BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

1963
Jan. 28, 29, 30, 31
Oct. 26

AND

SKUTTLE MFG. CO. OF CANADA LTD., B. D. WAIT CO. LIMITED, carrying on business under the firm name and style of WAIT-SKUTTLE COMPANY and the said WAIT-SKUTTLE COMPANY ..DEFENDANTS.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, as amended, ss. 29(1)(b) and (d), 30(1) and (2), 32(1) and 48(4) and Schedule III—Old Age Security Act, R.S.C. 1952, c. 200, s. 10(1) and (2)—Excise Tax Act Regulations—"Partly Manufactured Goods"—Exemption from sales tax—Sales by licensed manufacturer—Estoppel against Crown—Abatement of claim.

The Crown brought action to recover sales tax and penalties under the *Excise Tax Act* and the *Old Age Security Act*, in respect of the sale of humidifiers by the defendants between August 1, 1956 and December 31, 1958, on which no sales tax had been paid. The humidifiers were designed for use in conjunction with modern hot air furnaces.

The defendants raised the following defences: (1) the humidifiers were furnace fittings or fittings for furnaces and were exempt under s. 32(1) and the first paragraph under the heading "Building Materials" in Schedule III to the Act; (2) the humidifiers were articles to be used exclusively in the manufacture or production of furnaces for the heating of buildings and as such were exempt under s. 32(1) and the second paragraph under the heading "Building Materials" in Schedule III; (3) the humidifiers were exempt from sales tax under s. 30(2) of the *Excise Tax Act* as being goods sold by a licensed manufacturer to another licensed manufacturer as partly manufactured goods, the defendants alleging that, although under the Act the Minister is the sole judge of what are "partly manufactured goods" and no such decision had been made by him in this case, the Crown is estopped from denying that the Minister had made an adjudication that the humidifiers were "partly manufactured goods" and from denying that the humidifiers were "partly manufactured goods" in view of the conduct of the departmental officials and the advice received from them by the defendants over a long period of time; (4) in some cases, the defendants' customers paid sales tax on the humidifiers purchased from the defendants on their resale and the defendants were entitled to credit on the Crown's claim for all sums so paid.

Held: That the sales in question were not sales of furnaces but were sales of humidifiers which are not listed in the first paragraph under the heading "Building Materials" in Schedule III to the Act and so were not thereby exempted from tax.

2. That even if the humidifiers were in fact used in the manufacture or production of furnaces after their sale by the defendants this would not of itself be sufficient to entitle the defendants to exemption under s. 32(1) of the Act and the second paragraph under the heading "Building Materials" in Schedule III and that, when the defendants have parted with both possession of and title to the humidifiers without pay-

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ing the tax, the least that is required of them in seeking such exemption is that they establish that the humidifiers were sold under contractual arrangements requiring the purchaser to use them exclusively in the manufacture or production of furnaces for the heating of buildings, and that the defendants saw to it that the humidifiers were so used. The defendants have not done this and their claim for exemption under s. 32(1) accordingly fails.

3. That the *Excise Tax Act* makes the Minister of National Revenue the sole judge of what are "partly manufactured goods" and the Court has no jurisdiction to make such a decision for him when, as in this case, no such decision has been made.

4. That no case of estoppel against the Crown has been made out by the defendants, for it is the responsibility of the manufacturer under the *Excise Tax Act* to decide which sales he will report as taxable and which he will treat as exempt, and the Minister owes no duty to the taxpayer to audit his records to assure him that what he has treated as exempt sales were in fact exempt. When the departmental auditor assured the defendants that their records were in order and that the reporting procedure was correct he in no way purported to pass on the taxability or otherwise of the sales which the defendants had treated and reported as exempt. This and the additional fact that no tax was claimed for a long time raises no implication that the Minister had decided that the humidifiers in question were "partly manufactured goods" and therefore exempt under s. 30(2).

5. That since there is no evidence that any purchaser paid sales tax on behalf of the defendant or at all on the resale of the defendants' humidifiers as replacements, the defendants can obtain no abatement of the Crown's claim.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover sales tax.

The action was tried before the Honourable Mr. Justice Thurlow at Toronto.

C. R. O. Munro and *L. R. Olsson* for plaintiff.

P. B. C. Pepper, Q.C. and *W. R. Herridge* for defendants.

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

THURLOW J. now (October 26, 1963) delivered the following judgment:

In this action the Crown seeks to recover $42,292.51 for sales tax payable under the provisions of the *Excise Tax Act,* R.S.C. 1952, c. 100, as amended, and the *Old Age Security Act,* R.S.C. 1952, c. 200, in respect of sales of humidifiers made by the defendants between August 1, 1956 and December 31, 1958, together with penalties incurred by

the defendants on failure to pay the taxes from time to time as they became due.

The applicable portion of s. 30(1) of the *Excise Tax Act* by which the first of the taxes in question is imposed reads as follows:

> 30(1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
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> (*a*) produced or manufactured in Canada
>
> (1) payable . . . by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,

The other tax is imposed by s. 10 of the *Old Age Security Act* s-ss. (1) and (2) of which provide:

> 10(1) There shall be imposed, levied and collected an Old Age Security tax of two per cent on the sale price of all goods in respect of which tax is payable under section 30 of the *Excise Tax Act* at the same time, by the same persons and subject to the same conditions as the tax payable under that section.
>
> (2) Subsection (1) shall be read and construed as though the tax imposed thereby were imposed by section 30 of the *Excise Tax Act*; and all the provisions of the *Excise Tax Act* shall be read and construed as though the tax imposed by subsection (1) were an addition to the tax imposed by the provisions of the said section 30.

By s. 48 of the *Excise Tax Act* every person required by or pursuant to Part VI to pay taxes is required to file a monthly return of his taxable sales and to pay the taxes not later than the last day of the first month succeeding that in which the sales were made and s-s. (4) of the same section provides that

> 48(4) . . . upon default in payment of the tax or any portion thereof payable under Part IV, V or VI within the time prescribed by subsection (3), there shall be paid in addition to the amount of the default a penalty of two-thirds of one per cent of the amount in default in respect of each month or fraction of a month during which the default continues.

The sales in question were made by the defendant Wait-Skuttle Company which is a firm name under which the corporate defendants, Skuttle Manufacturing Company of Canada Limited and B. D. Wait Company Limited carry on business in partnership. The partnership business is carried on at Oakville, Ontario and is concerned with the manufacture and sale of various types of humidifiers. It is admitted that during the period in question Wait-Skuttle Company sold to various customers 71,107 humidifiers

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which it had manufactured in Canada, that the total selling price of these humidifiers was $422,925.05 and that no sales tax was paid by the defendants on any of these sales. Sales tax was, however, paid by the defendants on other sales of humidifiers which accounted for 7 per cent or 8 per cent of the total sales made by Wait-Skuttle Company during the material period. As to these no question arises in these proceedings.

It is not disputed that on the facts which I have thus far outlined and the statutory provisions to which I have referred, the Crown makes out a *prima facie* case for the taxes which it claims but by way of defence the defendants maintain that the sales in question were exempt from tax under one or the other of two provisions of the *Excise Tax Act* to which reference will be made, that in the circumstances to be related the Crown is estopped from asserting its claim for taxes in respect of the sales in question and that in any event in some instances the taxes in respect of the humidifiers were paid by the purchasers upon subsequent re-sale thereof. These defences will be outlined in greater detail later in these reasons.

The first of the two exempting provisions of which the defendants seek the benefit is s. 30(2) of the *Excise Tax Act* which provides that

> 30(2) Notwithstanding anything in subsection (1), the consumption or sales tax shall not be payable on goods
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> (*a*) sold by a licensed manufacturer to another licensed manufacturer if the goods are partly manufactured goods;

The expression "licensed manufacturer" is defined in s. 29(1)(*b*) as meaning: "any manufacturer or producer licenced under Part VI of the Act" and it is not disputed that at all material times both the defendants and the customers who purchased the humidifiers in question were manufacturers and licensed as such under the statute. The expression "partly manufactured goods" is also defined by s. 29(1)(*d*) as meaning

> only goods that are to be incorporated into and form a constituent or component part of an article that is subject to the consumption or sales tax; the Minister is the sole judge as to whether or not goods are "partly manufactured goods" within the meaning of this section;

It is I think desirable at this point to emphasize that the expression "partly manufactured goods" and the exemption

provided by s. 30(2) are strictly limited to goods to be used in the production of taxable goods, and have no relevance to sales of goods to be used in the production of goods which are exempt from tax under other provisions of the statute.

The other provision relied on by the defendants is s. 32(1) which provides that

> The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

Schedule III consists of a number of lists of articles or products grouped under headings such as "Building Materials", "Charitable, Health, etc.", "Coverings", "Diplomatic", "Engines", "Farm and Forest", "Foodstuffs" and "Machinery and Apparatus to be used in manufacture or production". In some cases the articles are named without restriction, but in others they are listed in conjunction with wording which limits the exemption to occasions when they are for use by particular purchasers such as diplomatic representatives or hospitals or when they are for use for some defined purpose. In the latter type of restriction the expression "to be used exclusively" appears in many items but sometimes it is expressed by the words "for use exclusively" and sometimes simply by the word "used". In the present case issues arise under two of the items listed under the heading "Building Materials", these two items being as follows:

> Furnaces, stokers, oil or gas burners, hot water and steam radiators not including fittings, for the heating of buildings
>
> Articles and materials to be used exclusively in the manufacture or production of the foregoing building materials, except hardware for doors and sash;

Before outlining the facts of the present case reference should also be made to certain regulations established pursuant to s. 38 of the *Excise Tax Act* by which the Minister of National Revenue is authorized to make such regulations as he deems necessary or desirable for carrying out the provisions of the Act, the same to be enforced in the same manner as all other provisions of the Act. The regulations in question are entitled "Regulations Pertaining to Excise and Sales Taxes" and they deal with a number of topics, the first of which is entitled "Certificates of Exemption". This topic is in turn dealt with under several subtitles including Licensed Manufacturers, Licensed Wholesalers,

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Hospitals, Provincial Governments and General. Under the subtitle "Licensed Manufacturers" it is prescribed that

(*a*) A licensed manufacturer, when purchasing or importing goods which cannot be used in, wrought into, or attached to articles to be manufactured or produced for sale, shall not quote his licence number nor give the certificate on the order or entry. On purchases or importations of goods which can be used in, wrought into, or attached to taxable goods for sale, a licensed manufacturer shall quote his licence number and give the certificate on the order or entry.

The certificate to be given by a licensed manufacturer is to be in the following general form:

I/We certify that the goods ordered/imported hereby are to be used in, wrought into, or attached to taxable goods for sale.

Licence Number ....
(Name of Purchaser)

(*b*) A licensed manufacturer shall not quote his licence number nor give the certificate as above when purchasing or importing goods to be used in, wrought into, or attached to articles specified as exempt from the Consumption or Sales Tax. (Note.—Except in respect of goods conditionally exempted according to use.)

On the wording of these regulations it would seem to follow that a licensed manufacturer when purchasing goods conditionally exempted from tax according to use is required, when the goods can be used in, wrought into or attached to taxable goods for sale to certify that they are to be so used whether he purchases them for such a purpose or not.

I turn now to the facts developed in support of the defence.

The humidifiers in question were all of types designed for use in conjunction with modern hot air furnaces. Some of them can also be used in conjunction with space heaters but in practice very few are so used. They consist of an open water tray fitted with an automatic valve to regulate the level in the tray of water from a piped supply line, a number of glass wool evaporating plates so shaped as to permit one part to be in the water and a much larger surface of the plate to be above the water and to overhang the tray, and a metal rack to hold the plates vertically in place. The plates absorb the water by capillary action and the current of air passing between the plates removes the moisture from their surfaces. For maximum effectiveness these devices must be mounted within two to eight inches of the heat exchanger of a hot air furnace or space heater and in a position where the circulating air when warmed by the heat

exchanger will pass along the surfaces of the plates. But they or some models of them are also advertised as capable of being used effectively in the cold air return stream of a hot air furnace or near the furnace in the main warm air duct. The places where they are mounted depend on the model or design of the particular furnace. In some cases they are mounted in an opening specially made for them in the exterior metal work of the furnace either at the base or half way up from the base or near the top and in other cases they may be mounted in an opening in the sheet metal work forming the plenum or bonnet installed above the furnace from which the heated air is circulated by ducts to various parts of the building.

The evidence also discloses that in early and now obsolete types of hot air furnaces restoration of humidity in the warmed air was secured by simple evaporation from the surface of water in a jacket forming part of the inner castings of the furnace and that with the development of furnaces equipped with forced circulating devices, the older method was replaced by the use in connection with hot air furnaces of humidifiers of the type here in question.

It also appears that furnace manufacturers purchase these humidifiers from manufacturers and supply them to customers with their furnaces which are themselves usually not entirely assembled as units when packed for shipment and in some cases are shipped disassembled to a very considerable extent. When the humidifier is to be installed in the furnace casing the opening for it is ordinarily made by the furnace manufacturer but the humidifier is not necessarily mounted in the opening prior to installation of the furnace. In other cases the opening for the humidifier may be made in the plenum by the manufacturer of the furnace if he also supplies the plenum or if he does not supply the plenum by a heating contractor engaged in installing the furnace and constructing the plenum for it. In some cases the price quoted for the furnace includes the humidifier supplied for it, in others the price of the humidifier is quoted separately but they are supplied as a matter of course in practically all cases of sales of hot air furnaces.

Humidifiers of these types besides being used in conjunction with furnaces are, as already stated, sometimes installed in space heaters which are not included in the list of exempted building material in Schedule III and they are

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also at times sold for use as replacements in which cases as well there is no exemption from sales taxes.

The defendants' business in manufacturing and selling humidifiers has been carried on at Oakville, Ontario since 1947. Most of the humidifiers which they manufacture are sold to manufacturers of furnaces who hold licences under the *Excise Tax Act* and when selling to them the defendants took care to ensure that in every case the order bore the sales tax licence number of the purchaser and a certificate. They did not pay tax on these sales but reported them as not taxable and from time to time over the years prior to 1956 their records were examined by auditors of the Department of National Revenue and no question was raised as to the propriety of their procedure nor was any claim ever made for tax. Such an examination was made in July 1956 and when early in 1957 following the death of B. D. Wait, the principal shareholder of B. D. Wait Company Limited, a request was made for a further examination to verify the company's position with respect to sales tax liability that defendant was informed by someone employed by the department that the company's procedure was in order and that no examination was necessary. The sales here in question were made following the audit of July 1956 and there is no evidence of any further audit having been made from August 1, 1956 to December 31, 1958. However, in July 1958 a letter was received stating that the Department had received information suggesting that sales tax was not being paid in connection with sales of humidifiers and that in the view of the Department humidifiers were taxable "for the reason that they are placed in the plenum, which is considered to be part of the duct work." Correspondence followed in which the defendants first said that their practice was to sell to furnace manufacturers "who show their sales tax licence in their purchase orders and who collect the sales tax at their sale level" and that when sales were made to others the sales tax was collected and reported and remitted to the Department at the end of each month. Later on receiving a further letter from the Department dated August 18, 1958 suggesting that manufacturers of tax exempt furnaces should furnish a certificate that the "humidifiers were to be incorporated into tax exempt furnaces in order to qualify for exemption", the defendants replied that "this is the way we have always operated and

will continue to do so." Still later on December 5, 1958 the Department wrote another letter stating that humidifiers are held to be taxable at the time of sale and that "a manufacturer's sales tax licence number should not be accepted."

With respect to the sales here in question made between August 1, 1956 and December 31, 1958, I am satisfied that each order bore the sales tax licence number of the purchaser and a certificate of one kind or another. In at least one case the certificate simply stated that the goods ordered were "to be used in, wrought into, or attached to articles for resale" but most of the certificates stated either that the goods ordered were "to be used in, wrought into, or attached to taxable goods for sale" or words to that effect or that the goods were "to be used in, wrought into, attached to or consumed in the manufacture of goods exempted from tax under Schedule III of the Act" or wording to that effect and in at least one instance the certificate stated that the goods ordered were "to be used in, wrought into, or attached to exempted furnaces for sale."

The evidence does not make clear to what extent the form which stated that the goods were to be used in making exempt goods was used but a comparison of the number and dates of purchase orders bearing this type of certificate which were available on a search for them being made with the number found bearing the other type of certificate suggests that the latter type was probably used in the majority of cases prior to August 1958 when the defendants circulated to their customers copies of the Department's letter of August 18, 1958 suggesting that the other type of certificate be furnished. Mrs. Wait the president of B. D. Wait Company Limited stated in evidence that both forms were in use prior to as well as after receipt of the Department's letter but while I accept her evidence as showing that the second type of certificate was used in some cases before the Department's letter was received, it is noteworthy that no purchase order dated prior to the letter and bearing such a certificate could be found or produced. In any event it is clear that whether the certificate received was of the one kind or the other the ordinary course of the defendant's business on receiving an order with such a certificate and a sales tax licence number thereon was to sell and deliver the goods and to report the sale as not taxable, without taking any further action to ensure that the humidifiers were in

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fact used in the manufacture or production of tax exempt furnaces or in the manufacture of taxable goods such as space heaters. The effect of the evidence on this point is I think that the defendants regarded their customers as reliable and trusted them to see to it that the goods were used for a purpose which would render them exempt and that they regarded it as being the responsibility of the purchaser to either use the goods for such a purpose or to pay the tax on making any other disposition of them such as a sale for replacement purposes. The statute, however, it may be noted, imposes no tax on a sale by a licensed manufacturer other than the sale made by the manufacturer of the goods and while as a result of the giving of the certificate the purchasers may have incurred liability to indemnify the defendants for tax in respect of goods disposed of otherwise than as stated in the certificates no liability on the part of the purchasers to the Crown for the tax would thereby arise.

It will be convenient to deal first with the defence that the sales in question were exempt under s. 32(1) and Schedule III of the Act. The defendants' first point on these provisions was that the humidifiers were furnace fittings or fittings for furnaces and were exempt under the first of the items which I have quoted. It was said that the words "not including fittings" in that item apply only to "hot water and steam radiators" and that accordingly in the case of furnaces, fittings should be regarded as included. The short answer to this in my opinion is that even assuming that the humidifiers were fittings for furnaces and would be exempted on sale of a furnace to which they were fitted the sales in question were not sales of furnaces but were sales of humidifiers which are not listed in the item.

The defendants' other contention which, to my mind, raises the most substantial issues in the action was that these humidifiers were articles to be used exclusively in the manufacture or production of furnaces for the heating of buildings within the meaning of the second of the items which I have quoted from Schedule III and that the sales were therefore exempt.

With respect to this submission, counsel for the Crown contended that the exempting section ought to be read with the taxing section and that when so read, the exemption should be interpreted as meaning "articles and materials

produced and manufactured in Canada and sold to be used exclusively in the manufacture or production of the foregoing building materials". In this connection reference was made to the judgment of the Privy Council in *The King v. Carling Export Brewery and Malting Co. Ltd.*[1] and it was submitted that anyone seeking the benefit of the exemption must be in a position to show that the goods were sold pursuant to an arrangement that they were to be used in the exempted manner, that the goods have in fact been used in that manner and that the seller has seen to it that they were so used. Counsel went on to submit that instead of establishing the facts which would entitle the defendants to the exemption the evidence indicates that some of the humidifiers were to be used in space heaters and some as replacement parts and that some would be installed in the plenum or duct work where they would form part of the warm air heating system rather than part of the furnace which was itself but a part of the heating system, that even when attaching a humidifier to a furnace in his factory a furnace manufacturer is merely attaching one part of a warm air heating system to another and in so doing he cannot be said to be manufacturing a furnace and that if any of the humidifiers were sold to be used exclusively in the manufacture of tax exempt furnaces there is no evidence of how many (with the exception of 66 humidifiers referred to in two orders of which evidence was given whereon the certificate given by the purchaser stated that the goods ordered were to be used in the manufacture of tax exempt goods) and that apart from what was stated in the certificates there was no evidence of the use to which any of the humidifiers was put.

In the *Carling Export Brewery* case the wording on which exemption from one of the taxes in question was claimed was "Provided that the consumption or sales tax specified in this section shall not be payable on goods exported" and in this Court[2] Audette J. held that entitlement to the exemption turned simply on whether or not the goods were in fact exported. In the Supreme Court[3] a somewhat narrower view was adopted, the Court holding that since the tax was payable at the time of sale the exemption applied only when the goods were exported by the manufacturer

[1] [1931] A.C. 435.
[2] [1929] Ex. C.R. 130.
[3] [1930] S.C.R. 361.

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himself pursuant to contractual arrangements therefor between him and the purchaser and prior to his parting with ownership and control of the goods. In the Privy Council reference was made to the provision for a refund of tax in cases where goods were in fact exported after their sale by the manufacturer, as indicating that the mere fact of exportation was insufficient to entitle the manufacturer to exemption but it was held that the manufacturer could succeed in his claim for exemption by establishing (a) that the goods were sold under arrangements that they were to be exported; and (b) that he saw to it that they were so exported. On the facts the Privy Council then held that the onus had been discharged.

While I do not regard the judgment in the *Carling Export Brewery* case as affording an exhaustive interpretation of the exempting provision which was under consideration, the case appears to me to lend support for the view that the fact (if it were established to be the fact) that following their sale the humidifiers here in question were used in the manufacture or production of furnaces would not by itself be sufficient to entitle the defendants to exemption and that in a case of this kind where the defendants have parted with both possession and title to the humidifiers without paying the tax, which under the statute becomes payable when the property passes or when the goods are delivered to the purchaser whichever is earlier, the least that is required of them in seeking the benefit of the exemption provided by s. 32(1) is that they establish that the humidifiers were sold under contractual arrangements requiring the purchaser to use them exclusively in the manufacture or production of the exempted building materials that is to say furnaces for the heating of buildings, and that they, the defendants, saw to it that the humidifiers were so used. There may be cases, such as those referred to in s. 31(1) in which no actual sale takes place, wherein the subsequent use to which the goods are put may be the only material fact upon which exemption depends, but in the case of an actual sale whereby the manufacturer parts with both title and possession of his goods, there would be, at the time when according to the terms of the statute the tax becomes payable, nothing to distinguish a taxable sale from an exempt sale if the right to exemption depended entirely on what later became of the goods and no one could ever know whether tax was payable or not even

on the simplest sale until the ultimate destiny of the goods was known. This leads me to conclude that whenever the manufacturer parts with title or possession of his goods by any type of actual sale save one by the terms of which the goods are to be used exclusively for a purpose which would render them exempt, liability for the tax arises at the time mentioned in the statute and that it is only in cases where under the contractual arrangements for the sale the goods are to be used by the purchaser for a purpose which will render them exempt and where the manufacturer on whom the tax is imposed sees to it that the arrangements are in fact carried out, that the exemption can apply. The kinds of arrangements with purchasers which may be appropriate to achieve this result may vary considerably according to the nature of the goods but this interpretation of the statute appears to me to make it necessary for a manufacturer who relies on the exemption and parts with his goods without paying the tax, to maintain himself in readiness to prove both that the goods were sold under such contractual arrangements for their use in accordance with the exempting provision and that he has seen to it that the arrangements were in fact carried out.

Turning now to the facts of the present case in so far as they relate to the exemption provided by s. 32(1) there was first no evidence of any contractual arrangements of a general character between the defendants and any of their customers that the humidifiers were to be used exclusively in the manufacture or production of furnaces for the heating of buildings and the only evidence there is on the question is that of the various certificates which appeared on the orders. With respect to these I am of the opinion that a certificate on an order stating that the goods ordered are to be used, wrought into or attached to articles for resale, as occurred in at least one case, can by no means be regarded as evidence of a contract by the purchaser to use the humidifiers so ordered exclusively in the manufacture of furnaces for heating buildings nor do I think that a certificate that the goods ordered are to be used in, wrought into or attached to taxable goods for sale or wording to the like effect can be regarded as evidence of a contract to use the goods exclusively in the manufacture of furnaces which would be exempt from tax. The fact that the regulations which I have quoted required that there be a certificate in

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the prescribed form may serve to explain why certificates of that type appeared on the purchase orders, but I do not think that they lend any aid to the defendants in their efforts to establish that under the contract for their sale, the goods were to be used exclusively in the production of furnaces for the heating of buildings. It must I think be borne in mind that the purpose of the regulations is to carry out the provisions of the statute, that is to say, to collect the taxes thereby imposed. They are not designed to afford protection from the liability which may arise or the consequences which may ensue if when selling his goods a manufacturer assumes that he is entitled to exemption and does not pay the tax nor are they designed to waive the right of the Crown to taxes or the right or duty of the Minister to collect them or to afford exemptions beyond those expressly provided by the statute. Unfortunately for persons engaged in business there appears to be nothing in the statute or in the regulations to afford assurance either that a claim will not some day be asserted for taxes in respect of goods exempted by reference to the use to which they are to be put or that a manufacturer will not one day be called upon to pay the tax if he is unable to prove that the goods which he sold and upon which he did not pay the tax were in fact exempt. In reading the regulations it is noticeable that they prescribe only the procedure which a purchaser is to follow in ordering goods the sale of which to him may for one reason or another be exempt from tax. Nothing is prescribed as to what the vendor, who is the party to be exempted, if anyone is entitled to exemption, is to do, and there is nothing in them to afford the vendor any assurance that he can rely on the certificate as proof that the sale is exempt. Rather they appear to me to be designed entirely to ensure that records of sales represented as exempt from tax will be available if and when the Minister requires them for the purpose of checking on the liability of either party for tax.

On the other hand, the certificate which quoted a sales tax licence number and stated that the goods ordered were to be wrought into exempted furnaces may I think be regarded as evidence of a contract to use the goods in such a way that they would be exempted from tax and having regard to the fact that the nature of the humidifiers ordered was such that they could be used only in conjunction with

furnaces or space heaters I think that the certificate which stated that the goods ordered were to be used in, wrought into, attached to or consumed in the manufacture of goods exempted from tax under Schedule III of the Act may in the circumstances properly be construed as meaning that the humidifiers ordered were to be used in the manufacture of tax exempt furnaces and thus as evidence of a contract to use the goods in such a way that they would be exempted from tax. It is thus only in cases where the latter two types of certificates were given that the contractual arrangement required for exemption existed and while I regard Mrs. Wait's evidence as establishing that there were other cases in which such certificates were given, I am unable to ascertain on the evidence in which or in how many cases such certificates were given beyond the two as to which details were established and which represented sales of 66 humidifiers in September and October, 1958 for a total sum of $415.80.

I turn now to the question of whether it has been established that the defendants saw to it that the humidifiers were used exclusively in the manufacture or production of tax exempt furnaces. On this point the evidence does not show what became of the humidifiers sold in any of the transactions and the most that, in my opinion, can be said of it is that it indicates that these humidifiers were useful only in conjunction with warm air furnaces or with space heaters and that when it was certified on the order that the humidifiers were to be used in the manufacture of tax exempt furnaces as well as in many instances where it was certified that they were to be used in, wrought into, or attached to taxable goods, the probability is that they were in fact used in conjunction with warm air furnaces. There is no evidence that the customers who purchased the humidifiers were constitued as representatives of the defendants in dealing with the humidifiers or that the defendants retained any other form of control over the use to which the humidifiers were put or even that they so much as required their customers to keep or that the customers actually kept any records of the use to which the humidifiers were in fact put. Moreover, it is clear that the defendants made no efforts to police or otherwise supervise their customers' use of the humidifiers. This may be understandable since most of the purchasers were customers of long standing

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whose reliability in honouring their contracts the defendants had no occasion to doubt, but in my opinion it fell far short of what is required by the statute of a manufacturer who parts with his goods without paying the tax and then seeks the benefit of an exemption the right to which depends on the use of the goods exclusively for a particular purpose. I am accordingly of the opinion that it has not been established with respect to any of the sales in question that the defendants saw to it that the humidifiers sold were used exclusively in the manufacture or production of furnaces and the defendants' claim to exemption under s. 32(1) therefore fails.

I come now to the defence that the humidifiers were "partly manufactured goods" within the meaning of the definition of s. 29(1)(*d*) and thus exempt under s. 30(2)(*a*). The Crown joined issue on this plea and added that the defendants have never applied for and the Minister has never made an adjudication in respect of the humidifiers and to this the defendants have rejoined that relying on the certificates of exemption which they received from their customers, on the fact that at divers times their books had been audited by officers of the Department of National Revenue and found to be in good order and that they had been advised both that their books had been found to be in good order and that they had been following proper procedure in the payment of sales tax and relying also on the Department's letter of August 18, 1958 to which reference has already been made, the defendants did not collect sales tax on the sales of the humidifiers in question and cannot now do so and that the Crown is estopped from denying that the Minister had made an adjudication that the humidifiers were "partly manufactured goods" and from denying that the humidifiers were "partly manufactured goods" and therefore exempt from tax. Alternatively, it was pleaded and argued that if the Minister has not made an adjudication this Court has jurisdiction to make it.

Apart from the alleged estoppel it is, I think, clear that on the issue of whether in fact the humidifiers were "partly manufactured goods" within the meaning of s. 30(2)(*a*) in the absence of evidence of a decision to that effect by the Minister (and there is no evidence of such a decision in the present case) the defence cannot succeed for the statute makes the Minister the sole judge of what are "partly manu-

factured goods" and the Court has in my opinion no authority to enter upon the enquiry. While the Minister might readily conclude that these humidifiers are "partly manufactured goods" when they are to be incorporated into space heaters, I do not see on what basis he could reach the conclusion that they were goods to be incorporated into taxable goods, and thus "partly manufactured goods" within the meaning of the definition, when they were to be used in the manufacture or production of tax exempt furnaces unless he were also to decide that the right to exemption under s. 30(2) depends entirely on the terms of the contract of sale, and not at all upon the use to which the goods may subsequently be put. But these are matters which are committed by the statute to his judgment alone and as I see it the Court is not given authority to review his decision or to make a decision for him. *Vide Central Electricity Generating Board v. Halifax Corporation*[1]. The utmost which the Court might do, where the matter is undecided, is to stay the action for recovery of the taxes until a decision is made but that course appears to me to be unwarranted in the present case because no application for such a stay has been made at any stage of these proceedings and because it was not shown that any application has ever been made to the Minister for a decision.

What was mainly relied on to establish the plea that the humidifiers were "partly manufactured goods" was the alleged estoppel. It was argued that since 1941 the defendants had been taking certificates from their customers and until the letter of August 18, 1958 there had been no suggestion from the Department that they were wrong in so doing or that they should not have been taking certificates, that on receiving the certificates they collected no sales tax and there was never any complaint about this from the Department and that they, the defendants, cannot now recover the sales tax from their customers, that the conduct of the Department in not requiring payment of the tax can be jusified on the ground that in its view the humidifiers were "partly manufactured goods" and that the Minister must be regarded as having made a determintaion that these goods were "partly manufactured goods" and that in the circumstances the Crown is estopped from claiming that the Minis-

[1] [1962] 3 All E R. 915.

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ter has not judged these goods to be "partly manufactured goods".

In my opinion, even apart from the legal question as to whether an estoppel can bar the right of the Crown to collect the tax (*vide Woon v. M.N.R.*[1]), no case for an estoppel of the kind mentioned has been made out. It must, I think, be remembered that the statute imposes the tax and creates a legal duty on the manufacturer not only to pay it but to file a monthly return of his taxable sales. Upon him thus is cast the responsibility of deciding which sales he will report as taxable and which he will treat as exempt. Upon the Minister is put the responsibility to collect the tax and to decide, when a dispute arises, whether or not goods are "partly manufactured goods" within the meaning of the definition, but he owes no duty to the taxpayers to audit their records for the purpose of assuring them that what they have treated as exempt sales were in fact exempt and I see no reason to think that his audits are made with any such object in mind. In the present case the substance of what I think has occurred is that the defendants have accepted certificates from their customers, which, it is perhaps unnecessary to say, were not representations by the Minister, and thinking that they could rely on these certificates have regarded the sales as exempt and reported them as non-taxable. In this situation it is I think readily conceivable that an officer of the Department on making an audit or check and seeing that in the case of each sale the order bore the sales tax licence number of the purchaser and a certificate would find nothing in the records of the defendants' business to suggest that the defendants' reporting was incorrect. But it seems to me that he would have nothing to indicate what had in fact become of the humidifiers after the defendants had parted with them. He would not be able to tell from the orders whether the goods were used in the manufacture of space heaters which would be taxable goods or in the manufacture of furnaces, which would not be taxable, or as replacements. Assuming then that he were asked by the defendants, who were anxious to know where they stood, since they had been treating sales as not taxable, whether they were operating as the Department wished, for him to reply that the defendants' records were in order or that the procedure in reporting was correct appears to me

[1] [1951] Ex C.R. 18.

to import nothing with respect to the taxability or otherwise of the sales which the defendants had treated and reported as exempt from tax and to my mind neither such a statement alone nor such a statement coupled with the fact that for a long time no tax was claimed raises any necessary or even probable implication that the Minister had decided that the humidifiers in question were either in whole or in part "partly manufactured goods". It signifies, if anything, merely that on the information received there was nothing which indicated that the sales reported as non-taxable were in fact taxable. There is in this situation, in my opinion, no basis for inferring a representation that the Minister had decided that the humidifiers sold by the defendants were "partly manufactured goods" nor is there evidence either in the letter of August 18, 1958 or elsewhere in the case, of any express representation by anyone to that effect or of anyone having been authorized to make any such representation. Moreover, even if it were to be inferred, from the fact that no complaint was made and no tax was claimed following an audit of records of sale transactions up to a particular date in many of which the orders bore a certificate that the goods were to be used in manufacturing taxable goods, that the Minister had decided that the goods sold pursuant to such orders were "partly manufactured goods" there would still, in my opinion, be no basis for drawing such an inference with respect to the goods involved in subsequent transactions the records of which had not been audited by anyone on behalf of the Minister, even though the orders may have borne the same kind of certificate as had appeared on the orders in transactions which had occurred earlier and had been examined. As the definition of "partly manufactured goods" refers to the use to which the goods are to be put it must, I think, necessarily be open to the Minister to decide the question in relation to particular sales, especially where the goods are of a kind that can be used in making non-taxable goods as well as taxable goods and a decision that the goods involved in one sale or in a number of sales were "partly manufactured goods" within the definition would not in my opinion imply that a similar decision had also been made or would be made with respect to the goods involved in subsequent transactions in respect of which there had not even been an examination of the records by anyone acting on the Minister's behalf. It will be recalled

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that an audit took place in July 1956 but that there was no evidence of any subsequent audit and that the claim relates only to sales made after the beginning of August 1956. And while the defendant, B. D. Wait Company Limited may have felt reassured by what it was told early in 1957 as to its procedure being in order and an audit at that time being unnecessary there is no evidence that the person who made the statement was authorized to exercise the function of the Minister to make a decision under s. 29(1)(*d*) or to represent that the Minister had made such a decision and such a statement would not in my view afford a basis for inferring that the Minister had even considered, let alone decided, the question with respect to the goods involved in sales made following the audit of July 1956. There was accordingly in my opinion nothing to estop the Crown from denying in this action that the humidifiers in question were "partly manufactured goods" or from denying that the Minister had decided that the humidifiers were "partly manufactured goods". The defence that the sales were exempt from tax under s. 30(2)(*a*) therefore fails.

It was also pleaded generally that the Minister was for the same reasons estopped from collecting the tax but as no argument was put forward on this point, I do not propose to discuss it further than to say that for the like reasons the plea in my opinion is not maintainable.

Finally, it was argued that when after obtaining humidifiers on which tax had not been paid a customer sold one of them as a replacement, he would report the sale and pay the tax to the Department, that the defendants were entitled to credit on the Crown's claim for all sums so paid and that a reference should be directed to ascertain the amount of the credit to which the defendants were so entitled. There is, however, no proof that any such payment was made on behalf of the defendants or indeed that any such payment was made and the defendants can therefore obtain no abatement of the claim on this ground.

In the result, therefore, the Crown is entitled to succeed in its claim for taxes amounting to $42,292.51 and for the penalties payable under s. 48(4) of the Act in respect of the failure of the defendants to pay the tax when due and if the

parties are unable to agree on the amount of such penalties there will be a reference to inquire and report thereon. The Crown is also entitled to costs.

Judgment accordingly.

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