

1960  
\*May 9  
June 24

HER MAJESTY THE QUEEN ..... APPELLANT;

AND

ALASKA PINE AND CELLULOSE }  
LIMITED ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA

*Taxation—Sales tax—Whether certain chemicals used in pulp mill exempt as catalysts or direct agents—Validity of regulation limiting time for claiming exemption—The Social Services Tax Act, R.S.B.C. 1948, c. 333, ss. s(l), 5(h), Sales Tax Regulations 3-11.*

Section 5(h) of the *Social Services Tax Act*, R.S.B.C. 1948, c. 333, provides for an exemption from sales tax of tangible personal property by way of chemical, animal, mineral or vegetable matter “used as catalyst, or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation, or such tangible personal property as is used for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property for the purpose of retail sale”.

In the operation of its pulp mills in British Columbia, the respondent company uses catalysts in its fire boxes and catalysts and direct agents in its boilers. It was admitted that none of these compounds entered into the company’s final product except as an impurity.

The trial judge held that the company was not exempt from sales tax under s. 5(h) of the Act. The Court of Appeal held that the company was exempt and that the limitation of claims for exemption imposed by regulation 3-11 was invalid. The Crown appealed to this Court.

*Held* (Cartwright J. *dissenting in part*): The appeal should be dismissed.

*Per Curiam*: The proviso in regulation 3-11, making the allowance of the exemption conditional upon an application being made by the purchaser within six months after the purchase in respect of which the exemption is claimed, was *ultra vires*. The commodities in question were exempt by virtue of the opening words of s. 5 of the Act.

*Per Kerwin C.J. and Abbott, Martland and Judson JJ.*: On the assumption that the words “transformation or manufacture of a product” applied to the use of both catalysts and direct agents, the company was entitled to the exemption for the reason that catalysts and direct agents did not stand in relation to the final product “by contact or temporary incorporation” as required by s. 5(h) of the Act. The word “product” was not confined to the commercial products of a business.

*Per Cartwright J., dissenting in part*: The comma after the word “catalyst” was to be considered and the company was entitled to the exemption in regard to the substances which were used as catalysts. However, the company was not entitled to the exemption in regard to the substances which were used as “direct agents”, because it was clear that they did not come in contact with and were not at any stage incorporated temporarily or otherwise with the wood-pulp.

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

APPEAL from a judgment of the Court of Appeal for British Columbia<sup>1</sup>, reversing a judgment of Maclean J. Appeal dismissed, Cartwright J. dissenting in part.

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*W. G. Burke-Robertson, Q.C.*, for the appellant.

*C. C. Locke*, for the respondent.

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

THE CHIEF JUSTICE:—In the operation of its pulp mills in British Columbia the respondent, Alaska Pine and Cellulose Limited, uses catalysts in its fire boxes and catalysts and direct agents in its boilers. By leave of this Court Her Majesty the Queen in the right of the Province of British Columbia appeals from the judgment of the Court of Appeal<sup>1</sup> for that province and the two points involved are: (1) Whether under the *Social Services Tax Act*, R.S.B.C. 1948, c. 333, as amended, the company is exempt from the assessment for taxes on the purchase of these articles; (2) Even if so exempt, whether the company lost its right to exemption because it failed to comply with reg. 3-11 of the Lieutenant-Governor in Council promulgated in purported exercise of the powers conferred by s. 5(*h*) of the Act.

Subsection (1) of s. 3 of the Act, as amended, reads:

3. (1) Every purchaser shall pay to Her Majesty in right of the Province at the time of making the purchase a tax at the rate of five per centum of the purchase price of the property purchased.

Section 5(*h*) provides:

5. The following classes of tangible personal property are specifically exempted from the provisions of this Act:—

\* \* \*

(*h*) Such tangible personal property by way of chemical, animal, mineral, or vegetable matter as the Lieutenant-Governor in Council may determine by regulation, used as a catalyst, or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation, or such tangible personal property as is used for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property for the purpose of retail sale;

Regulation 3-11 reads:

3-11. Tangible personal property by way of chemical, animal, mineral, or vegetable matter purchased by manufacturers and used as a catalyst or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation is exempt from the application of the

<sup>1</sup>(1960), 21 D.L.R. (2d) 24.

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tax; provided, however, that the exemption allowed by this regulation is conditional upon application being made by the purchaser within six months after the purchase of the tangible personal property in respect of which the exemption is claimed. The term "direct agent", as used in section 5(h) of the Act and in this regulation, shall mean only such chemical, animal, mineral, or vegetable matter as is used or consumed directly to produce a reaction or combination of materials comparable to that resulting from the use of a catalyst.

It might be here noted that counsel for the appellant, in connection with the second point, relies on subs. (1) of s. 32 of the Act and particularly the parts underlined:

32. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent and of supplying any deficiency therein, and for the purpose of relaxing the strictness of the law relative to the incidence or the collection of the tax thereunder, in cases where, without relaxation, great public inconvenience or great hardship or injustice to persons or individuals could not be avoided, the Lieutenant-Governor in Council may make such regulations as are considered necessary or advisable.

While the matter was not explained in detail, it appears from exhibit 8, which is a letter from the company to the Commissioner (the official appointed to administer the Act) that the catalysts and direct agents were purchased by the company from Alchem Ltd. of Burlington, Ontario. This exhibit is among the papers sent to the Court but is not printed in the appeal case. Presumably to take care of such a situation subs. (3) of s. 3 enacts:

3. (3) Every person residing or ordinarily resident or carrying on business in the Province who brings into the Province or who receives delivery in the Province of tangible personal property acquired by him for value for his own consumption or use, or for the consumption or use of other persons at his expense, or on behalf of, or as the agent for, a principal who desires to acquire such property for the consumption or use by such principal or other persons at his expense, shall immediately report the matter in writing to the Commissioner and supply to him the invoice and all other pertinent information as required by him in respect of the consumption or use of such property, and furthermore, at the same time, shall pay to Her Majesty in right of the Province the same tax in respect of the consumption or use of such property as would have been payable if the property had been purchased at a retail sale in the Province.

Apparently under s. 25 of the Act an inspection of the company's records was had and a calculation made of the taxes claimed to be due. The Commissioner assessed the company for the amount of the taxes so calculated. By subs. (2) of s. 25 the same right to appeal was conferred as exists under ss. 14 and 15. Section 14 provides for an appeal to the Minister of Finance, which the company

took without success, and s. 15 for an appeal from the Minister's decision to a judge of the Supreme Court of the Province, which the Company also took to no avail.

The latter appeal came before MacLean J. Not all the taxes assessed against the company were involved in that appeal but there was in issue before him an assessment relating to the company's purchase of certain lumber. On a further appeal to the Court of Appeal no objection was taken to that part of his judgment. The company had been assessed the sum of \$4,333.96, including interest, in respect of the only articles before the Court of Appeal, i.e., catalysts and direct agents. No evidence had been called on behalf of the present appellant before MacLean J. and counsel admitted that all the substances in question were either catalysts or direct agents. The company agrees that none of the boiler treatment compounds or combustion catalysts actually entered into the company's wood pulp—the company's final product—except as an impurity. It also agreed that no application for an exemption was filed by the company pursuant to the provisions of s. 3-11 of the regulations. The legality of reg. 3-11 will be considered later.

As to the first point, MacLean J. held in construing s. 5(h) of the Act that the comma following the word "catalyst" before the phrase "or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation" was misplaced and that the clause should be read as restricting the exemption of catalysts to those that are used for the transformation or manufacture of a product, by a contact or temporary incorporation, as in the case of direct agents. In the Court of Appeal Davey J.A., with whose judgment O'Halloran J.A. agreed, was inclined to doubt whether that was so. As he points out, a catalyst is a term of art with a well understood meaning in chemistry, i.e., a material substance which alters the speed of a chemical reaction, the catalyst itself undergoing no change in composition as a result of the reaction. This is according to the evidence of Dr. Wright, Head of the Division of Chemistry of the British Columbia Research Council. The same witness testified that the term "direct agent" is not one ordinarily used in the science and lacks a precise meaning. Davey J.A. did not

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rest his judgment on the matter of punctuation but assumed that the words "transformation or manufacture of a product" applied to the use of both catalysts and direct agents.

Proceeding on that basis MacLean J. had held that "product" meant only a commercial product of a business, i.e., in the case of the company, wood pulp. For the reasons given by Davey J.A. I agree that "product" is not confined to the commercial products of a business and I have nothing to add to his elaboration of the subject. It is apparent, therefore, that I am unable to concur with Sheppard J.A. who agreed with the conclusion of MacLean J. that the company's claim for exemption failed,—but for the reason that catalysts and direct agents do not stand in relation to the product, the wood pulp, "by contact or temporary incorporation" as required by s. 5(h) of the Act.

The three Members of the Court of Appeal were in agreement that the proviso in Reg. 3-11, "provided, however, that the exemption allowed by this regulation is conditional upon application being made by the purchaser within six months after the purchase of the tangible personal property in respect of which the exemption is claimed.", was *ultra vires* the Lieutenant-Governor in Council. I agree with that conclusion on the sole ground that the commodities in question are exempt by virtue of the opening words of s. 5 of the Act: "The following classes of tangible personal property are specifically exempt from the provisions of this Act". If my understanding of the manner in which the assessment arose is correct, the company did not pay the taxes at the times of purchase, I am unable to agree with the submission of counsel for the appellant with respect to this point. His argument that the six months' limitation was imposed simply as a means of determining the class is answered by the fact that the class is fixed by the terms of s. 5 of the Act. His second contention was that the Lieutenant-Governor in Council had power to impose what counsel described as a six months' limitation on applications for exemption by virtue of the opening and concluding clauses of s. 32(1) of the Act, as underlined earlier in these reasons, because the taxes are payable at the time of purchase and because some

limitation was merely a deficiency which the Lieutenant-Governor in Council is authorized to supply. In this particular case the company paid the taxes only as a result of the assessment by the Commissioner, approved by the Minister, and, in any event, the Lieutenant-Governor in Council was not authorized to take away a right conferred by the statute.

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The appeal should be dismissed with costs.

CARTWRIGHT J. (*dissenting in part*):—The questions raised on this appeal and the relevant provisions of the statute and the regulations are set out in the reasons of the Chief Justice.

I agree with the conclusion reached by the Chief Justice and by all the members of the Court of Appeal that the proviso in reg. 3-11, making the allowance of the exemption set out in s. 5(*h*) of the Act conditional upon an application being made by the purchaser within six months after the purchase in respect of which the exemption is claimed, was *ultra vires* of the Lieutenant-Governor in Council.

The facts are not in dispute. It is agreed that all the substances in respect of which exemption is claimed are either catalysts or direct agents. In the course of its manufacturing operations the respondent generates steam to operate its pulp mill. The catalysts are used in the fire-boxes to aid in the combustion of soot and to produce a cleaner fire. The direct agents are used in the boilers to inhibit corrosion and prevent scaling. None of the catalysts or direct agents enter into the wood pulp and the steam generated does not come in contact with the wood pulp.

It is not questioned that the tax demanded is payable unless the respondent is relieved from liability by the exemption contained in s. 5(*h*), and the appeal turns on the construction of that clause.

In construing the clause it is my opinion that we should have regard to the punctuation and particularly to the comma following the word "catalyst". The *ratio decidendi* of those cases which held that punctuation in a Statute ought not to be regarded was that statutes as engrossed on the original roll did not contain punctuation marks. We

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were informed by counsel that in British Columbia statutes are presented to the Legislature for passing and are passed punctuated as they appear in the copies printed by the Queen's Printer; consequently the foundation of the earlier decisions has been removed.

Cartwright J.

In my opinion the following statement of Lord Shaw of Dunfermline in *Houston v. Burns*<sup>1</sup>, which was the case of a will, is equally applicable to the construction of statutes; he said at page 348:

Punctuation is a rational part of English composition, and is sometimes quite significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings.

Reading the words of clause (h) of section 5 in their grammatical and ordinary sense with the assistance of the punctuation their meaning does not seem to me to be doubtful; two separate classes of tangible personal property of the kind included in the opening words, "Such tangible personal property by way of chemical, animal, mineral, or vegetable matter as the Lieutenant-Governor in Council may determine by regulation", are exempt; these classes are (i) such property used as a catalyst, and (ii) such property used as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation.

It follows that in my opinion the respondent is entitled to the exemption claimed in regard to the purchase of the substances which were used as catalysts.

The case of the other substances with which we are concerned is more difficult. It is conceded that these substances are "direct agents" but it is contended for the appellant that they are not used "for the transformation or manufacture of a product by contact or temporary incorporation". It is argued that in the facts of the case at bar the word "product" must mean the wood pulp which is produced by the operations of the respondent and it is clear that the direct agents do not come in contact with and are not at any stage incorporated temporarily or otherwise with the wood-pulp. This argument found favour with MacLean J., who

<sup>1</sup>[1918] A.C. 337.

rejected the argument that the boiler sludge produced as a result of the action of the direct agents could be regarded as a product in the following words:

This would require one to give a strained and unnatural meaning to the word "product" appearing in the context which it does. The whole clause is obviously concerned with exemptions for manufacturers, and I think that the "product" of this appellant is wood pulp, and not boiler sludge.

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Sheppard J.A. would have affirmed the judgment of the learned Judge of first instance on this point on the ground that even if the sludge might be regarded as a product (a question which he found it unnecessary to decide) the direct agents became an integral part of the sludge and could not be said to stand in relation to it "by contact or temporary incorporation".

The majority in the Court of Appeal in rejecting the view of MacLean J., dealt with the matter as follows:

On that aspect of the case the learned Judge held that "product" in that context means only a commercial product of a business—in this case, wood pulp.

With deference I cannot agree. In my opinion "product" as there used is not confined to the commercial products of a business. If it were "transformation" would be part of the manufacturing process and would be included in the word "manufacture". In that sense it would be redundant.

I find support for that view in the fact that the second part of clause (h) specifically restricts the exemption thereby allowed to personal property manufactured into or attached to other personal property for the "purpose of retail sale".

The last words clearly indicate that under the second part of clause (h) the end product must be a commercial product. But those restricting words are conspicuously absent in the first part of the clause. The omission is, I think, intentional, because the products there meant are the products of manufacturing processes regardless of the stage at which they are produced, beginning, middle, or end, or whether they are waste or commercial.

What that part of the clause requires for exemption is that the substance be used to transform or manufacture any product of the processes used regardless of whether the product be waste or commercial. "Transformation" relates to waste products, and "manufacture" refers to commercial products.

With respect it appears to me that in the concluding words of clause (h):—

or such tangible personal property as is used for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property for the purpose of retail sale.



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the emphasis is not on the distinction between waste products and commercial products but on the distinction between property intended for retail sale and property intended for other purposes such as, for example, wholesale sale.

On this branch of the matter I am in agreement with the reasoning of MacLean J. that to interpret the word "product" in clause (h), as including boiler sludge would be to give it an unnatural meaning. If that meaning had been intended some such word as "substance" would have been more appropriate than the word "product". In view of my agreement with MacLean J. on this point it becomes unnecessary for me to examine the ground upon which Sheppard J.A. proceeded.

Cartwright J.

For the above reasons I would allow the appeal in part and direct that the judgments below be set aside and that judgment be entered declaring that the respondent is entitled to the exemption claimed in respect of its purchases of catalysts but is not entitled to the exemption claimed in respect of its purchases of direct agents. As success has been divided I would direct that there should be no order as to costs in the courts below or in this Court.

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

*Solicitor for the appellant: G. L. Murray, Vancouver.*

*Solicitors for the respondent: Ladner, Downs, Locke, Clark & Lennox, Vancouver.*

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