SUNBEAM CORPORATION (CANADA) LTD. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1962

*Nov. 20, 21
Dec. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Whether taxpayer qualified to claim certain deductions by reason of having paid income tax in Quebec—Requirements to constitute a permanent establishment—The Income Tax Act, 1948, s. 31,

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Judson JJ.

[1] [1957] S.C.R. 858, 11 D.L.R. (2d) 161.

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enacted by Statutes of Canada 1952, c. 29, s. 13—Income Tax Act, R.S.C. 1952, c. 148, s. 40, amended by Statutes of Canada 1952-53, c. 40, s. 59(1).—Income Tax Regulations 400, 401, 402, 411(1)(a)(b), (2).

The appellant company, whose head office and plant were in Ontario, manufactured various electrical appliances and equipment which it sold exclusively to wholesale distributors across Canada. As its sales representative in the Province of Quebec in the years 1952, 1953 and 1954, the company employed C from March 31, 1952, to February 10, 1953, and D from April 10, 1953, until a year and a half after the end of 1954. These representatives did not have authority to make contracts on the appellant's behalf and did not keep in Quebec a supply of goods for delivery as a result of sales which they made. Orders were filled from the appellant's plant in Ontario. C and D each maintained an office in his own residence at his own expense and each used his office for doing the paper work involved in the business and for sales demonstration purposes. The company's claim for tax deductions under certain provisions of the Income Tax Regulations on the ground that it had a permanent establishment in Quebec in 1952, 1953 and 1954 was disallowed by the Minister. The Income Tax Appeal Board ruled in favour of the company, but an appeal from this decision was allowed by the Exchequer Court.

Held: The appeal should be dismissed.

The appellant did not have a "permanent establishment" in the Province of Quebec in the years in question. Interpreting those words, apart from the provisions of s. 411(1)(*a*) of the Regulations, the word "establishment" contemplates a fixed place of business of the corporation, a local habitation of its own. The word "permanent" means that the establishment is a stable one, and not of a temporary or tentative character.

Paragraph (*a*) of s. 411(1) of the Regulations defines various kinds of places of business which constitute a permanent establishment. The fact that the appellant's employee, for the discharge of his duties under his contract, set up an office in his own premises did not constitute that office a branch, an office or an agency of the appellant. Such office was not a permanent establishment of the appellant.

Under para. (*b*) of s. 411(1) of the Regulations an employee or agent can be deemed to operate a permanent establishment of a corporation, but only if he has authority to contract for his employer or principal, or if he has a stock of merchandise from which he regularly fills orders which he receives. Neither of these requirements was met in the present case.

The submission that the appellant had a permanent establishment in Quebec, by virtue of subs. (2) of s. 411 of the Regulations, because its sales representatives had "substantial machinery or equipment", varying in value from $4,000 to $11,000, on their premises, in the tax years in question, which they used for sales demonstrations, was rejected. As used in this subsection, the adjective "substantial" was intended to mean substantial in size. The use made by the sales representatives of the appellant's products for sales demonstration purposes did not constitute that kind of "use" which was contemplated by the subsection. In order to come within the subsection, the machinery or equipment would have to be used by the taxpayer for the purpose for which it was created.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], allowing an appeal from a decision of the Income Tax Appeal Board. Appeal dismissed.

J. J. Robinette, Q.C., and *J. A. Langford*, for the appellant.

D. S. Maxwell, Q.C., and *T. Z. Boles*, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This appeal is from a judgment of Cameron J., in the Exchequer Court[1], who allowed an appeal by the respondent from a decision of the Income Tax Appeal Board. The Board had allowed the appellant's appeal from reassessments for income tax for the years 1952, 1953 and 1954.

In issue is the right of the appellant to claim certain deductions from its income tax in each of those years by reason of its having paid income tax in those years in the Province of Quebec. The relevant statutory provisions are s. 37 of *The Income Tax Act* of 1948, as enacted in s. 13 of c. 29 of the Statutes of Canada, 1952, in respect of the year 1952, and s. 40 of c. 148 of the Revised Statutes of Canada, 1952, as amended by s. 59(1) of c. 40 of the Statutes of Canada, 1952-53, in respect of the years 1953 and 1954.

The sole issue is as to whether the appellant qualifies to claim the deductions under the provisions of the Income Tax Regulations and the question for decision is did the appellant, in the years in question, have a permanent establishment in the Province of Quebec?

Sections 400, 401 and 402 of the Income Tax Regulations, as applicable to the 1952 and subsequent taxation years, were made by PC 1953-255 of February 19, 1953. Those sections were later amended by PC 1953-1773 of November 19, 1953, mainly in order to substitute references to s. 40 of c. 148, R.S.C. 1952, for the original references to s. 37 of the 1948 *Income Tax Act*. These sections, as amended, are in part as follows:

400. (1) The Province of Quebec is the province prescribed for the purpose of section 40 of the Act.

[1] [1961] Ex. C.R. 234, [1961] C.T.C. 45, 61 D.T.C. 1053.

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(2) For the purpose of paragraph (*a*) of subsection (1) of section 40 of the Act, the following classes of corporations are prescribed:

(*a*) corporations that are taxable under the provisions of section 3 of the Quebec Corporation Tax Act and that are not taxable under the provisions of section 6 of the Quebec Corporation Tax Act, and

* * *

401. For the purpose of subsection (2) of section 40 of the Act, the amount of taxable income earned in a taxation year in a province shall be determined as hereinafter set forth in this Part.

402. (1) Where, in a taxation year, a corporation had no permanent establishment outside the province, the whole of its taxable income for the year shall be deemed to have been earned in the province.

(2) Where, in a taxation year, a corporation had no permanent establishment in the province, no part of its taxable income for the year shall be deemed to have been earned in the province.

Subsections (3) and (4) are rules for determining the amount of the taxable income earned in the year in the province (Quebec) where a corporation had a permanent establishment in that province and a permanent establishment outside that province. It is unnecessary to refer to them in detail as the parties are agreed that the deductions claimed by the appellant in each of the years in question have been computed in accordance with such rules.

Section 411 of the Regulations reads, in part, as follows:

411. (1) For the purpose of this Part,

(*a*) "permanent establishment" includes branches, mines, oil wells, farms, timber lands, factories, workshops, warehouses, offices, agencies, and other fixed places of business;

(*b*) where a corporation carries on business through an employee or agent who has general authority to contract for his employer or principal or has a stock of merchandise from which he regularly fills orders which he receives, the said agent or employee shall be deemed to operate a permanent establishment of the corporation;

(2) The use of substantial machinery or equipment in a particular place at any time in a taxation year shall constitute a permanent establishment in that place for the year.

The facts are not in dispute. The appellant is a company, incorporated under the laws of Canada, having its head office and manufacturing plant in the Province of Ontario. During the taxation years in question the appellant sold its wares in the Province of Quebec and other provinces of Canada.

The appellant manufactured electrical appliances, cattle clipping and shearing equipment and lawn and garden equipment. These products were sold by the appellant exclusively to wholesale distributors across Canada.

It had four sales representatives, located respectively in Vancouver, Winnipeg, Toronto and Montreal. A large number of sales representatives were not required because of the appellant's policy of selling to wholesale distributors exclusively. In the Province of Quebec there were not more than approximately 25 such distributors, of whom 15 were in the Montreal area.

Approximately 14 per cent or 15 per cent of the appellant's sales by value were made to the 25 distributors in the Province of Quebec. The Quebec sales representative was also responsible for sales to distributors in the Atlantic Provinces, which together, during the taxation years in question, accounted for a further 5 per cent approximately, of the appellant's sales.

In the years 1952, 1953 and 1954, the appellant had a sales representative in the Province of Quebec, a Mr. Comtois, from March 31, 1952, to February 10, 1953, and a Mr. Dyke, from April 10, 1953, until a year and a half after the end of the year 1954.

These sales representatives were employed pursuant to written agreements with the appellant. That with Comtois was for the period from March 31, 1952, to December 27 of that year, with provision for automatic extensions from year to year thereafter, but subject to arbitrary termination at any time on two weeks' written notice by either party. Dyke's agreement ran from April 12, 1953, to December 26 of that year. It had no automatic renewal clause, but was subject to arbitrary termination by either party on two weeks' written notice.

Each contract provided for commission sales by the sales representative in respect of certain of the products of the appellant, with a minimum amount guaranteed. The sales representative agreed to pay his own expenses out of his remuneration. The agreement contemplated sales demonstrations being arranged and the possible employment of demonstrators and of junior salesmen. Each agreement provided that the sales representative would devote his entire time, best effort and full and undivided attention to the sale of the appellant's products in his territory, and the sales representative agreed to follow the appellant's instructions and expressed wishes in carrying out his work.

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The sales representatives did not have authority to make contracts on the appellant's behalf and did not keep in Quebec a supply of goods for delivery as a result of the sales which they made. Orders were filled from the appellant's plant in Ontario.

Comtois and Dyke each maintained an office in his own residence, but received no rent or added compensation from the appellant for so doing. Each provided his own office equipment, without compensation therefor from the appellant. The telephone directory did not list the sales representative's residence as the appellant's place of business and the residence did not carry any business signs. The appellant provided its sales representative with calling cards, showing that he was the appellant's representative.

The office of the sales representative was used by him for doing the paper work involved in his business. Some of the orders from distributors were obtained there. In addition, sales demonstrations were held there on occasions and demonstrators were trained there. For these purposes the evidence was that the sales representatives kept quantities of the appellant's products at their premises, ranging in value from some $4,000 to $11,000.

On this evidence I am not prepared to hold that the appellant had a "permanent establishment" in the Province of Quebec in the years in question. Interpreting those words, apart from the provisions of s. 411(1)(*a*) of the Regulations, my opinion is that the word "establishment" contemplates a fixed place of business of the corporation, a local habitation of its own. The word "permanent" means that the establishment is a stable one, and not of a temporary or tentative character.

I now turn to s. 411(1) of the Regulations which, although already cited, I will repeat here:

> (*a*) "permanent establishment" includes branches, mines, oil wells, farms, timber lands, factories, workshops, warehouses, offices, agencies, and other fixed places of business;

Counsel for the respondent contended that in this paragraph the word "includes" should be interpreted as meaning "means and includes". Counsel for the appellant argued

that the definition contained in this paragraph was an expansive one. Both of them cited the judgment of Lord Watson in *Dilworth v. The Commissioner of Stamps*[1].

I do not think it is necessary to determine this point, in view of the fact that I interpret this paragraph as defining various kinds of places of business. All of the words used in this subsection, other than "branches" and "agencies", can have reference only to some form of real property. The paragraph concludes with the words "and other fixed places of business". When all the words of this paragraph are read together, in my opinion they are defining those kinds of places of business which constitute a permanent establishment.

From the evidence it is clear that the appellant did not have any fixed place of business of its own. As a result of its contracts with Comtois and with Dyke, it had, and it only had, an employee, who was subject to dismissal on two weeks' notice, to act as its sales representative. I do not agree that the fact that such employee, for the discharge of his duties under his contract, set up an office in his own premises constituted that office a branch, an office or an agency of the appellant. It is the appellant who must have the permanent establishment in the Province of Quebec to qualify for the tax deduction and neither the office of Comtois nor that of Dyke was, in my opinion, a permanent establishment of the appellant.

The fact that the appellant had an employee or agent in Quebec was not, in itself, sufficient to constitute a permanent establishment of the appellant. This, I think, is made clear by para. (*b*) of s. 411(1) of the Regulations. An employee or agent can be deemed to operate a permanent establishment of a corporation under that paragraph, but only if he has authority to contract for his employer or principal, or if he has a stock of merchandise from which he regularly fills orders which he receives. Neither of these requirements was met in the present case.

Finally, the appellant urged that it had a permanent establishment in Quebec, by virtue of subs. (2) of s. 411 of the Regulations, because its sales representatives had "substantial machinery or equipment", varying in value from $4,000 to $11,000, on their premises, in the tax years in

[1] [1899] A.C. 99 at 105 and 106.

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question, which they used for sales demonstrations. I agree with Cameron J. that, as used in this subsection, the adjective "substantial" is intended to mean substantial in size and that the subsection was intended only to apply to machinery and equipment such as is used by contractors or builders in the course of their operations.

In any event, I do not agree that the use made by the sales representatives of the appellant's products for sales demonstration purposes constituted that kind of "use" which is contemplated by the subsection. In my opinion, in order to come within the subsection, the machinery or equipment would have to be used by the taxpayer for the purpose for which it was created. The appliances of the appellant, in the hands of its sales representatives, were not being used for any such purpose, but were merely being displayed, or operated for the purpose of demonstrating what their use was.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Miller, Thomson, Hicks, Sedgewick, Lewis & Healy, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.