1941
* Dec. 18, 19.
1942
* Feb. 23.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... APPELLANT;

AND

NOXZEMA CHEMICAL COMPANY OF CANADA, LIMITED (DEFENDANT)... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Crown—Sales and Excise taxes—"Fair price on which the tax should be imposed", as determined by the Minister under s. 98 of Special War Revenue Act (R.S.C. 1927, c. 179, as amended by 23-24 Geo. V, c. 60, s. 20).

Respondent, a company which manufactured and sold toilet articles and medicated preparations, had, prior to January 1, 1939, sold its products direct to chain stores and wholesale dealers and paid sales and excise taxes on the basis of the prices charged. In December, 1938, a company—hereinafter called B. Co.—was incorporated for the purpose of selling in Canada respondent's and other products, and by an agreement of January 1, 1939, B. Co. became sole distributor in Canada of respondent's products, and was to sell them at the prices previously charged by respondent (unless respondent designated other prices) and to pay to respondent certain prices, which, it was calculated, were less than B. Co's selling prices by amounts estimated to have been the cost to respondent of selling, of which it was relieved. Respondent thereafter paid sales and excise taxes on the basis of prices received by it from B. Co. The Minister of National Revenue, in expressed pursuance of the powers vested in him by s. 98 of the *Special War Revenue Act* (R.S.C., 1927, c. 179, as amended by 23-24 Geo. V, c. 50, s. 20), determined that these last-mentioned prices were less than the fair prices on which such taxes should be imposed, and that the prices at which B. Co. sold the goods to dealers were the fair prices on which the taxes payable by respondent should be imposed; and by information in the Exchequer Court the Crown sued for the further taxes claimed (and penalties). The claim was dismissed ([1941] Ex. C.R. 155), and the Crown appealed.

Held: The appeal should be allowed and the Crown should have judgment for the additional taxes payable as a result of the Minister's determination (and also for the penalties provided for by s. 106 (5) of the Act).

Per the Chief Justice and Davis J.: The Minister's determination under s. 98 is a purely administrative act and is not open to review by the Court; and even if it may be said to be of a quasi-judicial nature, then all that was necessary was that the taxpayer be given a fair opportunity to be heard, and to correct or contradict any relevant statement prejudicial to its interests (*Board of Education* v. *Rice*, [1911] A.C. 179, at 182), and that was done.

Per Rinfret, Kerwin and Hudson JJ.: S. 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal; and in any event it was clear that he acted honestly and

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

impartially and gave respondent every opportunity of being heard; and his determination must be held to be binding. (*Spackman* v. *Plumstead District Board of Works*, 10 App. Cas. 229, at 235, cited).

Per Curiam: Pioneer Laundry v. *Minister of National Revenue*, [1940] A.C. 127, is not applicable to the present case.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the Crown's claim (sued for, together with penalties, by information of the Attorney-General of Canada, in that Court) against the respondent for sales taxes and excise taxes, which claim was based on a determination by the Minister of National Revenue (set out in the reasons for judgment of Kerwin J. *infra*) that certain prices, which the respondent claimed were the prices on which the taxes should be imposed, and on which it had paid them, were less than the fair prices on which the taxes should be imposed, and that other prices mentioned in the determination were the fair prices on which the taxes payable by respondent should be imposed. The Minister's determination stated therein that it was made "pursuant to the powers vested by section 98 of the Special War Revenue Act" (R.S.C. 1927, c. 179, as amended by 23-24 Geo. V, c. 50, s. 20).

J. C. McRuer K.C. and *W. R. Jackett* for the appellant.

C. F. H. Carson K.C. for the respondent.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—Much discussion took place before us on the argument with reference to the decision in the *Palmolive* case (2). But that case turned upon its own special facts and I do not think the decision governs the facts of the case now before us. An entirely different question was raised. The judgment of this Court in that case was delivered February 7th, 1933, and shortly thereafter Parliament amended the *Special War Revenue Act* by ch. 50, 1932-33, sec. 20, adding a provision (sec. 98) that where goods are sold at a price (that is, by the manufacturer or producer) "which in the judgment of the Minister" is

(1) [1941] Ex. C.R. 155.
(2) *Palmolive Mfg. Co. (Ont.) Ltd.* v. *The King; The King* v. *Colgate-Palmolive-Peet Co. Ltd.*: [1933] S.C.R. 131.

1942

THE KING
v.
NOXZEMA CHEMICAL COMPANY OF CANADA, LTD.

Davis J.

less than "the fair price on which the tax should be imposed", the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

The important question that arises upon this appeal is one of law, as to the position of the Minister under this section of the statute—that is, whether his act is purely an administrative act in the course of settling from time to time the policy of his Department under the statute in relation to the various problems which arise in the administration of the statute, or whether he is called upon under the section of the statute to perform a duty of that sort which is often described as a quasi-judicial duty.

My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new sec. 98; to enable him to see, for instance, that schemes are not employed by one or more manufacturers or producers in a certain class of business which, if the actual sale price of the product is taken, may work a gross injustice to and constitute discrimination against other manufacturers or producers in the same class of business who do not resort to such schemes which have the result of reducing the amount on which the taxes become payable. If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to correct or to contradict any relevant statement prejudicial to its interests. Reliance has consistently been put by the courts since 1911 upon the language of Lord Loreburn in *Board of Education* v. *Rice* (1):—

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as

(1) [1911] A.C. 179, at 182.

though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under s. 7, sub-s. 3, of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

But here the taxpayer very frankly admits that its solicitor was afforded every opportunity by the Minister to be heard and did in fact state in detail the taxpayer's position in the matter, supplemented with such statements and references as he thought advisable, and that the Minister's decision was not made until after that had been done.

A good deal was also said in argument about the judgment of the Judicial Committee in the *Pioneer Laundry* case (1), and an attempt was made by the respondent to show that the Minister here had acted against "proper legal principles", but I cannot see that there is any valid ground for that contention. In the *Pioneer Laundry* case (1) the manufacturer had a statutory right to an allowance for depreciation on its machinery. The amount of that allowance was to be "such reasonable amount as the Minister, in his discretion, may allow". The Minister said he would allow nothing, and in the reasons of his Commissioner of Taxation which he accepted there were very fairly and fully set out the grounds upon which no allowance was arrived at; and those grounds were held to be against "proper legal principles". I cannot see that the decision in the *Pioneer Laundry* case is relevant to the facts of this appeal.

I should therefore allow the appeal and set aside the judgment of the Exchequer Court. The appellant should have judgment for the additional sales and excise taxes payable as a result of the Minister's determination. The appellant is also entitled to the penalties provided for by subsection 5 of section 106 of the Act and the costs of the action and of the appeal.

(1) *Pioneer Laundry and Dry Cleaners, Ltd.*, v. *Minister of National Revenue*, [1940] A.C. 127.

1942

THE KING
v.
NOXZEMA CHEMICAL COMPANY OF CANADA, LTD.

Davis J.

The judgment of Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—This is an appeal by His Majesty the King from a decision of the Exchequer Court dismissing an information exhibited by the Attorney-General of Canada against Noxzema Chemical Company of Canada, Limited. By this information the appellant claimed from the respondent, under the provisions of the *Special War Revenue Act*, certain amounts for sales and excise taxes and also penalties for non-payment of these taxes at the times specified in the Act.

In the course of its business, the respondent manufactures and sells toilet articles and medicated preparations, and the taxes are claimed in respect of sales of these goods made by the respondent in the period from January 1st to July 31st, 1939. Under section 80 of the Act, the respondent became liable to pay excise taxes, and under section 86, to pay sales taxes,—in each case on "the sale price" of the goods mentioned. The expression "the sale price" used in these two sections is not defined. The question for determination arises because of the action of the Minister of National Revenue, taken under the provisions of section 98:—

> 98. Where goods subject to tax under this Part or Under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

Section 80 is in Part XI of the Act while section 86 is in the same Part (XIII) as section 98.

Prior to January 1st, 1939, the respondent sold its products direct to chain stores and wholesale dealers at tax-included prices and paid sales and excise taxes on the basis of these prices. On December 30th, 1938, a company called "Better Proprietaries Limited" was incorporated under the laws of the Province of Ontario, at the instance of J. M. Shaw, the President of the respondent company, and of one Andrews who was interested on behalf of Bromo-Seltzer Limited in the distribution of the latter's product Bromo-Seltzer. Better Proprietaries Limited was financed by Shaw and Andrews who each loaned the Company $2,500.

On January 1st, 1939, an agreement was made whereby Better Proprietaries Limited became the sole distributors

in Canada of the respondent's products. By that agreement it was provided that the same tax-included prices previously charged by the respondent for its products should be the prices to be charged by Better Proprietaries Limited unless otherwise designated by the respondent. Better Proprietaries Limited agreed to pay the respondent prices which it was calculated would net the respondent what it had previously received from dealers. That is, it was estimated that the difference between the two sets of prices was the cost of selling the products, of which cost the respondent was relieved when Better Proprietaries Limited took over that expense. It was also agreed that should J. M. Shaw at any time cease to be President and General Manager of the latter company, the respondent should have the right to cancel the agreement.

During the period from January 1st to July 31st, 1939, the respondent made sales of the goods mentioned to Better Proprietaries Limited at the prices set out in the contract between the two companies. As a result of these sales it became liable to pay to His Majesty sales taxes and excise taxes not later than the last day of the first month succeeding that in which the sales were made. It duly paid these taxes on the basis of the sale prices actually received by it from Better Proprietaries Limited. In pursuance of section 98 of the Act, the Minister determined on or about September 27th, 1939, that these sale prices were less than the fair prices on which the taxes should be imposed, and also determined what those fair prices should be. This determination appears from the following memorandum:—

Ottawa, September 27th, 1939.

Whereas the Noxzema Chemical Company of Canada Limited did, prior to January 1st, 1939, sell the whole of its manufactured products to various wholesalers and chain stores, tax-included, and account for excise and sales tax on the basis of such sales to the trade;

And whereas, commencing January 1st, 1939, the Noxzema Chemical Company of Canada Limited entered upon an arrangement with Better Proprietaries Limited whereby the latter company obtained exclusive selling rights of the products of the Noxzema Chemical Company of Canada, Limited;

And whereas, during the period January 1st to July 31st, 1939, the Noxzema Chemical Company of Canada sold or purported to sell to Better Proprietaries Limited the whole of its manufactured products for resale to the wholesalers and chain stores aforesaid;

1942

THE KING
v.
NOXZEMA CHEMICAL COMPANY OF CANADA, LTD.

Kerwin J.

And whereas, in the judgment of the undersigned, the prices obtained by the Noxzema Chemical Company of Canada Limited from sales to Better Proprietaries Limited were less than the fair prices on which sales tax and excise tax should be imposed.

The undersigned, therefore, pursuant to the powers vested by Section 98 of the Special War Revenue Act, does hereby determine that the prices at which Better Proprietaries Limited sold the goods in question to the wholesalers and chain stores were the fair prices on which the taxes payable by the Noxzema Chemical Company of Canada should be imposed.

(Sgd.) J. L. Ilsley,
Minister of National Revenue.

On or about October 5th, 1939, notice was given to the respondent of this determination and of the additional sales and excise taxes payable on the basis therein set forth, and a demand for payment was made. This demand not being complied with, the information was filed in the Exchequer Court under the provisions of section 108 of the Act, the first four subsections of which read as follows:—

108. 1. All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of His Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by His Majesty, in the Exchequer Court or in any other court of competent jurisdiction.

2. Every penalty incurred for any violation of the provisions of this Act may be sued for and recovered

(*a*) in the Exchequer Court of Canada or any court of competent jurisdiction; or

(*b*) by summary conviction under the provisions of the *Criminal Code* relating thereto.

3. Every penalty imposed by this Act, when no other procedure for the recovery thereof is by this Act provided, may be sued for, prosecuted and recovered with costs by His Majesty's Attorney-General of Canada, or, in the case of penalties under Parts I, II or III, in the name of the Minister of Finance, and in the case of penalties under Parts IV to XIV, inclusive, in the name of the Minister of National Revenue.

4. Any amount payable in respect of taxes, interest and penalties under Parts XI, XII and XIII remaining unpaid, whether in whole or in part after fifteen days from the date of sending by registered mail of a notice of arrears addressed to the taxpayer, may be certified by the Commissioner of Excise and on the production to the Exchequer Court of Canada or judge thereof or such officer as the Court or judge thereof may direct, the certificate shall be registered in the said Court and shall, from the date of such registration, be of the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the said Court for the recovery of a debt of the amount specified in the certificate, including penalties to date of payment as provided for in Parts XI, XII and XIII of this Act and entered upon the date of such registration, and all reasonable costs and charges attendant upon the registration of such certificate shall be recoverable in like manner as if they were part of such judgment.

The learned President considered that section 98 did not empower the Minister to fix the sale prices so as to include items which did not enter into the computation of the respondent's production costs and its sale prices, or authorize the Minister to fix those sale prices at other than the actual sale prices when they were not below the fair prices as between a manufacturer and a dealer, the dealer being an independent trading corporation. He decided that section 98 must be construed to contemplate a case where a producer has sold his goods to a dealer below the nominal price,—below an average of the prices of the other manufacturers of the same class of goods; and that there was no evidence to show that the sale prices from the respondent to Better Proprietaries Limited were less than the fair prices. On these grounds he dismissed the information.

In this Court, Mr. Carson relied on the decision of the Judicial Committee in *Pioneer Laundry* v. *Minister of National Revenue* (1). During the course of the trial, the President intimated that he considered this decision inapplicable, and it would appear from his reasons for judgment that he adhered to that view. With that opinion I agree. While in the *Income War Tax Act* there under review there was no appeal provided in terms from a decision of the Minister as to depreciation, there was an appeal from the determination as to the amount of taxes to be paid, and the proceedings which culminated in the decision of the Privy Council originated with an appeal taken from such determination. It was held that in arriving at the amount of the income taxes to be paid by the Pioneer Laundry & Dry Cleaners, Ltd., the Minister had actually not exercised the discretion left to him by the Act as to depreciation, and the matter was referred back to him in order that that should be done. In the present case, the Minister has considered and determined the two matters mentioned in section 98 of the *Special War Revenue Act*.

I therefore turn to the grounds upon which the President proceeded and which, of course, are relied upon by the respondent. I proceed upon the assumptions that Better Proprietaries Limited is an independent sales corporation and that the Minister thought otherwise. Even with these assumptions, we cannot be aware of all the reasons that

(1) [1940] A.C. 127.

1942

THE KING v. NOXZEMA CHEMICAL COMPANY OF CANADA, LTD.

Kerwin J.

moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less,—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it,—but less than what he considered was the fair price on which the taxes should be imposed. The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in *Spackman* v. *Plumstead District Board of Works* (1) appears to be particularly appropriate:—

> And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, *primâ facie*, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

In any event, it is quite clear that the Minister acted honestly and impartially and that he gave the respondent every opportunity of being heard, and, in fact, heard all it desired to place before him. Whatever might be the powers of the Exchequer Court, if proceedings had been taken under subsection 4 of section 108, as to which it is unnecessary to express any opinion, the taxes, if properly payable, are recoverable under subsection 1 of section 108 as a debt due to or as a right enforceable by His Majesty in the Exchequer Court or in any other court of competent jurisdiction. In view of the wording of section 98, nothing, I think, need be shown other than what appears in the present case and the obligation of the respondent is to pay taxes on the basis of the prices determined by the Minister.

It has not been overlooked that as of January 1st, 1939, Bromo Seltzer Limited entered into an agreement with Better Proprietaries Limited with reference to the sale in Canada of its product, in terms similar to the agreement between the respondent and Better Proprietaries Limited. Prior thereto Bromo Seltzer Limited had disposed of its product throughout Canada through a separate selling organization and the sales taxes were figured by it and accepted by the Minister on the basis of the prices which

(1) (1885) 10 App. Cas. 229, at 235.

it received from the selling organization. That organization had no connection whatever with Bromo Seltzer Limited but was a company engaged in marketing different products. After the agreement between Better Proprietaries Limited and Bromo Seltzer Limited, the latter paid, and the Minister accepted, sales taxes on its product on the basis of the prices received by it from Better Proprietaries Limited. Whether that course is still being followed, we do not know. Nor may we speculate as to what difference, if any, there is between the case of Bromo Seltzer Limited and the present case. The result of such a speculation could have no effect upon the matter to be determined in this appeal.

The appeal should be allowed, the judgment of the Exchequer Court set aside, and the appellant should have judgment for the additional sales and excise taxes payable as a result of the Minister's determination. The appellant is also entitled to the penalties provided for by subsection 5 of section 106 of the Act and the costs of the action and appeal.

Appeal allowed with costs.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the respondent: *Mulock, Milliken, Clark & Redman.*