CITY OF CHARLOTTETOWN (PLAINTIFF) APPELLANT; 1932

AND

*May 11, 12.
*June 15.

FOUNDATION MARITIME LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

Taxation—Direct or Indirect tax—B.N.A. Act, s. 92, head 2—Municipal tax, on contractors non residents of the province, computed on basis of percentage of contract price—Ultra vires.

The appellant City was by statute empowered "to pass by-laws imposing a tax on contractors resident outside this province doing business within" the City. It passed a by-law enacting that all contractors non residents of the province who should engage in the business of a contractor for the performance of any work within the City, under a contract or agreement, should pay to the City "on every such contract or agreement a direct tax," the tax to be a percentage of the contract price, graduated on a sliding scale according to the amount of the contract. The City claimed from respondent payment of a tax, in accordance with the by-law, of a percentage on the amount of respondent's contract for the building of an hotel.

Held: The tax was "indirect taxation," and the said by-law imposing it was *ultra vires.* (Judgment of the Supreme Court of Prince Edward Island *en banc,* 3 M.P.R. 196, affirmed, on this ground.)

"Direct taxation," as defining the sphere of provincial legislation (*B.N.A. Act,* s. 92, head 2), discussed, and authorities referred to.

Having regard to the form of the tax as imposed, it is nothing else but "the exaction of a percentage duty on services" and would ordinarily be regarded and should be classified as "indirect taxation" (*City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117, at 125). Such a tax would invariably be an element in the fixing of the price of the contract and, in its normal and general tendency, must be reasonably assumed to pass to the owner, in the ordinary course of the transaction, as enhancement of the cost.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Maclean (*ad hoc*) JJ.

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APPEAL by the City of Charlottetown from the judgment of the Supreme Court of Prince Edward Island *en banc* (1).

The City claimed $7,812.50 for taxes against the respondent. The respondent disputed the City's right to impose the tax upon it. A special case was stated for the opinion of the Supreme Court of the Province, and, pursuant to order made on consent of the parties, the case was heard by the Court *en banc,* which gave judgment in favour of the respondent.

The special case is set out in full in the judgment now reported. The appeal to this Court was dismissed with costs.

W. N. Tilley K.C. and *R. M. Martin K.C.* for the appellant.

Gregor Barclay K.C. and *J. O. C. Campbell* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The City of Charlottetown claimed $7,812.50 for taxes alleged to be due by the respondent as contractors resident outside the province of Prince Edward Island in respect of the respondent's building under contract the Canadian National hotel in Charlottetown. The tax is computed on a percentage of the amount of the contract for the building (except the foundation and steel work), as estimated and fixed by the mayor of the city as provided for in a city by-law.

The respondent resisted payment of the tax on several grounds.

The parties concurred in stating the questions of law arising herein in the form of a special case for the opinion of the Supreme Court of the province; and, on consent of all concerned, the case was heard by the court *en banc,* which, having considered the points submitted, ordered that judgment be entered for the respondent, without costs.

The most convenient way to expose the facts and the respective contentions of the parties is to transcribe the stated case:

(1) (1931) 3 M.P.R. 196; [1932] 1 D.L.R. 453.

"This action was commenced on the ninth day of December, A.D. 1930, by a writ of summons, whereby the plaintiff claimed $7,812.50 for debt, and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:—

"1. The plaintiff is a body corporate under an enactment of the Legislature of Prince Edward Island known as the City of Charlottetown Incorporation Act.

"2. The defendant is a body corporate incorporated by Letters Patent issued under authority of an enactment of the Parliament of Canada and having as one of its objects and powers the construction of buildings, generally throughout Canada.

"3. On or about the 28th day of April, A.D. 1930, at Montreal in the Province of Quebec the defendant entered into a contract with Canadian National Realties, a body corporate with head office without Prince Edward Island, for the construction of a hotel (except the foundation and steel frame) for said Canadian National Realties, in the City of Charlottetown; and the defendant built and constructed such hotel under the said contract. The materials used in such construction were largely imported into Prince Edward Island.

"4. Section 112 (19) of the City of Charlottetown Incorporation Act, being 3 Edward VII, Cap. 17, is as follows:

It is hereby enacted that the City Council of Charlottetown shall have power to pass by-laws imposing a tax on contractors resident outside this province doing business within the City of Charlottetown.

"5. In pursuance of said Statute the plaintiff's City Council on May 21, 1908, duly and regularly passed the following by-law:

A BY-LAW TO IMPOSE A TAX ON NON-RESIDENT CONTRACTORS.

BE IT ENACTED by the City Council of the City of Charlottetown as follows:

1. All persons commonly known as Contractors non residents of the Province of Prince Edward Island who shall engage in the business of a Contractor for the performance of any work of a public or private nature within the City of Charlottetown, under a contract or agreement, shall pay to the City of Charlottetown on every such contract or agreement a direct tax to be computed in the manner following, that is to say:

(*a*) On all contracts where the contract price does not exceed $10,000.00 the tax shall be three per cent. of such contract price.

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(b) Where the contract price exceeds $10,000.00 but does not exceed $25,000.00 the tax shall be two and one-half per cent. of such contract price.

(c) Where the contract price exceeds $25,000.00 but does not exceed $50,000.00 the tax shall be two per cent. of such contract price.

(d) Where the contract price exceeds $50,000.00 the tax shall be one and one-quarter per cent. of such contract price.

2. In cases where the exact amount of the contract price cannot be ascertained and in all cases where the same is disputed, the Mayor of the said City shall have power to fix the precise amount of said tax and when so fixed by the Mayor as aforesaid such tax may be sued for and recovered in the manner hereinafter provided.

3. The tax aforesaid shall be paid on or before the expiration of ten days after it has been applied for by the Collector of the said City or other persons duly authorized, and in default of payment may be sued for and recovered in any Court of competent jurisdiction.

(Sgd.) W. W. CLARKE, City Clerk. (Sgd.) B. C. PROWSE, Mayor.

"6. Under the foregoing enactment and by-law the plaintiff City has sought to impose upon the defendant a tax of $7,812.50, being the rate of one and one-quarter per cent. on $625,000, said $625,000 being the amount of the defendant's contract for the building of said hotel (except the foundation and steel frame) as estimated and fixed by the Mayor of the Plaintiff City.

"7. The due and proper assessment and demand as based on the said by-law and statute (whose provisions are not admitted to be *intra vires*) is accepted subject to later determination of the actual contract price if admissible.

"8. The Head Office of the defendant company is at Halifax in the Province of Nova Scotia; it has no place of business in the Province of Prince Edward Island; there is no allegation of any other or further work done in the City by the defendant, and it is not assessed by the plaintiff City in respect to any property or in any way, except the said tax in respect to the said contract.

"9. The question for the Court is whether or not the defendant is liable to pay the tax claimed and more particularly:

(1) Is the tax "indirect taxation," and so *ultra vires?*

(2) Is the tax an interference with the status and powers of Dominion Companies, and so *ultra vires?* If not *ultra vires* for this reason, is it enforceable against the defendant, a Dominion Company?

(3) Is the tax an interference with "Trade and Commerce," and so *ultra vires?*

(4) Is it taxation "within the Province" within the meaning of the British North America Act, 1867?

(5) Is the by-law *ultra vires* the statute in professing to tax an isolated transaction?"

The judges in the Supreme Court of Prince Edward Island were unanimous in holding that the tax in dispute was "indirect taxation," and we agree with their conclusion on this point.

The by-law declares that the tax is to be a "direct" one, but it is needless to say that the point does not turn on the language used in the enactment. As was observed in *Caledonian Collieries Limited* v. *The King* (1), to label the tax as a direct tax does not affect the substance of the matter.

The question of "direct taxation" as defining the sphere of provincial legislation has often been the subject of pronouncements by this Court and by the Judicial Committee of the Privy Council. The effect of the decisions, when analyzed, is substantially as follows:

In every case, the first requisite is to ascertain the inherent character of the tax, whether it is in its nature a direct tax within the meaning of section 92, head 2, of the *British North America Act,* 1867 (*Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co. Ltd.* (2); *City of Halifax* v. *Fairbanks' Estate* (3)). The problem is primarily one of law; and the Act is to be construed according to the ordinary canons of construction: the court must ascertain the intention of Parliament when it made the broad distinction between direct and indirect taxation. At the time of the passing of the Act,—and before,—the classification of the then existing species of taxes into these two separate and distinct categories was familiar to statesmen. Certain taxes were then universally recognized as falling within one or the other category. The framers of the Act should not be taken to have intended to disturb "the established classification of the old and well known

(1) [1927] Can. S.C.R. 257, per Duff J. at 258.
(2) [1930] A.C. 357, at 363 & 364.
(3) [1928] A.C. 117, at 124.

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species of taxation." (*City of Halifax* v. *Fairbanks' Estate* (1).)

Customs or excise duties were the classical type of indirect taxes. Taxes on property or income were commonly regarded as direct taxes (*Fairbanks* case (1)).

These taxes had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies. (*Bank of Toronto* v. *Lambe* (2).)

As applied, however, to taxes outside these well recognized classifications, the meaning of the words " direct taxation," as used in the Act, is to be gathered from the common understanding of these words which prevailed among the economists who had treated such subjects before the Act was passed (*Attorney-General for Quebec* v. *Reed* (3)); and it is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (Political Economy, ed. 1886, vol. II, p. 415) has been judicially adopted as affording a guide to the application of section 92, head 2 (*Fairbanks* case (4).) Mill's definition was held to embody " the most obvious indicia of direct and indirect taxation " and was accepted as providing a logical basis for the distinction to be made between the two. (*Bank of Toronto* v. *Lambe* (5).) The expression " indirect taxation " connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And Mill's canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on. (*The King* v. *Caledonian Collieries, Limited* (6).) It is the normal or general tendency of the tax that

(1) [1928] A.C. 117, at 125.
(2) (1887) 12 App. Cas. 575, at 582.
(3) (1884) 10 App. Cas. 141, at 143.
(4) [1926] Can. S.C.R. 349, at 368; [1928] A.C. 117, at 125.
(5) (1887) 12 App. Cas. 575 at 583.
(6) [1928] A.C. 358.

will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed or from the results which in the ordinary course of business transactions must be held to have been contemplated. (*Fairbanks* case (1).)

Let us now examine the tax in discussion in the light of the principles so laid down.

It is a tax on non-resident contractors (and it seemed to be common ground, at the argument, that, by the word "contractors," was meant those who undertake building contracts). It is therefore a tax upon a person working for someone else in respect of the work he does for someone else, (*Grain* case (2)), and the amount will be paid by someone else than the person primarily taxed (*Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (3)). The tax is not a direct lump sum imposed yearly as a result of the non-resident engaging in the business of contractor within the city of Charlottetown, it is a tax on every contract or agreement, on each single transaction, graduated on a sliding scale according to the amount of the contract.

Having regard to the form of the tax as imposed this case is different in almost every respect from those of *Bank of Toronto* v. *Lambe* (4), and of *Brewsters and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (5). In truth, the tax is nothing else but "the exaction * * * of a percentage duty on services," of which Lord Cave said that it "would ordinarily be regarded" and should be classified "as indirect taxation" (6). Such a tax would invariably be an element in the fixing of the price of the contract and, in its normal and general tendency, must be reasonably assumed to pass to the owner, in the ordinary course of the transaction, as enhancement of the cost. That would seem to be, in the end, the natural consequence —in fact, the inevitable result—of the taxation now in question. In the case of *Attorney-General for Quebec* v.

(1) [1928] A.C. 117, at 122.
(2) *Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561.
(3) [1927] A.C. 934.
(4) (1887) 12 App. Cas. 575.
(5) [1897] A.C. 231.
(6) *City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117, at 125.

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Queen Insurance Co. (1), the disputed tax was imposed under cover of a licence to be taken out by insurers. The price of the licence was to be a percentage on the premiums received for insurances. Speaking of that case in *Bank of Toronto* v. *Lambe* (2), Lord Hobhouse said: "such a tax would fall within any definition of indirect taxation."

It was pointed out by the appellant that, in the *Fairbanks* case (3), Lord Cave excluded, as a rule, from the operation of Mill's principle the imposition of municipal and local rates. This, we have no doubt, meant municipal and local rates properly so called. It is idle to mention that a rate is not a municipal rate in the proper sense, merely because it was imposed by a municipality. It must be a municipal rate according to the common understanding of the word. We find it impossible to classify the disputed tax as a municipal tax in that sense.

It was further argued that the non-resident contractors would, in the ordinary course, be limited in their contract price by the competition of resident contractors and would be forced to absorb the tax. A similar argument was advanced in *The King* v. *Caledonian Collieries, Limited* (4) and again put forward in *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co. Ltd.* (5), and it was rejected on the ground that the general tendency of the tax remains and it is "really irrelevant in determining the inherent character of the tax."

The case was stated for the purpose of determining whether, as a matter of law, the respondent was "liable to pay the tax claimed." The tax was imposed in the by-law. There was no dispute about the statute. Counsel for the respondent stated at bar that he found nothing objectionable in the particular section of the city charter. The object of the stated case was to test the validity of the by-law. For the reasons we have stated, our view is that the tax is "indirect taxation" and the by-law is *ultra vires*. That being so, the assessment must be set aside and the action must be dismissed. We need therefore go no further, and it is unnecessary to consider the other questions submitted.

(1) (1878) 3 App. Cas. 1090.
(2) (1887) 12 App. Cas. 575, at 584.
(3) [1928] A.C. 117.
(4) [1928] A.C. 358 at 362.
(5) [1930] A.C. 357 at 364-5.

The judgment appealed from should be confirmed, with costs to the respondent in this court.

Appeal dismissed with costs.

Solicitor for the appellant: *K. M. Martin.*

Solicitor for the respondent: *J. O. C. Campbell.*