1967

*Nov. 14, 15
Dec. 18

HER MAJESTY THE QUEEN .....APPELLANT;

AND

YORK MARBLE, TILE AND TERRAZZO LIMITED ....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Petition of right for refund—Imported slab marble—Polishing and cutting for installation by importer in buildings—Whether finished marble "goods produced or manufactured in Canada" and therefore liable for sale or consumption tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30(1)(a), 31(1)(d)—Old Age Security Act, R.S.C. 1952, c. 200, s. 10(1).

The respondent imported slabs of raw marble of varying thickness and size and after several finishing operations installed the finished product in the various buildings as to which it was a subcontractor. The work done at the respondent's plant on the raw marble consisted of book matching, grouting, rodding, gluing, grinding, rough and fine polishing, cutting and edge finishing. The sole issue to be determined was whether the work done by the respondent on the slabs resulted in such marble becoming "goods produced or manufactured in Canada" within the meaning of s. 30(1)(*a*) of the *Excise Tax Act*, R.S.C. 1952, c. 100. The trial judge found that the activities to which the slabs were subjected were not the application of an art or process so as to change the character of the imported natural product so as to come within the meaning of "produced or manufactured" in the *Excise Tax Act*. The Crown appealed to this Court.

Held: The Crown's appeal should be allowed.

The work done by the respondent on the marble slabs resulted in such marble becoming "goods produced or manufactured in Canada" within the meaning of s. 30(1)(*a*) of the *Excise Tax Act*. Adopting one of the definitions of "manufacture" in *M.N.R. v. Dominion Shuttle Co. Ltd.* (1933), 72 Que. S.C. 15, the finished marble slabs which left the respondent's plant had by work, both by hand and machinery, received new form, new quality and new properties. The words "produced" and "manufactured" as used in the present statute are not synonymous, and if there were any doubts that the various procedures taken by the respondent resulted in the manufacture of a piece of marble, there was no doubt that those procedures did result in the production of a piece of marble.

The fact that the respondent used the marble pieces in executing the building subcontracts did not exempt it from the liability of the tax since the *Excise Tax Act* imposes a consumption tax as well as a sales tax.

Revenu—Taxe de vente—Pétition de droit pour obtenir remboursement—Tranches de marbre importées—Polissage et sciage avant l'installation dans des édifices par l'importateur—Est-ce que le marbre fini est «une

*PRESENT: Abbott, Judson, Hall, Spence and Pigeon JJ.

marchandise produite ou fabriquée au Canada» et en conséquence sujet à la taxe de vente ou de consommation—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 30(1)(a), 31(1)(d)—Loi sur la sécurité de la vieillesse, S.R.C. 1952, c. 200, art. 10(1).

La compagnie intimée importe des tranches de marbre brut de différentes épaisseurs et grandeurs, et après les avoir travaillées installe le produit fini dans différents édifices pour lesquels elle agit comme sous-entrepreneur. Les travaux qui se font à l'atelier de l'intimée sur le marbre brut consistent en l'appariation ou l'appareillement, le masticage, l'insertion de baguettes de fer, le collage, le rodage, le polissage en gros et en fin, le sciage et la finition des bords. La seule question à décider était de savoir si les travaux faits par l'intimée sur les tranches de marbre avaient eu comme résultat de faire de ces marbres de la «marchandise produite ou fabriquée au Canada» dans le sens de l'art. 30(1)(*a*) de la *Loi sur la taxe d'accise,* S.R.C. 1952, c. 100. Le juge au procès a conclu que les activités auxquelles les tranches de marbre étaient soumises n'étaient pas l'application d'un art ou d'un procédé au point de changer le caractère du produit naturel importé de telle sorte qu'il tombe dans le sens de «produit ou manufacturé» de la *Loi sur la taxe d'accise.* La Couronne en appela devant cette Cour.

Arrêt: L'appel de la Couronne doit être maintenu.

Les travaux faits par la compagnie intimée sur les tranches de marbre ont eu comme résultat de faire de ces marbres des «marchandises produites ou fabriquées au Canada» dans le sens de l'art. 30(1)(*a*) de la *Loi sur la taxe d'accise.* Adoptant l'une des définitions de «fabriqué» dans *M.N.R. v. Dominion Shuttle Co. Ltd.* (1933), 72 Que. C.S. 15, les tranches de marbre finies qui sortent des ateliers de l'intimée ont reçu, par l'effet du travail manuel ou à la machine, une nouvelle forme, une nouvelle qualité et de nouveaux attributs. Les mots «produit» et «fabriqué» tels qu'employés dans le statut présent ne sont pas synonymes, et s'il y a le moindre doute que les différents procédés dont l'intimée fait usage ont eu comme résultat la fabrication d'une pièce de marbre, il n'y a aucun doute que ces procédés ont eu comme résultat la production d'une pièce de marbre.

Le fait que l'intimée a utilisé les pièces de marbre pour exécuter ses contrats de construction ne l'exempte pas de l'obligation de payer la taxe puisque la *Loi sur la taxe d'accise* impose une taxe de consommation aussi bien qu'une taxe de vente.

APPEL par la Couronne d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], concernant une pétition de droit pour obtenir un remboursement de la taxe de vente. Appel maintenu.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], concerning a petition of right for refund of sales tax. Appeal allowed.

---

[1] [1966] Ex. C.R. 1039, [1966] C.T.C. 355, 66 D.T.C. 5210.

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

C. R. O. Munro, Q.C., and *N. A. Chalmers*, for the appellant.

W. D. Goodman and *B. A. Spiegel*, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of Mr. Justice Gibson of the Exchequer Court of Canada[1] delivered on May 11, 1966, whereby he allowed a petition of right brought by the respondent to recover moneys paid by it to the Receiver General of Canada pursuant to a demand made by the Minister of National Revenue for payment of the sales or consumption tax imposed by the *Excise Tax Act* and the *Old Age Security Act* on marble products. The provisions under which the taxes were claimed were ss. 30(1)(*a*) and 31(1)(*d*) of the *Excise Tax Act*, R.S.C. 1952, c. 100, and s. 10(1) of the *Old Age Security Act*, R.S.C. 1952, c. 200, as enacted by Statutes of Canada 1959, c. 14, s. 1. These sections read as follows:

Excise Tax Act:

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

(*a*) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and . . .

* * *

31. (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.

Old Age Security Act:

10. (1) There shall be imposed, levied and collected an Old Age Security tax of three 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.

By agreement between the parties, the sole issue to be determined in the Exchequer Court was whether the work

[1] [1966] Ex. C.R. 1039, [1966] C.T.C. 355, 66 D.T.C. 5210.

done by the respondent on slab marble during the period in question resulted in such marble becoming "goods produced or manufactured in Canada" within the meaning of s. 30(1)(*a*) of the *Excise Tax Act*.

The respondent imported slabs of raw marble. At the time of their arrival at the respondent's plant these slabs had merely been cut from a large block. The slabs varied in thickness and in size both as to length and width. The surface was rough and greyish in colour and the slab edges were rough and unfinished. Exhibit 2 filed at the trial is a photograph of such rough marble slabs as they were stored in the respondent's warehouse and illustrates that the said slabs possessed none of the beauty of the finished product installed by the respondent in the various buildings as to which the company was sub-contractor.

The work done at the respondent's plant from the time the rough marble arrived there until the finished pieces left ready for installation in the various buildings was described by the vice-president, Alfred Peirol, C.A., in his evidence and may be summarized as follows:

(a) *Book Matching:* Each slab of marble is matched against other slabs which have been sawn from the same block so that the veining which appears in the marble will follow a pattern from piece to piece in a particular installation.

(b) *Grouting:* Certain slabs of marble such as Travertine marble have voids at their surfaces which are often filled with coloured cement material.

(c) *Rodding:* Certain slabs of marble are weak and must be reenforced with metal rods. This is done by cutting grooves in one surface of the slab of marble and by inserting and cementing metal rods into the grooves.

(d) *Gluing:* Certain slabs of marble often break in the course of being worked on and consequently are glued together with special materials.

(e) *Grinding:* The surface of a slab of marble is sometimes reduced and levelled by using a grinder.

(f) *Rough Polishing:* Marble is polished on polishing tables. The marble is laid flat on the table and a disc mounted on an electrically powered polishing head is caused to rotate on the surface of the marble. To the disc may be attached an abrasive such as carborundum segments or the disc may be left bare and an abrasive in the form of carborundum grain is placed on the marble itself. The rough polishing is usually done in two stages and the result thereby obtained is referred to as a honed finish.

(g) *Fine Polishing:* From time to time polishing is begun on the polishing table to the time the marble leaves the table, the marble may undergo five polishing stages. In each stage, finer abrasives or carborundum segments are used until in the final

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

stage the marble is polished with felt buffing pads and fine abrasive powders. The stages of polishing performed after the marble surface has been honed are referred to as fine polishing.

(h) *Cutting:* Once the marble is polished, it is cut to the desired dimension with a power diamond circular saw. The saw is mounted over a table on which the marble is placed and fastened. Sawing marble is a delicate operation as the edges of a piece of marble which will be exposed must not be damaged in the operation.

(i) *Edge Finishing:* The exposed edges of a piece of marble are polished with belt sanders or by hand and again several stages are used to obtain the desired finish.

The learned Exchequer Court Judge in his reasons for judgment found that the activities aforesaid were not the application of an art or process so as to change the character of the imported natural product dealt with so as to come within the meaning of "produced or manufactured" in the *Excise Tax Act*, and it is this finding which is contested by Her Majesty the Queen in this appeal.

Many authorities were cited but in my view few are enlightening. It must always be remembered that decisions in reference to other statutory provisions, and particularly decisions in other jurisdictions, are of only limited assistance in construing the exact provisions of a statute of Canada. In reference to the words "all goods (a) produced or manufactured in Canada", Duff C.J. noted in *His Majesty the King v. Vandeweghe Limited*[2]:

> The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe.

Further reference shall be made to that judgment hereunder. It was delivered on March 6, 1934, and on December 2, 1933, Archambault J., in *Minister of National Revenue v. Dominion Shuttle Company Limited*[3], gave a very interesting judgment in the Superior Court of the Province of Quebec.

Both of these judgments considered the said ss. 85 ff. of the *Special War Revenue Act* in which the same words, "produced or manufactured in Canada" were used. Archambault J., outlined the facts as follows:

> The evidence shows that these lengths of lumber were sold and delivered by the saw-mill in British Columbia to defendants at Lachute, in lengths of 20', 16' and 25' and at so much per thousand feet.

2 [1934] S.C.R. 244 at 248, 3 D.L.R. 57.

3 (1933), 72 Que. S.C. 15.

The work done on these lengths by defendant was: first, to cut them in lengths of 10′, or 8′; second, to creosote them, or dip them in creosoting oils to preserve them against the elements of the weather (for which defendants have a special plant); third, to round them or mill or dress the lumber to the rounded shape; fourth, to bore holes in them in order to insert the pin on which the insulator is placed, and after this work was done, they were sold to the Canadian Pacific Railway at the price, not based on so much a thousand feet, but based on so much per hundred "cross arms".

and he then continued:

The questions to be decided are: first, are the defendants the producers or manufacturers of these "cross arms"? second, should the cost of transportation from British Columbia to Lachute be included in the sale price?

First, what is a manufacturer? There is no definition of the word "manufacturer" in the Act and it is practically impossible to find a definition which will be absolutely accurate, but from all the definitions contained in leading dictionaries, Corpus Juris, Encyclopedias, etc., the Court gathers that to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.

This is exactly what the defendant company did. They received the raw material or prepared raw material, or lengths of lumber, and put them through the processes already mentioned to make "cross arms" and sold them to the consumer.

For the present purposes, I wish to note and to adopt one of the definitions cited by the learned judge, i.e., that "manufacture is the production of articles for use from raw or prepared material by giving to these materials *new forms, qualities and properties or combinations* whether by hand or machinery". (The italics are my own.) If one were to apply the latter test to the question at issue in this appeal, in my view, the finished marble slabs which left the respondent's plant had by work, both by hand and machinery, received new form, new quality and new properties. The form differed in that what arrived were great slabs of raw marble sometimes as long as sixteen feet and of varying widths, and what left were exactly shaped pieces of polished marble much smaller in size cut with precision to fit the places into which they were to be installed. As to quality, what arrived was a greyish, non-descript slab of stone and what left was a highly polished marble facing whether it was to be installed in a wall, as a window sill, or as a post. As to properties, what arrived was in many cases a piece of unfilled stone and sometimes one which would be

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

too fragile for use and what left in most cases was a piece of marble in which the rough unevenness had been filled in by grouting and where necessary the weakness had been remedied by rodding.

In my view, the application of this test alone would be sufficient justification to find that the marble pieces which left the respondent's plant had been "produced" or "manufactured" there from the raw material of the rough slabs of marble which had arrived.

In *Gruen Watch Company of Canada Ltd. et al. v. Attorney General of Canada*[4], McRuer C.J.H.C. considered the same question in reference to the same statute. The facts may be briefly stated from the first paragraph of his judgment at p. 430:

> The plaintiffs in this action have been engaged for many years in the importation of watch movements from abroad. They import or purchase in Canada watch cases adapted to the particular movements imported, and by a very simple operation performed by unskilled labour, taking only a very few minutes at an expense of from 1.25 to 3.6 cents each, the watch movement is placed in the case and a watch ready for sale is produced. In some cases wrist-bands, bracelets or brooches are attached to the watch case for the personal convenience of the purchasers. The plaintiffs do not manufacture either watch movements or watch cases.

At p. 442, the learned Chief Justice said:

> I cannot find that the simple operation of putting a watch movement into a watch case is "manufacturing" a watch in the "ordinary, popular and natural sense" of the word, but I feel clear that the plaintiffs "produced" watches "adapted to household or personal use". It may well be that, as counsel for the plaintiffs argued, the movement as imported in the tin or aluminum case will keep time and could be used as a watch. It is not a watch "adapted to household or personal use" as the term is used in its ordinary and popular sense, and the movement in the aluminum case would be quite unsaleable as such.

It is to be noted that the learned Chief Justice used the firmly established principle that the taxing statute must be interpreted by the consideration of the words thereof in the ordinary, proper, and natural sense, and that doing so he found himself able to distinguish between the two words "produced" and "manufactured". It was the submission of counsel for the respondent before this Court that the two words must be considered as being practically synonymous and *Charles Marchand Co. v. Higgins*[5] was quoted as an authority therefor. That was a decision of

---

[4] [1950] O.R. 429, [1950] C.T.C. 440, 4 D.L.R. 156.

[5] (1940), 36 F. Supp. 792.

Mandelbaum, District Judge in the District Court of the Southern District of New York, and the decision on this point may be taken from one sentence in the reasons of the learned District Court Judge, "I am of the opinion that the terms as used in the present taxing statute are synonymous". The learned District Court Judge reached that conclusion because Article 4 of Treasury Regulation 46 (1932 edition) provided:

> As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of the article, or produces a taxable article by combining or assembling two or more articles.

and then various authorities relied on by the learned District Court Judge held that "manufacture" implied a change into a new and different article.

For these reasons, I am not able to accept the decision in *Charles Marchand v. Higgins* as being an authority which should persuade this Court to hold that "produce" and "manufacture" as used in the statute presently considered in which neither is defined are synonymous, and I adopt the course of McRuer C.J.H.C., in *Gruen Watch Co. v. Attorney General of Canada* in holding that an article may be "produced" although it is not "manufactured". In that case, although he was unable to come to the conclusion that the mere insertion of the movement into the watch case was the manufacture of the watch, he found no difficulty in determining that such a process was the production of a watch.

Similarly, in the present case, if I had any doubt that the various procedures taken by the respondent in reference to the marble slabs resulted in the manufacture of a piece of marble, I would have no doubt that those procedures did result in the production of a piece of marble.

In *The King v. Vandeweghe Limited, supra,* Duff C.J., upon commenting that the words "produce" and "manufacture" were not words of any very precise meaning, sought an aid to construction in a consideration of the exemptions from the impositions which were listed in subs. (4) of s. 86 of the then statute. Amongst those exemptions were pulpwood, tan bark, wool no further prepared than washed and raw fur. The Chief Justice of this Court remarked at p. 248:

> Light is thrown upon the meaning of the word "produced" by the fact that pulpwood and tan bark and other articles the product of the forest

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

are contemplated as being produced within the meaning of the statute. We have further the item "wool no further prepared than washed" which seems to imply that wool still further prepared, by dyeing for example, if sold, comes within the incidence of the tax. Then we have "raw furs" which is not without its implication. It is not easy to see why a raw fur which is separated from the animal upon which it grew, when combed, "made pliable" and dyed and thereby turned into "merchantable stock-in-trade", has not become something which is "produced" if the term "produced" is properly applicable to such things as "pulpwood" and "tan bark".

To apply the same method of testing to the present situation, Schedule 3 to the *Excise Tax Act* contains a list of exemptions, including:

> Building stone (exemption removed effective June 14, 1963)
> Sand
> Gravel
> Rubble
> Field Stone
> Cut flowers
> Straw
> Forest products when produced and sold by the individual settler or farmer
> Furs, raw
> Logs and round unmanufactured timber
> Sawdust and wood shavings
> Wool not further prepared than washed

Of course, such goods as sand, gravel, rubble or field stone could not be considered either "manufactured" or "produced". Nor in all probability would they have been imported and so taxable under s. 30(1)(*b*). There have been, however, some very simple operations in the production of cut flowers, straw, raw furs and wool not further prepared than washed, and yet it is apparent that these items were regarded by Parliament as being "manufactured" or "produced".

In at least two recent decisions, the Court has considered the schedules to the Customs Act as being a revenue statute in *pari materia* and therefore an aid in the interpretation of words in the *Excise Tax Act*. In *Bradshaw v. Minister of Customs and Excise*[6], Duff C.J., when considering the phrase "nursery stock" as used in subs. (4) of s. 19BBB of c. 8 of the Statutes of Canada, 5 Geo. V, pointed out that in the Customs Tariff the words used were "trees,

[6] [1928] S.C.R. 54, [1927] 3 W.W.R. 85, 4 D.L.R. 278.

plants and shrubs, commonly known as nursery stock" and in *The King v. Planters Nut and Chocolate Company Ltd.*[7], Cameron J., at p. 130, said:

> It is of considerable interest, also, to note that in the tariff rates under *The Customs Act* (which, as a revenue Act, I consider to be in *pari materia*), separate items are set up for fruits, for vegetables, and also for "nuts of all kinds, not otherwise provided, including shelled peanuts". This would seem to indicate that in the minds of the legislators, nuts were not included in the categories of fruits or vegetables, and also that peanuts fell within the category of nuts.

When one calls in aid of the construction of the words "manufactured" and "produced" in s. 30(1)(*a*) of the *Excise Tax Act*, the provisions of the Customs Tariff, items 306(b) and 306(c), which read as follows:

> 306b. Building stone, other than marble or granite, planed, turned, cut or further manufactured than sawn on four sides.
>
> 306c. Marble, not further manufactured than sawn, when imported by manufacturers of tombstones to be used exclusively in the manufacture of such articles, in their own factories.

it would appear that the legislators regarded mere sawing of both building stone and marble as being the manufacture thereof. I view these considerations of both the exemptions in Schedule C of the *Excise Tax Act* and the items in the *Customs Act* as being confirmatory of my view that the legislators intended that the words "manufactured" or "produced" should encompass goods such as the polished marble slabs in question in this appeal.

Gibson J., in the penultimate paragraph of his reasons for judgment, stated:

> The activities of the suppliant in relation to the imported marble were done as part and parcel of executing building sub-contracts resulting in such marble becoming part of the realty and in doing so the suppliant did not at any material time produce or manufacture in Canada "goods" as meant in s. 30(1)(*a*) of the Excise Tax Act.

It should be noted that the *Excise Tax Act* in s. 30 imposes not only a sales tax but a consumption tax and that s. 31(1)(*d*) of the said *Excise Tax Act* makes specific provision for goods which although manufactured or produced in Canada were for use by the manufacturer or producer and not for sale. This Court, in *The King v. Fraser Companies Ltd*[8], held that a corporation which

---

[7] [1951] Ex. C.R. 122, [1951] C.T.C. 16.

[8] [1931] S.C.R. 490, 4 D.L.R. 145.

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

produced lumber and used the same in the performance of a building contract was liable for the tax, and again, in *The King v. Dominion Bridge Co. Ltd.*[9], held that a company which produced steel members in order to fabricate them in the superstructure of a bridge was liable to the tax.

I am, therefore, of the opinion that the fact that the respondent used the marble pieces in executing the building sub-contracts does not exempt it from the liability of the tax.

I would allow the appeal with costs. Her Majesty should have the costs in the Exchequer Court.

Appeal allowed with costs.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitors for the respondent: Goodman & Carr, Toronto.

---

[9] [1940] S.C.R. 487, 2 D.L.R. 545.