithographer or engraver, which produced, for its own use and not for sale, the goods in question, viz., stationery supplies for its head office and branches, the bank was a producer within the meaning of that term, as used in clause (*a*) of s. 86 of the Special War Revenue Act, R.S.C. 1927, c. 179, and that the goods in question were produced in Canada by it within the meaning of that clause.
>
> We cannot find anything in the statute to support the view put forward by counsel for the appellant that its application is confined to a manufacturer or producer whose business is manufacturing or producing for sale. That construction of the Act would involve the exclusion from our consideration of clause (*d*) of s. 87, which, in our opinion, was introduced to remove any doubt that the statute was intended to apply to a case such as that at bar.

Another decision to the effect that the manufacturer using for his own purpose articles produced or manufactured by him is bound to pay the consumption or sales tax on these articles was rendered by the Supreme Court of Canada in the case of *The King* v. *Fraser Companies*

(1) (1930) S.C.R., 174.

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Limited (1). The defendant, Fraser Companies Limited, was a manufacturer of lumber for sale; it consumed a portion of its lumber in building operations carried on over a period of years; the lumber so consumed, taken from stock in the company's yards, had been produced and manufactured in the ordinary course of the company's business of manufacturing for sale; it had not been produced or manufactured especially for the purpose for which it was used. Smith, J., delivering the judgment of the majority of the Court, said (p. 493):

> The view taken in the court below (that the lumber consumed by the defendant in building operations was produced in the ordinary course of business for sale and not specifically for use by the defendant within the meaning of section 87 (*d*)) 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.

Another case in which the same principle was sanctioned, although the action was dismissed on another ground, is that of *The King* v. *Henry K. Wampole & Co.* (2). I may quote from the notes of Anglin, C.J., speaking for the majority of the Court, the following remarks (p. 496, *in fine*):

> My construction of clause (*d*) of section 87 is that the "use" by the manufacturer or producer of goods not sold includes any use whatever that such manufacturer or producer may make of such goods, and is wide enough to cover their "use" for advertising purposes by the distribution of them as free samples, as is the case here. I am, therefore, with great respect, unable to agree in the reasons assigned by the learned trial judge for dismissing this petition (1931, Ex.C.R. 7).

and at page 497:

> 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.

(1) (1931) S.C.R. 490. (2) (1931) S.C.R. 494.

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The first case cited is the most in point. In the other cases the defendants were admittedly manufacturers or producers within the purport of the Special War Revenue Act and subject to the consumption or sales tax under section 86 of said Act. The only question in dispute was whether the use made by the defendants of their products, lumber for construction purposes in the one case and samples for advertising purposes in the other, fell within the meaning of that word as used in subsection (*d*) of section 87.

In the case of the *Bank of Nova Scotia* v. *The King,* it is idle to say that the bank, as such, was not a manufacturer or producer. The Supreme Court however, affirming the judgment of the Exchequer Court in its conclusion, held that the bank, having a department where it printed all the stationery required for its banking operations, was to be considered, under subsection (*d*) of section 87 (previously subsection 13 of section 19BBB of the Special War Revenue Act, 1915, 5 Geo. V, ch. 8, as enacted by 13-14 Geo. V, ch. 70, s. 6), with regard to its printing plant or department, a manufacturer or producer.

Does the same principle apply in the case of an isolated act by a person who is not a manufacturer or producer by trade? Must a man building, as in this case, a yacht, or building any other object or article, for instance a truck, a rig, or, on a smaller scale, a pair of skis, a table, a tool, for his personal use, with no idea of selling it, be considered a manufacturer or producer for the purpose of the Act? I must admit that I have been unable to find any decision or authority on the point, although I have spent considerable time in looking up the jurisprudence dealing with consumption or sales tax.

After reading sections 85, 86 and 87 separately and in conjunction with one another and giving the matter careful consideration, I have reached the conclusion that subsection (*d*) of section 87 does not apply to an isolated act like the one with which we are concerned; I do not think that it was the intention of the legislators to impose a tax on a person who, not being a manufacturer by trade, manufactures or produces, for his own use and with no intent of disposing of it by sale or otherwise, an object or article, which is not used in connection with any trade

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or business. If it was the legislators' intention to impose such a tax, I think, they should have said so clearly. If there is ambiguity in a taxing statute, the ambiguous provision must be interpreted favourably to the taxpayer; if there exists any doubt, the taxpayer must have the benefit of the doubt.

I may add, although this consideration may be of lesser importance and weight, that presumably the defendant paid, indirectly perhaps but paid nevertheless, the consumption or sales tax on all the materials used in the construction of the *Cora Marie* and that in charging a tax on the value of the vessel he would be called upon to pay a double tax on at least the value of such materials.

For all these reasons, I believe that the action is unfounded and that it must be dismissed. The defendant will be entitled to his costs against the plaintiff.

Judgment accordingly.