HER MAJESTY THE QUEEN (*Plaintiff*) APPELLANT;

AND

LABORATOIRES MAROIS LIMITEE (*Defendant*) ..... RESPONDENT.

1957
Dec. 4
1958
*Apr. 1, 22
Jun. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax and old age security tax—Computation of amount on goods delivered by manufacturer to unlicensed wholesale branches and sold by branches to retailers—On what price tax to be calculated—The Excise Tax Act, R.S.C. 1927, c. 179, ss. 85, 86, 99, as amended—The Old Age Security Act, 1951, 2nd sess. (Can.), c. 18—Regulation 782-C.

Regulation 782-C made by the Minister of National Revenue under s. 99 of the *Excise Tax Act*, 1927, contained the following provision:

(*b*) Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Fauteux JJ.

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transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.

NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

The respondent, a manufacturer which distributed its products in the manner contemplated by this paragraph, computed the sales tax and old age security tax payable by it as follows: It first deducted from the regular sale price to ordinary retailers (which included the tax) an amount representing the tax, and then deducted 20 per cent. from this reduced amount, after which it computed and paid tax on the amount remaining after these deductions. The Crown contended that this method of computing the tax violated the "note" in the regulation and that the 20 per cent. must be deducted from the tax-inclusive selling price, since the tax was within the words "any other allowances" in the "note".

The Crown exhibited an information in the Exchequer Court, claiming the difference between the tax paid and the amount claimed by it. The information was dismissed and the Crown appealed. On the hearing of the appeal counsel filed a written agreement as to the amount for which judgment should be entered if the appellant succeeded.

Held (Kerwin C.J. dissenting): The appeal should be allowed and judgment should be entered for the amount agreed upon.

Per Taschereau and Fauteux JJ.: Regulation 782-C was *ultra vires* of the Minister since it changed the basis of computing the tax and therefore could not be called a regulation "for carrying out the provisions of" the Act. The appellant was therefore entitled to the full amount demanded by it, but since it had agreed to accept a lower amount judgment should go for that amount.

Per Rand J.: It was impossible to say that the method followed by the respondent produced the statutory tax-exclusive sales price or that the tax-inclusive sales price did not contain undisclosed allowances. When a seller introduced a tax-inclusive price and there was no means of determining independently the statutory sale price to which the tax was related, he made it impossible to ascertain whether any allowance was made in relation to the tax and the amount of that allowance, if any. The Crown was, therefore, entitled to tax in the full amount claimed and should have judgment for the amount agreed upon. It was unnecessary to determine whether the regulation was valid.

Per Locke J.: The regulation did not change the method of computing the tax and was within the powers of the Minister under s. 99, but the respondent's method of applying the regulation was wrong. The respondent should first have deducted 20 per cent. of the total tax-inclusive price to the retailers and computed tax at the statutory rate on the balance. The question was not as to the meaning of "sale price" as defined in the Act but rather as to the meaning of "regular list selling prices to ordinary retailers" in the regulation.

Per Kerwin C.J., *dissenting*: The regulation was valid and within the powers of the Minister, and the manner of computation adopted by the respondent was correct. It was never intended that sales tax was to be computed upon a price that already included sales tax.

APPEAL from a judgment of Fournier J.[1] in the Exchequer Court of Canada dismissing an information for an alleged balance of sales tax and statutory penalties. On the argument of the appeal, counsel for the parties filed a consent that

if Appellant's interpretation of the regulation contained in circular No. 782c as applicable to Respondent is correct, then Respondent for the period up to the date of the institution of Appellant's action herein has failed to pay sales tax in the amount of $1,577.83 and that accrued penalties owing by Respondent in this respect at such time totalled $395.77.

Appeal allowed, Kerwin C.J. dissenting.

A. Geoffrion and *P. Ollivier,* for the plaintiff, appellant.

B. Marchessault and *H. Quain,* for the defendant, respondent.

THE CHIEF JUSTICE (*dissenting*):—This is an appeal by Her Majesty the Queen against a judgment of the Exchequer Court[1], dated May 6, 1955, dismissing an information against Laboratoires Marois Limitée, for an alleged balance of sales tax and statutory penalties. The sales tax was payable from June 1, 1949, to April 11, 1951, under the provisions of ss. 85 to 98 inclusive of *The Excise Tax Act,* R.S.C. 1927, c. 179, as amended (now R.S.C. 1952, c. 100), and for the period from April 12, 1951, to January 31, 1952, under those sections and also under the *Old Age Security Act,* 15-16 Geo. VI, c. 18 (now R.S.C. 1952, c. 200). The appellant admits that during these two periods the respondent was a manufacturer of drugs, pharmaceutical preparations, proprietary and patent medicines and other similar products in the sense of certain regulations contained in circular no. 782-C (mentioned hereafter) and did not sell to independent wholesalers; and the respondent admits that it was subject from time to time to the statutory enactments referred to above. Subsection (1) of s. 86 of the *Excise Tax Act,* as amended by 1947, c. 60, s. 14(1), provides for the imposition of sales tax on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) 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 . . .

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

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Kerwin C.J.

By subs. 1(*b*) of s. 85, as re-enacted by 1951, c. 28, s. 5, "sale price", for the purpose of determining the tax, means:

> (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto . . .

The real dispute hinges upon the validity and effect of certain regulations established under the authority of s. 99 of the *Excise Tax Act*, which provides that the Minister "may make such regulations as he deems necessary or advisable for carrying out the provisions of this Act". These regulations are contained in circular no. 782-C, dated April 1, 1948, which reads in part:

> Ottawa, April 1, 1948.
>
> Re: Drugs, Pharmaceutical Preparations,
> Proprietary and Patent Medicines, etc.
>
> The Honourable, the Minister of National Revenue has been pleased to establish the following regulations, under authority of Section 99 of The Excise Tax Act:
>
> (*a*) Where manufacturers of the above mentioned products sell them to independent wholesalers in representative quantities in the regular and ordinary course of their business, this will determine the value at which they may transfer these goods from their factories to their unlicensed wholesale branches, and the sales tax will apply on the value thus determined.
>
> (*b*) Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.
>
> NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

Exhibit 1 at the trial is a statement, col. 2 of which is headed "Actual Selling price", and the figures below are tax-included prices. For the month of June 1949 the figure is $9,295.57 and the tax computed by the respondent as owing by it, and actually paid, is $559.13.

The respondent contends that when it transfers its products to its wholesale branches to the value of $100 at the regular list selling-prices to ordinary retailers, it is necessary, in order to ascertain the tax payable, first to deduct 20 per cent. from $100 in accordance with para. (*b*) of the circular. The rate applicable in June 1949 was 8 per cent., so that the tax on $80 would amount to $6.40. That sum added to the $100 made a total of $106.40, tax included. In

order to obtain the exact sale, or transfer, price of the goods, of which the selling-price in June 1949 to ordinary retailers, tax included, was $9,295.57, that amount must be divided by 1.064 and the answer, $8,736.44, subtracted from $9,295.57, leaving $559.13.

The appellant contends that the terms of the "note" forming part of para. (*b*) of the circular were not complied with by the respondent, since in contravention thereof the respondent deducted another "allowance" and is therefore not entitled to the 20 per cent. deduction. The argument is that, as the last part of the body of para. (*b*) states that the sales tax at the current rate is to apply "*on* the remainder", "remainder" must include the tax itself; that the respondent deducted that tax before calculating the amount of it and, therefore, because the tax is one of the "allowances", the deduction of which is prohibited by the "note", the respondent has not complied with the terms of the regulations. Hence it cannot claim the 20 per cent. and was, therefore, liable for 8/108 of $9,295.57, or $688.56. This would leave a balance owing for June 1949 which would attract the prescribed penalties; and similarly with reference to the other months in the two periods.

I agree with the trial judge that it was never intended that the sales tax should be included in an amount upon which the tax itself should be paid and it is, therefore, not one of the "other allowances" prohibited by the "note". I also agree with him that, while the Minister cannot make a regulation which would have the effect of changing the rate of tax or the meaning of the term "sale price", Regulation 782-C did neither of these things, but was merely a regulation "for carrying out the provisions of this Act" in accordance with s. 99 of the *Excise Tax Act*.

The appeal should be dismissed with costs.

The judgment of Taschereau and Fauteux JJ. was delivered by

TASCHEREAU J.:—Sa Majesté la Reine a poursuivi l'intimée devant la Cour de l'Échiquier, et lui a réclamé en vertu de la *Loi sur la taxe d'accise*, S.R.C. 1927, c. 179, tel qu'amendée, et de la *Loi sur la sécurité de la vieillesse*, une balance de $4,982.63, ainsi qu'une somme additionnelle de $1,211.99, représentant les pénalités dues à cause du défaut de payer le capital.

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Taschereau J.

En raison de ventes faites par l'intimée au Canada, durant la période du 1er juin 1949 au 31 janvier 1952 inclusivement, la défenderesse d'après la loi aurait dû payer un montant total de $27,911.61, mais il est resté un solde de $5,067.90, qui a cependant été réduit par des crédits subséquents à $4,982.63, qui est le montant réclamé par l'action, en outre des pénalités. Il a été originairement admis que les chiffres produits étaient exacts, que durant toute la période pour laquelle les taxes sont réclamées, la défenderesse était fabricante de drogues et de préparations pharmaceutiques, et qu'elle ne vendait pas à des grossistes indépendants. Les dispositions de la *Loi sur la taxe d'accise* et de la *Loi sur la sécurité de la vieillesse,* sur lesquelles la demanderesse base sa réclamation, se lisent ainsi:

Article 86 de la Loi de la taxe d'accise, tel qu'amendé par 1947, c. 60, art. 14(1):

(1) Il doit être imposé, prélevé et perçu une taxe de consommation ou de vente *de huit pour cent* sur le prix de vente de toutes marchandises,

a) produites ou fabriquées au Canada,

(i) payable, dans tout cas autre que celui qui est mentionné au sous-alinéa (ii) du présent alinéa, *par le producteur ou le fabricant* à l'époque où les marchandises sont livrées ou à l'époque où la propriété des marchandises est transmise, selon celle des deux dates qui est antérieure à l'autre . . .

(Les italiques sont miennes.)

L'article 10 de la *Loi sur la sécurité de la vieillesse* est conçu dans les termes suivants:

10. (1) Est établi, prélevé et perçu un impôt de sécurité de la vieillesse *de deux pour cent* sur le prix de vente de toutes marchandises à l'égard desquelles une taxe est payable d'après l'article quatre-vingt-six de la *Loi sur la taxe d'accise,* en même temps, par les mêmes personnes et sous réserve des mêmes conditions que la taxe payable en vertu dudit article.

(Les italiques sont miennes.)

En vertu de l'art. 99 de la *Loi de la taxe d'accise,* le Ministre des Finances, ou le Ministre du Revenu National, selon le cas, peut établir les règlements qu'il juge nécessaires ou utiles *"pour appliquer les dispositions de la présente loi".* Pour faire suite à cette prétendue autorisation, le Ministre du Revenu National a établi le règlement 782-C, et c'est particulièrement le para. (*b*) que la défenderesse-intimée invoque au soutien de sa défense:

(*b*) Lorsque les fabricants *ne vendent pas aux grossistes indépendants,* ou lorsque les ventes ne sont pas faites aux grossistes en quantités suffisantes pour constituer des ventes types, les fabricants portant licence

peuvent transférer leurs produits à leurs succursales de gros non munies de licence aux prix de ventes réguliers consentis aux détaillants ordinaires qui n'obtiennent aucun prix de faveur ou rabais spécial quelconque, *moins 20 pour cent.* La taxe de vente aux taux courants s'applique au reste.

(Les italiques sont miennes.)

Les Laboratoires Marois Limitée n'ont pas vendu à des grossistes indépendants, mais ont livré leurs produits à des succursales, dont celles-ci ont subséquemment disposé, et la compagnie, en conséquence, s'est appuyée sur ce règlement du Ministre du Revenu National, pour computer sa taxe sur le prix de vente régulier habituellement consenti aux détaillants ordinaires, *moins 20 pour cent.*

Comme l'honorable juge en chef de cette Cour, et M. le Juge Fournier de la Cour de l'Échiquier qui a rejeté l'action[1], je suis d'opinion qu'étant donné que l'intimée ne vend pas à des grossistes indépendants, elle a justement établi sa taxe, en déduisant le 20 pour cent autorisé par le règlement, et qu'en conséquence elle aurait payé la totalité du montant réclamé. Il s'ensuivrait logiquement si le règlement s'applique, que l'action a été rejetée tel qu'elle devait l'être, et que le présent appel devrait subir le même sort.

Cependant, la Couronne soutient avec raison que le 20 pour cent ne peut être enlevé que comme résultat de l'application du règlement cité plus haut, et elle ajoute que ce règlement, qu'elle a elle-même passé, dépasse l'autorité du Ministre du Revenu National, est *ultra vires,* et ne peut en conséquence justifier l'attitude de la compagnie intimée. Quelqu'étrange que cela puisse paraître, c'est bien l'attitude prise par l'appelante.

Le Ministre en effet peut établir les règlements qu'il juge nécessaires ou utiles, mais seulement *"pour appliquer les dispositions de la présente loi".* Il me semble que, dans le cas qui nous occupe, ce règlement va bien au delà, car il autorise la computation de la taxe sur une base de *20 pour cent de moins* que sur le prix de vente régulier, qui est déterminé par la loi. Ceci a pour effet de réduire le montant payable, en calculant le montant de la taxe sur $80 au lieu de $100. Je crois que ceci dépasse l'autorité conférée au Ministre par le statut.

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

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Je suis clairement d'opinion que le Ministre, en vertu de la loi, n'est pas autorisé par règlement à changer, ou à modifier, une taxe imposée par le Parlement, et à affecter ainsi la déclaration positive d'un statut. Je m'accorde avec ce qui a été dit sur ce point dans les causes suivantes: *Attorney General of Canada v. Coleman Products Co.*[1]; *Attorney General of Canada v. Goldberg*[2]. Vide également *The King v. Dominion Press Co.*[3]; *The King v. Canada Rice Mills Limited*[4].

Si le règlement est *ultra vires* comme je le pense, et si la compagnie intimée ne peut pas déduire 20 pour cent du montant sur lequel la taxe doit être basée, il s'ensuit qu'elle devrait la totalité du montant réclamé, soit la somme de $4,982.63, tel que le veut l'art. 86 de la *Loi sur la taxe d'accise* et l'art. 10 de la *Loi sur la sécurité de la vieillesse*, sans tenir compte du règlement 782-C (*b*).

Cependant, lors d'une ré-audition, ordonnée par cette Cour, il a été établi par consentement mutuel des parties, que le montant véritablement dû n'est que de $1,577.85, plus une pénalité jusqu'à la date de l'action, s'élevant à $395.77, formant un total de $1,973.62.

Je crois donc que l'appel doit être accueilli, et l'action maintenue jusqu'à concurrence de ce montant, plus une pénalité additionnelle, tel que le veut la loi, au taux de deux-tiers de un pour cent par mois, sur le montant de taxes dû depuis le 1er janvier 1954, jusqu'à la date du paiement.

J'aurais été porté à n'imposer aucune pénalité, étant donné que l'intimée s'est basée, pour ne pas faire le paiement réclamé, sur un règlement du Ministre, que ce dernier répudie aujourd'hui, mais je crois que ceci m'est interdit comme conséquence du jugement du Comité Judiciaire du Conseil Privé, dans une cause de *Minister of National Revenue v. Trusts and Guarantee Company, Limited*[5]. J'ai, cependant, discrétion de n'accorder aucun frais. Dans cette cause, le Comité Judiciaire a décidé ce qui suit:

> It is contended that this provision gives to the Court a discretion to determine whether interest shall or shall not be exacted from the taxpayer.

[1] [1929] 1 D.L.R. 658.
[2] [1929] 1 D.L.R. 711.
[3] [1928] Ex. C.R. 122 at 128.
[4] [1938] Ex. C.R. 257 at 262, [1939] 2 D.L.R. 45, affirmed [1939] S.C.R. 84, [1939] 2 D.L.R. 544; [1939] 3 All E.R. 991, [1939] 3 D.L.R. 577.
[5] [1940] A.C. 138 à 151, [1939] 4 All E.R. 149, [1939] 4 D.L.R. 417, [1940] 1 W.W.R. 402.

Their Lordships cannot accede to this contention. The powers given to the Court by the section are in terms given subject to the provisions of the Act, and therefore subject to the provisions of ss. 48 and 49. *The Court has no more power under the sections to waive the payment of the interest than it has to waive the payment of any tax imposed by the Act, or to impose a greater rate of interest or a larger amount of tax than the Act provides.* The section is merely an enactment conferring upon the Exchequer Court exclusively the jurisdiction of dealing with disputes arising in connection with assessments made under the Act; *and as regards tax, interest and penalties,* its powers are confined to seeing that they are only charged in strict accordance with the Act. *As regards costs, the Court has no doubt a complete discretion.*

(Les italiques sont miennes.)

De plus, lors de cette ré-audition que j'ai mentionnée plus haut, les parties ont également admis que la pénalité serait exigible, dans le cas où l'intimée ne justifierait pas son défaut de payer la taxe.

L'appel devrait donc être maintenu en partie, jusqu'à concurrence des montants ci-dessus mentionnés, mais sans frais devant la Cour de l'Échiquier ni devant cette Cour.

RAND J.:—The Crown appeals from a judgment of the Exchequer Court[1] dismissing an information brought to recover excise taxes imposed under the *Excise Tax Act,* R.S.C. 1927, c. 179, as amended. The goods sold were pharmaceutical products and they were transferred by the respondent to what the scanty material in the case leads me to infer was a wholly controlled subsidiary carrying on business as an unlicensed wholesaler, by which they were sold to retail dealers. The taxation period ran from June 1, 1949, to January 31, 1952; until April 11, 1951, the tax was 8 per cent., and from that date, 10 per cent. By regulation of the Minister under the authority of s. 99 of the Act it was provided:

(*b*) Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.

NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

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Rand J.

The Crown assessed the tax in the following manner: It took the actual retail selling-price, a tax-inclusive price, and segregating the tax arrived at the taxable or sale price. This was done by taking the non-inclusive price at a unit of $100 which, at 8 per cent., produced a tax-inclusive price of $108; dividing that into the total sales brought a tax-exclusive price on which the tax was assessed. For example, the total sales for June 1949 at the tax-inclusive price were $9,295.57: dividing that by 108 gave a quotient of $8,607.19 and a tax of $688.56. This, it will be seen, brings in no deduction of 20 per cent. under the regulation.

The respondent, on the other hand, taking $100 as the unit of tax-exclusive price, deducted, first, the 20 per cent., and on the $80 remaining computed the tax at 8 per cent. The result, $6.40, represented the tax on $100 tax-exclusive price. Adding this amount to the $100 he divided the total, for example that of June, $9,295.57, by $106.40 to obtain the sale price, the difference between which and the total would represent the tax. For that total, the result was $559.13 which is 6.40 per cent. of the so-called sale price $8,736.44.

But as can be seen, the latter is that amount which plus the duty chargeable upon it at the rate prescribed, on this item, 8 per cent. of 80 per cent. of the tax-exclusive sales price, gives the total tax-inclusive sum. In the absence of evidence, how can it be assumed that any amount so ascertained is the actual tax-exclusive sale price? The tax-inclusive price may obviously contain elements of allowance which are quite undiscoverable. Even the basis put forward is not always borne out in the result. The total sales for July 1951, after the tax had been increased to 10 per cent., were $8,780.18 and the tax paid $650.38; for December the sales were $8,795.31 and the tax paid $645.93. Deducting the tax paid from the tax-inclusive sales, the former gives a tax-exclusive sale price of $8,129.80, and the latter $8,149.38. But the tax on the latter at the rate of 8 per cent. is $651.92; the tax-exclusive sales price producing a tax of $645.93 is $8,074.13. These latter two items together amount to a tax-inclusive sales price received of $8,720.06 against $8,795.31 shown on the statement. If the assumption is to be made, how could it result that, comparing the original items of July and December charged at the same tax rate, a lower tax-inclusive sales total would produce a higher amount of tax? Even if error is suggested in the

computation, the fact remains that it is impossible to affirm that the method followed produces the statutory tax-exclusive sales price or that the tax-inclusive price does not contain undisclosed allowances.

The "note" to the regulation assumes that there is an ascertainable retail sale price free from any such tax or basis of calculation and that, subject to s. 85(1)(*b*) of the statute, that amount is the price from which the deduction of 20 per cent. is to be made, the balance to be charged at the appropriate rate.

As a condition of the percentage deduction, in the resulting price no "allowances" are to be involved. What is an "allowance"? From the examples used I take it to be a certain charge or portion of charge ordinarily borne by the purchaser which is absorbed by the seller. For example, in the case of prepaid transportation it is assumed that the purchaser will normally be liable for the "sale price" plus the transportation cost, and the "sale price" is the price at the door of the factory. An allowance on the freight would mean that the actual cost to the purchaser would be something less than the sale price plus the transportation. The sale price would not, ordinarily, absorb the total transportation, but that is conceivable. At any rate, any amount so absorbed is not to be deducted in addition to the 20 per cent. Other deductions, such as cash discounts, are of the same nature and they represent fractional subtractions from the sale price as benefits to the purchaser.

When the seller introduces a tax-inclusive price and there are no means of determining independently the statutory sale price to which the tax is related, he makes it impossible to ascertain mathematically whether and what, if any, allowance is made in relation to the tax. Certainly there would be no purpose in adding to the sale price the amount of the tax and then showing the result merely as a single sum. That would be simply another form of collecting the tax as a separate and additional item and no imaginable competitive purpose, certainly we have no evidence of it, can justify the inference that that is normally the actual purpose.

I think it must be taken that in such a price some amount of tax is absorbed, that is, the sale price plus the tax has been reduced a certain amount and the balance is the tax-inclusive price. But what that amount is, where the point

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may be at which the sale price may end and where the added tax portion, to produce the total sales given us, begins, in the absence of an independently found sale price, which is not to be found in the material before us, is beyond determination.

In that situation, the Crown is entitled to say that as the seller has not shown what the taxable sales price is, the tax, apart from s. 85(1)(*b*), must be imposed upon the only price actually received, which in this case, for example, would, for the June 1949 sales, be 8 per cent. of $9,295.57, or the sum of $743.64. But the Crown interprets s. 85(1)(*b*) as excluding any portion of excise sales tax and has reduced the tax-inclusive total, as already illustrated, to $8,607.01, on which the rate of 8 per cent. has been charged producing a tax of $688.56.

If the deduction of 20 per cent. were applied to the sum of $8,607.01, it is impossible to say that the "note" to the regulation would be respected because it cannot be said that that sum does not include a tax allowance from the "sale price". The presumption is that it does; the condition of the regulation is, then, not fulfilled and the deduction of 20 per cent. becomes unavailable. This leaves the tax collectible to be on that sum $8,607.01 at 8 per cent. which is the amount claimed.

On this footing the validity of the regulation does not come into question.

I would, therefore, allow the appeal and direct judgment for the amount of the taxes agreed upon, $1,577.83, with accrued penalties of $395.77 together with additional penalties at the rate of two-thirds of 1 per cent. per month on the amount of taxes from January 1, 1954, until payment in full. There will be no costs in either Court.

LOCKE J.:—There are two questions to be determined: the first, as to the proper interpretation of the language of Regulation 782-C, and the second, whether the regulation was validly made under the powers vested in the Minister by s. 99 of the *Excise Tax Act,* R.S.C. 1927, c. 179, as amended.

The sales tax claimed is in respect of sales made between June 1, 1949, and January 31, 1952. The tax for the period up to June 21, 1951, was imposed by s. 86(1) of the *Special*

War Revenue Act, as it was enacted by 1947, c. 60, s. 14. So far as it affects the present matter, that section read:

> 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) hereof, 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 matters referred to in subpara. (ii) do not affect the matter. By s. 1 of 1947, c. 60, the name of the statute was changed to the *Excise Tax Act.*

In 1951, s. 86(1) was amended by changing the rate of tax to 10 per cent.

Section 15 of an Act to amend the *Special War Revenue Act,* 1932-33, c. 50, which remained in force until the amendment which became effective on June 20, 1951, read in part:

> (*a*) "sale price" for the purpose of calculating the amount of the consumption or sales tax, shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto, and shall include the amount of other excise duties when the goods are sold in bond; and in the case of goods subject to the taxes imposed by Parts X and XII of this Act, shall include the amount of such taxes . . .

The taxes referred to in Parts X and XII were excise taxes on matches, cigarette papers, cigarette paper tubes, playing cards and wines.

By s. 3 of c. 15 of the statutes of 1950, "sale price" for the purpose of calculating the amount of the consumption or sales tax was declared to mean the price before any amount in respect of the consumpiton or sales tax was added. While the further terms of s. 3 differ in some respects from those of s. 15, the variation does not affect the present matter.

By s. 5 of c. 28 of the statutes of 1951, the definition of "sale price" in s. 85(1) was amended to read:

> (*b*) "sale price" for the purpose of determining the consumption or sales tax, means the aggregate of
>
> (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,
>
> (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price (whether payable at the same or some

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other time) including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and

(iii) the amount of excise duties payable under the *Excise Act* whether the goods are sold in bond or not,

and, in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof.

The action was tried by Fournier J. upon admissions made by the parties, partly in writing and partly orally. Of the latter, no record was made at the trial but, after the appeal to this Court was launched, counsel for the parties filed a document dated February 21, 1957, setting out the admissions that had been made. From these it appears that the respondent was between June 1, 1949, and January 31, 1952, a manufacturer of drugs and pharmaceutical preparations. While the record contains no evidence of the fact, it is common ground that the goods thus manufactured were delivered to branches of the respondent company maintained presumably in the Province of Quebec and that the sales which give rise to the claim were made by these branches to retail dealers in such supplies.

Two exhibits were filed at the trial containing a set of figures the accuracy of which is admitted which, in a column under the heading "Actual Selling price", shows for the month of June 1949 the sum of $9,295.57. Since the respondent could not sell to itself, the delivery of the goods to its branches did not constitute a sale and no tax could be imposed in respect of it under either of the statutes. Liability to pay sales tax upon these transactions is, however, admitted and, accordingly, the figures stated as being the actual selling price in ex. 1 must be taken as being the price agreed to be paid by retail druggists to the branch of the respondent effecting the sale.

The regulation, so far as it need be considered in the present matter, reads:

(*b*) Where manufacturers do not sell to independent wholesalers . . . licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.

NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

Upon the record as it stands, it must be taken as established that in the month of June 1949 the selling price to the retailers was the amount above mentioned and, there having been a sale, sales tax at the appropriate rates became payable by the respondent and, no doubt, the price agreed to be paid for each article included such tax.

I see no ambiguity in the words "the regular selling prices to ordinary retailers". That is the amount which the retailers agreed to pay and it is that amount, and not any lesser amount, which is subject to the deduction of 20 per cent. Therefore, treating June 1949 as a typical month, under the regulation as it reads 20 per cent. of $9,295.57, which amounts to $1,859.13 should have been deducted from the larger amount, leaving $7,436.44 on which the tax at the rate of 8 per cent. under the *Excise Tax Act* should have been computed and paid.

While it is clearly arguable that the change made in the definition of "sale price", for the purpose of computing the tax, effected by s. 5 of c. 28 of the statute of 1951 does not exclude the amount of the sales tax as part of the price since the reference is to "any other tax", the Crown in this litigation has taken the attitude that, in this sense, the definition does not differ from that contained in s. 86(1) of the Act as enacted in 1947. As the 1951 amendment affects only a small part of the claim, I do not in these circumstances deal with the matter.

The sale price in question here, for the purpose of the computation of the tax, however, is not the sale price defined in the statute. The question is not as to what "sale price" means in the sections of the Acts of 1932-33 and 1950, but rather what the expression "regular list selling prices to ordinary retailers" means in the regulation. While s. 85, which is the first section in Part XIII of the Act, says that in that part, unless the context otherwise requires, the words "sale price" are to be given the meaning above quoted and while under s. 2 of the Act, dealing with interpretation, this would apply in construing regulations made under the Act, in this regulation "the context otherwise requires". The statutory definition, in my opinion, has no application in construing the words "regular list selling prices to ordinary retailers". For these reasons, it is my opinion that if the

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respondent is entitled to rely upon the regulation, there can be no deduction for sales tax before the 20 per cent. deduction is made.

For the Crown, it is contended that Regulation 782-C was one which the Minister was without power to make. No such contention, it may be noted, was made in the pleadings, though it was obviously known that the respondent had relied upon the regulation in making payment of what it considered was due for sales tax. However, the matter was treated as open at the trial and argued before the learned trial judge who, in a carefully reasoned judgment[1], found against the Crown's contention. I agree with Fournier J. that the regulation does not assume to change the rate of sales tax, but rather to afford a means of establishing the sale price to which the prescribed rate is to be applied in a manner designed to place manufacturers who do not sell to independent wholesalers but market their goods to the retail trade through their own branches in a competitive position with those who sell to the wholesale trade. If the manufacturer sells to an independent wholesaler, the sale price is, of necessity, less than that when the goods are sold to a retailer, and to impose upon manufacturers, who incur the expense of maintaining branches through which sales are made, sales tax on the higher price charged to retailers would obviously place them at a competitive disadvantage. The 20 per cent. deduction from the price agreed to be paid by the retail dealer before computing the tax appears to me to be simply an endeavour to administer the Act fairly and to place the manufacturers on an equal footing. The power given by s. 99 is to "make such regulations as he deems necessary or advisable for carrying out the provisions of this Act", language which, in my opinion, is wide enough to include prescribing a manner of determining a sale price such as is done by this regulation.

In the factum filed on behalf of the Crown in this matter, as an alternative argument to the contention that Regulation 782-C was without validity it is said that in any event the respondent, on the proper construction of the regulation, was not entitled before making the deduction of 20 per cent. to deduct from the selling price any amount in respect of sales tax. With this contention I agree.

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

Following the further statement as to the facts made by counsel for the parties at the opening of the present term, a written consent signed on behalf of the parties has been filed agreeing that, if the Crown's interpretation of the regulation is correct, the respondent was indebted for sales tax in the amount of $1,577.83 and accrued penalties of $395.77 on the date of the institution of the action, and for additional penalties at the rate of two-thirds of 1 per cent. per month on the amount of the taxes from January 1, 1954, until full payment.

I would, therefore, allow this appeal and direct that judgment be entered for the above amounts and such penalties. In the circumstances, I agree that there should be no order as to costs either in this Court or the Exchequer Court.

Appeal allowed without costs, KERWIN C.J. *dissenting.*

Solicitor for the appellant: F. P. Varcoe, Ottawa.

Solicitors for the respondent: de Martigny & Marchessault, St. Jérôme.