REXAIR OF CANADA LIMITED (*Defendant*) ..... APPELLANT;

1958
*Apr. 29
Jun. 26

AND

HER MAJESTY THE QUEEN (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Federal excise tax and sales tax—Manufacturer—Special arrangements between holder of patent rights and other company—The Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(a)(ii), 23(1), (5), 30.

The appellant company, a subsidiary of a United States company, was incorporated for the purpose of marketing, throughout Canada, a vacuum cleaner sold under a trade-name registered in Canada in the name of the parent company, which held assignments of the necessary patents. No written licence was given to the appellant but the evidence showed that the American company permitted the appellant and another company, C.R. Co., to use its Canadian patent and trade-mark rights.

The appellant and C.R. Co. entered into an agreement whereby the latter agreed to manufacture vacuum cleaners for the appellant and the appellant undertook to indemnify C.R. Co. against any claims for infringement of patents.

C.R. Co. received a licence under the *Excise Tax Act* and paid sales tax and excise tax on the prices charged by it to the appellant, but under the agreement it was entitled to be reimbursed for these taxes by the appellant. The appellant took delivery of the cleaners from C.R. Co. and sold them through its distributors.

Held (Cartwright J. dissenting): Taxes were properly payable on the prices charged by the appellant to its distributors, rather than on the prices charged by C.R. Co. to the appellant. The appellant was within the definition of "manufacturer or producer" in s. 2(*a*)(ii) of the Act, since C.R. Co. manufactured the goods "for" the appellant and the latter exercised complete control over the production. Even if the appellant did not own or hold a patent right it used a patent right, and also the trade-mark right which was an "other right" within the meaning of the definition. The words "producer or manufacturer" in s. 30 of the Act should receive the same construction as "manufacturer or producer" in ss. 2(*a*)(ii) and 23(1). *The King v. Shore,* [1949] Ex. C.R. 225, approved.

Per Cartwright J., *dissenting*: C.R. Co. was the actual manufacturer of the goods, and the Act showed that it was Parliament's intention to levy the taxes on the price at which the manufacturer sold to a purchaser, in this case the appellant. The contract between the appellant and C.R. Co. was one for the sale of "future goods" as defined in s. 6(1) of the Ontario *Sale of Goods Act,* and property in the goods passed to

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

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the appellant from time to time as provided in Rule 5 of s. 19 of that Act. The contract could not be construed as one of agency. *Dixon v. London Small Arms Company* (1876), 1 App. Cas. 632, applied.

APPEAL from a judgment of the Exchequer Court of Canada[1]. Appeal dismissed, Cartwright J. dissenting.

P. B. C. Pepper, for the defendant, appellant.

G. Henderson, Q.C., for the plaintiff, respondent.

The judgment of Kerwin C.J. and Abbott, Martland and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By an information exhibited in the Exchequer Court Her Majesty the Queen under the provisions of the *Excise Tax Act* claimed from the appellant, Rexair of Canada Limited, a sum of money for excise tax and sales tax together with interest, penalties and licence-fees. Hyndman J., sitting as Deputy Judge, gave judgment as asked[1] following an earlier decision of Cameron J. in *The King v. Shore*[2].

The appellant was incorporated in 1947 under the *Dominion Companies Act* as a wholly-owned subsidiary of Martin-Parry Corporation, a United States company, to market throughout Canada a vacuum cleaner known as the "Model C. Rexair Conditioner and Humidifier" and sold under the trade name "Rexair", which is registered in Canada in the name of Martin-Parry. That company is also the holder by assignment of various patents of invention in the United States and other countries, including five in Canada, the latter being in respect of parts of vacuum cleaners. While no written licence was given, the evidence is explicit that Martin-Parry permitted the appellant and Canadian Radio Manufacturing Corporation Limited (hereinafter referred to as "Canadian Radio") to use its Canadian patent and trade-mark rights.

An agreement, dated July 10, 1950, was entered into between the appellant and Canadian Radio whereby the latter agreed to manufacture for the appellant 10,000 "Rexairs" and wherein the appellant undertook to idemnify Canadian Radio against all claims for infringement of patents. It was also provided that no change in material

[1] [1956] Ex. C.R. 267, [1956] C.T.C. 108, 56 D.T.C. 1056.
[2] [1949] Ex. C.R. 225, [1949] C.T.C. 159.

or design should be made without the prior written approval of the appellant. Clause 1(e) contemplated that some of the tools required for the manufacturing operation might be transfered from Martin-Parry, although no such transfer was made. The same clause also provided that all tools required would become the property of the appellant and would not be used in the production of goods except for the appellant. By cl. 4 the appellant agreed to disclose improved procedures resulting from the experience of Martin-Parry. By cl. 8 the appellant was entitled to maintain an inspector in the plant of Canadian Radio with authority to reject any parts or completed machines which did not conform to the appellant's drawings (which were to be and were furnished by the appellant to Canadian Radio) and to the appellant's standard of finish and test specifications. In accordance with this clause, an employee of the appellant spent part of most of the days during which the units were actually being manufactured at the plant of Canadian Radio.

Canadian Radio received a licence under the *Excise Tax Act* and paid sales and excise taxes on the prices charged by it to the appellant, but, by the effect of cl. 1(f) of the agreement, was entitled to be reimbursed therefor by the appellant. The appellant took delivery of the Rexairs from Canadian Radio and sent them to its distributors and the taxes now claimed are on the prices charged by the appellant to those distributors, less the amounts paid by Canadian Radio.

While the rates of taxation varied throughout the period in question—February 1, 1951, to November 1953—it is agreed that reference may be made to the *Excise Tax Act*, R.S.C. 1952, c. 100. By subs. (1) of s. 23 thereof, an excise tax is imposed in respect of goods "manufactured or produced in Canada" and by subs. (2) "when the goods are manufactured or produced and sold in Canada, such excise tax shall be paid by the manufacturer or producer at the time of delivery of such goods to the purchaser thereof". Subsection (5) provides for the application to certain articles of the words "manufactured or produced

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in Canada", but these are special cases and have no significance in the disposition of the appeal. Section 2, however, is important:

2. In this Act,

(a) "manufacturer or producer" includes

* * *

(ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not.

Subsection (2) of s. 23 refers to "when goods are manufactured or produced and sold in Canada", but clearly the Rexairs were so manufactured or produced and the question is whether the appellant was the manufacturer or producer. On the evidence referred to above that question must be answered in the affirmative. Canadian Radio agreed to manufacture them "for" the appellant and the control exercisable and in fact exercised by the appellant over the production leads to the same conclusion. Even if the appellant did not own or hold a patent right (which is an affirmative, and not merely a negative, right) it used a patent right and also an "other right" being the trade-mark right; and both of these were rights to goods being manufactured for or on their behalf by Canadian Radio and so bring the appellant within the extended meaning of "manufacturer or producer".

Mr. Pepper argued that taking the French version of s. 2 (a)(ii) together with the English text, as is indeed proper, a different construction was not merely suggested but required. The French version is as follows:

2. Dans la présente loi, l'expression

(a) "fabricant ou producteur" comprend

* * *

(ii) toute personne, firme ou corporation qui possède, détient, réclame ou emploie un brevet, un droit de propriété, un droit de vente ou autre droit à des marchandises en cours de fabrication, soit par elle, en son nom, soit pour d'autres ou en son nom par d'autres, que cette personne, firme ou corporation vende, distribue, consigne ou autrement aliène les marchandises ou non.

". . . des marchandises en cours de fabrication" should be taken as the equivalent of "goods [which are] being manufactured". Reading (ii) as a whole in the French

version, there are no grounds upon which it may be construed in a sense differing from that to be ascribed to the English text.

The sales tax is imposed by s. 30 of the *Excise Tax Act* in the following words:

> 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 the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, ...

Although, in this section, the reference is to the tax being payable by "the producer or manufacturer" rather than by "the manufacturer or producer" in s. 2, the meaning of each phrase is the same. Furthermore, s. 31 (1) of the Interpretation Act, R.S.C. 1952, c. 158, provides:

> 31. (1) In every Act, unless the contrary intention appears,
>
> * * *
>
> (*n*) where a word is defined other parts of speech and tenses of the same word have corresponding meanings;

so that, in any event, "produced or manufactured" is entitled to the assistance of the extension of the meaning of "manufacturer or producer" in s. 2(*a*).

It may be that, as was suggested, all the arguments now advanced were not presented to the Exchequer Court in *The King v. Shore, supra,* but for the reasons given above that decision was correct and this appeal must be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The relevant facts are set out in the reasons of the Chief Justice and in those of the learned Deputy Judge[1].

The question to be decided is whether the excise tax, levied under s. 23 of the *Excise Tax Act,* hereinafter referred to as "the Act", and the sales tax levied under s. 30 of the Act are to be computed on the sale of the vacuum cleaners by the appellant to the distributors who purchased from it or on the sale, if there was one, from Canadian Radio Manufacturing Corporation Limited, hereinafter referred to as "Canadian Radio", to the appellant. The answer depends on whether Canadian Radio or the

[1] [1956] Ex. C.R. 267, [1956] C.T.C. 108, 56 D.T.C. 1056.

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appellant was the manufacturer of the goods within the meaning of that word as used in the sections mentioned.

The claim of the respondent is founded largely on s. 2(*a*)(ii) of the Act which reads:

> 2. In this Act,
>
> (*a*) "manufacturer or producer" includes
>
> * * *
>
> (ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not.

There was some discussion in argument as to what word in clause (ii) is the object governed by the preposition "for". It appears to me to be "others". I think the words "or for or on their behalf by others" are used as the equivalent of "or for others or on their behalf by others". That this is so would be clearer if there were commas after the words "for" and "by" and the punctuation were as follows: "or for, or on their behalf by, others"; but any doubt on the matter appears to me to be removed by the wording of the French version, "soit pour d'autres ou en son nom par d'autres". This point may not be of great importance as the learned Deputy Judge has based his decision on the view that the goods were being manufactured by Canadian Radio on behalf of the appellant. He says in part[1]:

> If I am correct in this interpretation of the said agreement, it seems to me one cannot escape the conclusion, examining the said agreement as a whole, that the units in question were being manufactured on behalf of Rexair, and for no other purpose.

The learned Deputy Judge finds—and on the evidence it is indisputable—that Canadian Radio was the actual manufacturer of the goods; and correctly states the issue to be whether or not in spite of this the appellant and not Canadian Radio must be regarded as the manufacturer within the meaning of the *Excise Tax Act*.

On a consideration of ss. 23 and 30, read in the context of the whole Act, it appears to me to be the intention of Parliament to levy the taxes with which we are concerned on the sale price of goods sold by the manufacturer thereof

[1] [1956] Ex. C.R. at p. 273.

to a purchaser, payable at the time of delivery of the goods or (in the case of sales tax) at the time when the property in the goods passes, whichever is the earlier.

There is no suggestion in the case at bar that the appellant and Canadian Radio were not entirely independent corporations dealing with each other at arm's length; and if the contract between them was one of sale, in my opinion, it would be on the price paid by the appellant to Canadian Radio that the taxes should be computed. If, on the other hand, on the true construction of the terms of the contract, Canadian Radio agreed to manufacture the goods as the agent of the appellant or, to use the words of s. 2(*a*)(ii), to manufacture the goods on its behalf, the appeal would fail, for then the appellant would be the manufacturer, *qui facit per alium facit per se,* and the first sale of the goods would be that made by it to its distributors.

On a consideration of all the terms of the contract, and with deference to the contrary view entertained by the learned Deputy Judge, I have reached the conclusion that the contract was one for the sale of "future goods" as defined in *The Sale of Goods Act,* R.S.O. 1950, c. 345, s. 6(1), reading as follows:

> 6.—(1) The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods".

and that the property in the goods passed to the appellant from time to time as provided in Rule 5 of s. 19 of the last-mentioned act, which reads:

> *Rule 5*—(i) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied, and may be given either before or after the appropriation is made;
>
> (ii) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not), for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

The circumstances, that the goods were to be manufactured to the specifications of the appellant, that the appellant had the right of inspection and rejection, that

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the contract contained an "escalator clause", that the appellant agreed to indemnify Canadian Radio against claims for infringement of patents, that certain dies and tools were to be purchased by the appellant and that Canadian Radio agreed not to sell the goods to anyone other than the appellant do not, I think, permit us to treat the contract as one of agency and not of sale. It seems clear that the goods while in process of manufacture were the property of Canadian Radio and that a loss which happened by fire would have fallen upon Canadian Radio. The reasons against construing the contract in the case at bar as one of agency appear to me to be as cogent as those found sufficient by the House of Lords in *Dixon v. The London Small Arms Company, Limited*[1].

I confess to having difficulty in fully understanding the intention of Parliament in enacting s. 2(*a*)(ii), quoted above; but I cannot construe the clause as changing the incidence of taxes which in my opinion under the plain words of s. 23 and s. 30 fall upon the sale from Canadian Radio to the appellant to a later sale made by the appellant to others. Having reached the conclusion that the contract between Canadian Radio and the appellant was one under which the appellant purchased from Canadian Radio goods manufactured by the latter, I find it impossible to hold that the appellant was itself the manufacturer of the goods.

I would allow the appeal, set aside the judgment of the Exchequer Court and dismiss the information with costs throughout.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the defendant, appellant: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the plaintiff, respondent: F. P. Varcoe, Ottawa.

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[1] (1876), 1 App. Cas. 632.