1933
Oct. 16.
1934
Mar. 20.

BETWEEN:

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

PLAINTIFF;

AND

WILLIAM NEILSON LIMITED,

DEFENDANT.

Revenue—Sales tax—When exigible—Special War Revenue Act.

The Special War Revenue Act, R.S.C. 1927, c. 179, as amended by 21-22 Geo. V, c. 54, provided that there should be levied a sales tax of four per cent on the sale price of all 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. The amendment also provided that goods sold prior to March 2, 1931, for delivery after June 2, 1931, were liable to the tax of four per cent.

The defendant company, a manufacturer of chocolate products subject to the tax, sought to avoid payment of the increased tax by accepting orders for future delivery of goods which were set apart in its warehouse and marked "Reserved stock sold". There was no identification of the particular goods representing the order of any individual purchaser. When a customer wished delivery of a portion of the goods ordered they would be taken from the reserved stock and payment made when shipped. The defendant notified the Department of National Revenue each month of the quantity of goods thus sold and later remitted the tax thereon calculated at the rate of one per cent.

The action was brought to recover the amount of the tax calculated at the rate of four per cent upon the sale price of goods sold after March 2, 1931, and delivered after June 2, 1931.

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Held: That the tax was exigible by the manufacturer when the transaction was finally consummated by delivery of the goods to the purchaser, regardless of the precise date of sale, or where or when the title to the goods passed to him.

ACTION by the Crown to recover a certain amount alleged to be due by the defendant for sales tax.

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

Glyn Osler, K.C., and *H. C. Walker* for the Crown.
C. F. H. Carson for the defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (March 20, 1934) delivered the following judgment:

In this information the plaintiff seeks to recover from the defendant a certain sum of money alleged to be due and payable as sales tax, under sec. 86 of the *Special War Revenue Act*, as amended by chap. 54, s. 11, of the Statutes of Canada, 1931. By the amending statute just mentioned, sec. 86 (1) of the *Special War Revenue Act* was repealed, and a new section was substituted therefor, and the early portion of the new section reads as follows:

86. (1) In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four 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.

Although the new section, no. 86 (1), was only assented to on August 3, 1931, yet it became effective as of June 2, 1931. The corresponding portion of the repealed section provided that the sales tax should be one per cent of the sale price of all goods,

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him.

It will be observed that thus far the distinction between the new section, and the repealed section, is that by the former provision the rate of taxation was to be four per cent instead of one per cent, and the tax became payable at the time of the delivery of the goods to the purchaser, instead of at the time of the sale of the goods by the manufacturer.

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The defendant was at the material time a manufacturer of chocolate products which were subject to the sales tax. Early in April, 1931, the defendant, and others, were led to believe that an increase in the rate of the sales tax was imminent. In anticipation of such an increase the defendant conceived the idea of promoting the sale of its products to certain, not all, of its customers, in advance of their immediate requirements, with the expectation that these sales would be treated by the taxing authorities as having been made prior to the date when the anticipated increased rate of taxation would come into effect, and that such sales would be taxable at the rate of one per cent only, and not at the anticipated increased rate which turned out to be four per cent.

It is desirable, particularly in the event of an appeal, that I should explain the nature of the transactions in question, although in my view of the case such facts are really not of importance. I shall first quote from a circular letter addressed by the defendant to its salesmen and this will generally outline the plan of procedure adopted by the defendant in reference to these transactions. It is in part as follows:

With reference to the coming increase in Sales Tax.

In many instances we find that the lack of proper warehousing facilities is preventing the Jobbers from buying the supplies they desire. Therefore we are ready to assist them in making it possible for them to take full advantage of the coming increase in Tax. We will warehouse the goods they specifically order and they may be taken out by the jobber as required within a reasonable time, and whether the orders are stored in Calgary, Edmonton or Toronto, the Jobbers must be invoiced at once for the goods. We want you to cover your strategic Jobbers immediately, taking only *bona fide* orders. As we are assisting the jobber to take advantage of the Sales Tax increase by warehousing this goods, the jobber should co-operate with us by releasing his order in large shipments as soon as possible; you will appreciate we are doing the jobber a real service in protecting him. Remember, these orders must be *bona fide*.

Read carefully the attached circular prepared by the Canadian Manufacturers' Association. Digest also the attached sample order and invoice. Have the jobber sign the order and you write across the face of the order "Accepted by William Neilson Limited, per E. V. Johnson", thus signifying that the order has been placed and accepted. Also, under the heading "When shipped", write the word "Advise". If you make out the invoice, you must follow the enclosed copy and the notation on our invoice must appear on your invoice, word for word.

Note the above word—"strategic" jobber. You no doubt realize that we could not make this offer to every one of your Jobbers, but to such jobbers as (names omitted) and so forth, you have a wonderful opportunity.

We are quite prepared and want to sell every box of bars we have on hand in Toronto and in storage at outside points. Understand, the order must be *signed* by the dealer, accepted by you and *invoiced* by you if time is short, or by us, before the budget comes down, and the goods, if in your storage, must be set aside and specifically appropriated to him as the ownership is his.

* * * * * * * * * * *

Should the government make it impossible for the order to go through as we have outlined, and insists upon collecting the new tax, the dealer in that event will have to assume same.

I should also in fairness refer to another letter of the defendant's, dated April 27, 1931, addressed to one Lison, who, I think, was a salesman of the defendant, and which Mr. Carson stressed as evidence of the *bona fides* of the defendant's scheme. It is as follows:

To-morrow we will mail you a list of Jobbers' names, if any that you should not sell on this scheme.

Understand, when we invoice the goods, the goods become the property of the dealer, therefore if he should fail or become a bankrupt, the goods carried in our warehouse would be considered part of his assets, which we would have no claim upon.

The practice suggested in the defendant's circular letter to its salesmen was carried out and these special sales were all made after April 1, 1931. The salesman would write across the face of the order an acceptance thereof on behalf of the defendant, and later an invoice would go forward to the customer. The customer's shipping directions were usually expressed upon the order, "future as required", or, "advise". The defendant, in practice, would then manufacture the goods mentioned in these orders, or take the same from manufactured stock already on hand, and assemble the same aside in one section of its warehouse and the bulk would represent the aggregate of such special orders or sales. The goods so set apart were designated or marked "Reserved Stock Sold". I should perhaps further state that upon receipt of an order the sales department of the defendant company would advise its production department of the receipt of such order or orders, and the production department would later inform the sales department that such and such goods were being held against such and such order or orders, stating the number or numbers thereof. When a customer requested delivery of a portion of the goods so ordered they would be taken from the reserved stock. The invoices forwarded the customers contained a notice that the goods were held in the defendant's warehouse at Toronto at the customers' risk and subject

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to their shipping instructions. The particular goods representing the order of any one customer were not earmarked and there was no way of identifying the same in the total quantity of reserved stock; they would be in the reserved stock representing the aggregate of goods so ordered but not delivered. There is no evidence as to the practice followed where the goods were to be supplied from any of the defendant's warehouses outside of the City of Toronto. The goods would not be paid for by the customer until shipment was made, when, a thirty day draft would be made upon the customer. In November, 1931, this practice was abandoned and the undelivered balance of the reserved stock turned back into ordinary warehouse stock, the unfulfilled orders cancelled, and these special transactions came to an end. Roughly, it was stated, about twenty-five per cent of the total quantity of goods thus ordered was turned back into ordinary warehouse stock. As I understand it, the defendant would monthly send a statement to the Department of National Revenue, advising them of the quantity of goods thus sold, and in the following month it would remit the tax thereon, calculated at the rate of one per cent upon the sale price. It seems that in all cases here the sales tax was not added to the price of the goods, but was absorbed by the defendant. Possibly it was reflected in the selling price, but that is not clear. I think this sufficiently explains the procedure followed in respect of the special orders or sales which give rise to the controversy here.

The question for decision is whether such of the goods here in question, as were delivered after June 2, 1931, were liable to the sales tax at the rate of four per cent, or, at the rate of one per cent, upon the sale price. Upon a careful consideration of the matter it is my opinion that sec. 86 (1) of the Act is conclusive of the issue, and that the sales of goods in question here, delivered after June 2, 1931, were liable to the sales tax at the rate of four per cent upon the sale price, at the time of delivery. The meaning of sec. 86 (1) (*a*) is, I think, quite plain, and it is to the effect that after June 2nd the sales tax was to be four per cent on the sale price of goods, payable at the time of delivery by the manufacturer, instead of at the time of the sale as hitherto; that is the main feature of the new section no. 86 (1) of the Act. It matters not, I think,

subject to what I shall immediately state, when the sales took place, or when in the strictly legal sense the goods passed to the purchaser; the tax was exigible by the manufacturer when the transaction was finally consummated by delivery of the goods to the purchaser. I have already pointed out that the new section 86 (1) of the Act, which was substituted for the same numbered section in the amended statute, was only assented to on August 3, 1931, but by sec. 25 of the amending Act, the substituted sec. 86 (1) was stated to be deemed to have come into force on the second day of June, some two months prior to the enactment of the amending statute. It was therefore a taxing provision intended to be retroactive for the period of two months in respect of the delivery of goods sold prior to June 2nd, but delivered after that date. It seems to me that some such provision was imperative.

There are two qualifying provisions in sec. 86 (1) (*a*) of the amending Act, which I should at once mention, and they are as follows:

> Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.
>
> Provided further that if any manufacturer or producer has prior to the 2nd day of March, 1931, made a *bona fide* contract for the sale of goods to be delivered after this section comes into force, and if such contract does not permit the adding of the whole of the tax imposed by this section to the amount to be paid under such contract, then so much of the tax by this section imposed as may not under such contract be added to the contract price shall be payable by the purchaser to the vendor and by the vendor to His Majesty, but in case the vendor refuses or neglects to collect such tax from the purchaser the vendor shall be liable to His Majesty for the payment of such tax.

It is difficult to understand just why the first proviso was enacted, what was its intention, or what purpose it was intended to serve. The draftsman, out of an abundance of caution, probably hoped to capture the sales tax upon some sale or sales of goods, where, for some unusual or unexpected cause, there was not a physical delivery of the goods by the manufacturer to the purchaser. If such a case arose the legislature evidently intended that the tax would then be payable by the manufacturer at the time of sale. In any event, that proviso raises no difficulty here because in all cases with which we are here concerned, deliveries were made.

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Coming now to a consideration of the second proviso to sec. 86 (1) (*a*) and which I have just above quoted. Now this proviso, which was repealed the following year, relates to bona fide contracts for the sale of goods made prior to March 2, 1931, but which were to be delivered after the new sec. 86 (1) came into force, on June 2nd, and it states that when the full tax of four per cent on the sale price could not be added under the contract, then, so much of it as could not—that here would be three per cent—must be paid by the purchaser to the vendor, and by the vendor to His Majesty, and if the vendor neglected to collect the tax from the purchaser, then the vendor would be liable for the balance of the tax to His Majesty, the one per cent tax presumably having been paid by the manufacturer at the time of sale under the provisions of the repealed section no. 86 (1). No goods therefore, sold prior to March 2nd for delivery after June 2nd, were to escape the tax of four per cent upon the sale price. It was to be paid either by the manufacturer or the purchaser. The sales of goods with which we are here concerned took place after March 2nd, and the same were all delivered after June 2nd, under the terms of the contracts of sale; the date of delivery was to be determined by the customer. From this, I think, the intention of the legislature is fairly clear. Sales of goods made even prior to March 2nd, for future delivery, were not to escape the increased tax rate if they were to be delivered, or were delivered, after June 2nd, when either the purchaser or vendor was to pay the same. No exception is made in respect of goods sold after March 2nd, and it must have been intended to capture the tax upon sales of goods made subsequent to March 2nd, but which were delivered after June 2nd, and the tax in that event was in the first instance payable by the manufacturer, upon delivery of the goods, without recourse against the purchaser in the manner indicated in the preceding proviso. It is to be inferred from the second proviso which I have quoted, that the legislature intended that in the case of any contract for the sale of goods made after March 2nd, and prior to June 2nd, as here, and which goods were in fulfilment of the contract delivered after June 2nd, the sales tax was payable by the manufacturer at the rate of four per cent at the time of the

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delivery of the goods, regardless of the precise date of sale, or where or when the title to the goods passed to the purchaser. The increased tax rate was retroactive for a definite period, and the Crown looked to the manufacturer to pay it, in the first instance, when the goods were delivered and not when sold, and the rate of taxation was to be four per cent upon the sale price. That was the scheme and purpose of the new section 86 (1) of the Act, and, I think, upon careful examination this will appear to be quite clear. If goods sold prior to March 2nd and delivered after June 2nd, were not permitted to escape the tax, which was to be paid by either the manufacturer or the purchaser, then it follows that in the case of goods sold after March 2nd but not delivered till after June 2nd, the tax was to be paid by the manufacturer upon delivery of the goods. In other words, goods sold subsequent to March 2nd, deliveries of which were postponed till after June 2nd, became liable to the sales tax prescribed by sec. 86 (1) (*a*).

Many other contentions were raised by Mr. Osler and Mr. Carson. It was urged, for example, by the former that whether the property in the goods in question passed to the customer was to be determined by the Sales of Goods Act of Ontario, and by the common law authorities. Mr. Carson argued that "sale," as used in the Special War Revenue Act, should be construed only in the sense contemplated by the Act, and was not affected by the common law, or the Sales of Goods Act of Ontario or any other province. In view of the conclusion I have expressed it would seem unnecessary to discuss these points which so frequently arise in cases involving the passing of goods from a vendor to a purchaser.

There will be judgment for the plaintiff. It was agreed by counsel that I need not determine the precise amount payable by the defendant, if I found for the plaintiff, but if in the end counsel are unable to agree upon the proper amount, I may be spoken to upon the point upon the settlement of the minutes. Costs will follow the event.

Judgment accordingly.