THE MINISTER OF CUSTOMS AND EXCISE (PLAINTIFF) ..... } APPELLANT;

AND

THE DOMINION PRESS LIMITED (DEFENDANT) ..... } RESPONDENT.

1927
*June 10.
*June 17.

ON APPEAL PER SALTUM FROM THE SUPERIOR COURT, AT MONTREAL, PROVINCE OF QUEBEC

Sales tax—Job printer—Material supplied by client—Contract—Lease and hire—Sale—Special War Revenue Act (1914), 5 Geo. V, c. 8; (1922) 12-13 Geo. V, c. 47; (1923) 13-14 Geo. V, c. 70.

The transactions of a job printer, who contracts to deliver printed business cards, labels, order forms, price lists and statements, on material supplied by him, constitute sales by a producer within the meaning of the *Special War Revenue Act* (1918) and its amendments.

Whether a job printer may or may not be styled a manufacturer or a producer according to the conception of these words in the commercial or ordinary sense, the intention of Parliament to include a job printer in the class of producers for the purposes of the sales tax is clearly indicated by the wording of the Act and its amendments.

The King v. *Crain Printers Ltd.* ([1925] 3 D.L.R. 291) approved.

APPEAL *per saltum* from the judgment of the Superior Court, at Montreal, province of Quebec, Duclos J., dismissing the appellant's action.

The material facts of the case are stated in the judgment now reported.

A. Geoffrion K.C. and *P. Lanctot K.C.* for the appellant.

E. Lafleur K.C. and *Jacob De Witt K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The Minister of Customs and Excise claims from the Dominion Press Limited the sum of $3,684.20 for sales taxes from April, 1923, to October, 1924, under the provisions of the *Special War Revenue Act,* 1915, and amendments. The transactions took place in Montreal.

It was agreed, for the purposes of the present litigation, that the Minister was to be regarded as having the

*PRESENT:—Anglin C.J.C. and Duff, Mignault Newcombe and Rinfret JJ.

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same right to bring action as the King and that the judge should take judicial notice of the departmental circulars.

It was further agreed that the business of Dominion Press Limited, for the relevant period, exceeded $10,000 *per annum*.

The amount claimed is not disputed. Only the liability for the tax is in issue.

The first statute applicable in point of time is chapter 47 of 1922 (12-13 Geo. V.) which came into force on the 21st May, 1922. By section 13 of this statute, a new subsection 1 of s. 19BBB is enacted. The material part provides for the imposition of

an excise tax of 2½ per cent. on sales and deliveries by Canadian manufacturers or producers and wholesalers or jobbers * * * but in respect of sales by manufacturers or producers to retailers or consumers, the excise tax shall be 4½ per cent * * *

Under the fourth paragraph of the subsection,

the taxes specified in this section shall not apply to sales or importations of * * * (then follows a long enumeration of articles, among which appears:) job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 per annum.

Then the subsequent paragraph reads:

Provided further that the excise taxes specified in this section shall not be payable on goods exported, or on sales of goods made to the order of each individual customer by a business which sells exclusively by retail, under regulations by the Minister of Customs and Excise who shall be sole judge as to the classification of a business; and provided that the tax as specified in this section shall be payable on sales of goods manufactured for stock by merchants who sell exclusively by retail.

On the 1st January, 1924, came into force an amending statute and ss. 1 of s. 19BBB was then made to read:

* * * there shall be imposed, levied and collected a consumption or sales tax of 6 per cent. on the sale price of all goods produced or manufactured in Canada * * * which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him.

The new statute also struck out from the exemption in the fourth paragraph of ss. 1 the words above quoted:

Job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 per annum;

but the exemption was extended to all manufacturers or producers whose sales did not exceed $10,000 per annum.

The respondent pleads that it is

a contracting printer who prints by special contract to the order of each individual customer for whose purposes alone the work done is suitable and useful, and it in no sense manufactures or produces any merchandise for sale nor does it sell any goods inasmuch as the business carried on by it is one of lease and hire of work and service and not one of the sale of goods.

The evidence is that Dominion Press Limited does "general job printing and lithographing * * * on special orders only." It makes "no goods for stock." It does "nothing but contract work." Its general way of doing business is described as follows by the manager of the defendant corporation:

Q. And you generally supply the paper?

A. That is a question. If it is a matter of supplying it from stock, we do not supply 1 per cent. A customer will come to us and ask us what is the most suitable paper for the job, and we tell him to the best of our knowledge. Almost invariably he will ask us to get it for him, because we know something about the quality and will see there is nothing put over. He will pay us precisely the same price for the paper as if he went to the jobbing house, but the jobbing house in consideration of saving a salesman going around allows us a commission of 20 per cent.

Q. On the paper?

A. Yes, for securing them that customer. They understand they are supplying the customer with the paper, but as part consideration for the 20 per cent. we collect the amount for them with our bill for the labour.

Q. You are liable for the price towards the manufacturer?

A. Yes.

Q. A customer comes to you and says: "I want some letter-heads, or envelopes (as for example) printed for me on this certain paper" and as you have not that paper in stock you go to the paper dealer and buy the paper. Do you mention to the dealer the name of the person for whom you are buying the paper?

A. Not necessarily.

Q. Is the paper invoiced to him?

A. No. It is invoiced to the printer. That is part of the consideration.

Q. So far as the paper seller knows, it is simply a matter of your going to him and getting the paper, which is invoiced to you, and paid by you?

A. That is true.

Q. You get the paper, print it, and deliver the printed product to the particular customer who has ordered it?

A. Yes.

Q. And he pays you for the paper and printing combined, but you do not charge him more for the paper than if he had bought it directly? Your profit on the paper is the lesser price—call it commission, or what you will—that the paper maker has allowed you on the invoice?

A. Yes. Of course, that is not every transaction.

Q. But, that is a typical transaction?

A. No. A customer may want us to print some government postcards for him. He does not go to the trouble of getting the cards and we go to the post office and get them, and include the amount in his bill. We are not competing with the post office. In the same way, a man may be getting out a prospectus, and will ask us if we will distribute this prospectus for him, and mail it to his customers. We sometimes have a bill for $50 or $75 or $100 for postage. We simply get the

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postage stamps. We call these things disbursements. Our costs are invariably computed on the labour alone, those other things we regard as outside.

Q. But, the profit on those things enters into your receipts?

A. The commission we get for that service helps pay our expenses.

Q. Leaving aside exceptional cases, the general way of doing business is the one you have just described?

A. Yes.

On this evidence, the contract between the respondent and its customers is not one of lease and hire, but one of sale. It is a contract for the sale of a thing to be made (" *chose à faire* " or " *chose une fois faite* ").

Such is the solution of the Roman law and of the old French law which the Commissioners have embodied in the Civil Code of Quebec. On this subject, a quotation from Pothier (Bugnet, 3rd edition, vol. 4, no. 394) is strictly in point:

Ce contrat (de louage d'ouvrage) a aussi beaucoup d'analogie avec le contrat de vente.

Justinien en ses *Institutes,* au tit—*de Loc.* cond., dit qu'on doute à l'égard de certains contrats, s'ils sont contrats de vente ou contrats de louage, et il donne cette règle pour les discerner: "lorsque c'est l'ouvrier qui fournit la matière, c'est un contrat de vente; au contraire, lorsque c'est moi qui fournis à l'ouvrier la matière de l'ouvrage que je lui fais faire, le contrat est un contrat de louage."

Par exemple, si j'ai fait marché avec un orfèvre pour qu'il me fasse une paire de flambeaux d'argent, et qu'il fournisse la matière, c'est un contrat de vente que cet orfèvre me fait de la paire de flambeaux qu'il se charge de faire; mais si je lui ai fourni un lingot d'argent pour qu'il m'en fît une paire de flambeaux, c'est un contrat de louage.

Observez que, pour qu'un contrat soit un contrat de louage, il suffit que je fournisse à l'ouvrier la principale matière qui doit entrer dans la composition de l'ouvrage; quoique l'ouvrier fournisse le surplus, le contrat n'en est pas moins un contrat de louage.

On peut apporter plusieurs exemples de ce principe.

Lorsque j'envoie chez mon tailleur de l'étoffe pour me faire un habit: quoique le tailleur, outre sa façon, fournisse les boutons, le fil, même les doublures et les galons, notre marché n'en sera pas moins un contrat de louage, parce que l'étoffe que je fournis est ce qu'il y a de principal dans un habit.

Pareillement, le marché que j'ai fait avec un entrepreneur pour qu'il me construise une maison, ne laisse pas d'être un contrat de louage, quoique par notre marché il doive fournir les matériaux, parce que le terrain que je fournis pour y construire la maison, est ce qu'il y a de principal dans une maison, *quum aedificium solo cedat.*

The modern doctrine and jurisprudence in France should perhaps be accepted with caution, because article 1711 of the Code Napoléon contains the following definition:

Les devis, marchés, ou prix faits pour l'entreprise d'un ouvrage moyennant un prix déterminé sont aussi un louage lorsque la matière est fournie par celui pour qui l'ouvrage se fait;

which is not to be found in the Civil Code of Quebec. But the preponderating opinion is that the above passage of Pothier well expresses the state of the old law (Fuzier-Herman, Répertoire, *verbo* Louage d'ouvrage, de services et d'industrie. no. 1105). Planiol (Droit Civil, 6th ed. vol. 2, no. 1902) calls it the "*solution traditionnelle*". On the authority of *Clay* v. *Yates* (1) the situation would be the same under the common law.

According to the evidence before us, the respondent does not undertake to print on material (such as tags, cards, or paper generally) supplied by the client. It contracts to sell and deliver printed business cards, labels, order forms, price lists, statements and general stationery. The transactions described in the evidence and in respect of which the Minister seeks to recover taxes are sales. In the words of Pothier, "elles participent du contrat de vente."

We must decide moreover that they are sales by a producer within the meaning of the statute. For the question is not whether a job printer may or may not be styled a manufacturer or a producer, according to the conception of these words in the commercial or even in the ordinary sense. What we have to enquire is whether it was the intention of Parliament, for the purposes of the sales tax, to include a job printer in the class of producers. This intention, we think, is clearly indicated by the exclusion of:

job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 *per annum*

from the imposition of the sales tax. The use of the word "produced" shows that, in the mind of the legislator, job printing done in pursuance of a contract of sale (such as the evidence shows the respondent to have done here) was the work of a "producer." This view is also supported by the fact that, if such had not been the intention of the legislator, there would have been no necessity for the special exemption of

job printed matter * * * sold by printers or firms whose sales * * * do not exceed $10,000 *per annum.*

We agree with the appellant that the repeal of this exception the following year cannot alter its effect upon the

(1) 1 H. & N. 73; 156 E.R. 1123.

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meaning of the general words, especially as the repeal was mainly for the purpose of extending the exemption to all manufacturers and producers.

We now have to consider the proviso

that the excise taxes specified in this section shall not be payable on sales of goods made to the order of each individual customer by a business which sells exclusively by retail, under regulations by the Minister of Customs and Excise who shall be sole judge as to the classification of a business; and provided that the tax as specified in this section shall be payable on sales of goods manufactured for stock by merchants who sell exclusively by retail.

There is no doubt that the sales in respect of which taxes are claimed by the Minister in this action were, according to the evidence before us,

sales of goods made to the order of each individual customer by a business which sells exclusively by retail.

We find moreover that, on the 18th August, 1921, the Minister of Customs adopted the following regulation:

Job printers, or newspaper publishers who also do job printing, may be classed as retailers when selling exclusively, by retail, goods made to the order of each individual customer.

Goods made for stock, or sold to customers for resale, are held to be subject to the sales tax.

Concerns covered by the first paragraph will not be required to secure sales tax licenses, nor collect sales tax.

This ruling in effect from the 10th May, 1921, inclusive.

This was a classification of the business of the respondent, pursuant to the proviso of the statute. As a result, sales of the character of those made by the respondent became exempt from excise taxes, while the regulation remained in force. Upon this point, we are in accord with the views expressed by Rose J. in *The King* v. *Crain Printers Limited* (1). This judgment went to the Appellate Division, but the appeal was dismissed by default.

But, on the 13th July, 1922, the Minister of Customs and Excise, issued another regulation reading as follows:

OTTAWA, 13th July, 1922.

Under authority of the provision of section 19BBB, of the 1922 amendment to the *Special War Revenue Act*, the following businesses are hereby classified as manufacturers, subject to the payment of sales tax on their sales:—

Job printers whose sales of printed matter are ten thousand dollars *per annum* or more;

Manufacturers of loose-leaf systems or devices;

Pipe organ builders;

Boat builders.

(1) [1925] D.L.R. 291.

Except perhaps in its attempt to define job printers as "manufacturers"—which was quite unnecessary and ineffective—this regulation does not do more than repeat, in different words, the enactment of the statute that

> the taxes * * * shall not apply to sales * * * of * * * job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 per annum.

In terms, it restores the liability to the payment of the sales tax already imposed by the statute upon all job printers whose sales of printed matter are $10,000 or more, and, in effect, it does away with the exemption in favour of

> job printers * * * when selling exclusively, by retail, goods made to the order of each individual customer

—resulting from the regulation of the 18th August, 1921. The latter must therefore be held to have been superseded by the regulation of the 13th July, 1922. We know of no subsequent regulation and none was invoked by the respondent. It follows that during the period extending from April, 1923, to October, 1924, in respect of which the arrears of sales taxes are claimed to be due by the respondent, no exemption was in force in favour of job printers who sold

> exclusively by retail * * * goods made to the order of each individual customer,

on account of the absence of the regulation necessary to give effect to the exemption and without which the proviso could not apply.

It may further be said that, after the 1st January, 1924, when section 6 of c. 70 of the statute of 1923 came into force, no regulation of the kind could have been issued, because the proviso was then repealed and the power of classification by the Minister was taken away by Parliament.

For these reasons, we think the appeal should be allowed, and the action maintained, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Marcotte & Lanctot.*

Solicitor for the respondent: *Jacob De Witt.*