1950

Mar. 20
Apr. 14

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

FRANK H. ALLISON.....DEFENDANT.

Revenue—Excise Tax—Excise Tax Act, R.S.C. 1927, c. 197, ss. 101 (a), 108 (1) (8) and (9), 113 (8) (a and b)—Evidence of Minister's signature—"Document" referred to in s. 108 (8) of the Act—Amendment one of procedure and applicable to pending action.

Held: That a document in accordance with s. 108 (8) of the Excise Tax Act setting out the opinion of the Minister of National Revenue that a person required to do so has failed to keep records or books of account and making an assessment against such person, and having attached thereto the Certificate of the Deputy Minister as required by s. 108 (9) of the Act, is proper evidence of the opinion formed by the Minister and of his assessment.

2. That the document referred to in s. 108 (8) of the Excise Tax Act includes the signature of the Minister, and when certified by the Deputy Minister is evidence of such signature in the manner directed by the Statute.

3. That the amendment to the Act as set out in ss. 8 and 9 of s. 108 deals with procedure and applies to an action begun before and pending at the time the amendment was enacted.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant excise tax alleged due to the Crown under the provisions of the Excise Tax Act R.S.C. 1927, c. 197.

The action was tried before the Honourable Mr. Justice Kelly, Deputy Judge of the Court, at Winnipeg.

Arni G. Eggerston, K.C., and *A. H. Laidlaw* for plaintiff.

No one for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

KELLY D.J. now (April 14, 1950) delivered the following judgment:—

This is an information by the Honourable the Attorney General of Canada to recover from the defendant retail purchase taxes allegedly due under Part XVII (since repealed), of the Excise Tax Act, Cap. 179, R.S.C. 1927, as amended.

1950

THE KING v. ALLISON

Kelly, D.J.

The defendant, at all relevant times, carried on business, at the City of Winnipeg, as a jeweller and it is alleged that he failed to affix and cancel stamps to the amount of retail purchase taxes imposed in respect of goods sold by him.

The imposition of retail purchase taxes was authorized by Part XVII of the Excise Tax Act and such obligation was to be discharged by affixing and cancelling an excise stamp or stamps to the amount of the tax imposed.

In addition to penalties for failure to affix or cancel such stamps, the Excise Tax Act provides:—

101 (*a*) Every person who, being required by or pursuant to this Act to affix or cancel stamps, fails to do so as required is liable to His Majesty for the amount of stamps he should have affixed or cancelled and that amount shall be recoverable in the Exchequer Court of Canada, or in any other court of competent jurisdiction as a debt due to His Majesty.

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.

The defendant filed a Statement of Defence herein, denying liability, but at the trial counsel for the defendant stated that the latter would not appear and thereupon withdrew from the case.

It appears that the Minister of National Revenue, being of opinion that the defendant had failed to keep records and books of account, as required so to do by S. 113 (1) of the Excise Tax Act, assessed the amount of stamps that the defendant was required to affix and cancel, as aforesaid. This assessment was in the following form:—

I, James Joseph McCann, of the City of Ottawa, Minister of National Revenue for the Dominion of Canada, having considered audit reports made by Excise Tax Auditor N. W. Kennedy, and having considered the replies made by Frank H. Allison, Esq., on July 5th, 1948, and his solicitor, G. Lyman Van Vliet, Esq., of the City of Winnipeg, on July 23rd, 1948, in response to departmental letter of June 24th, 1948, for representations regarding or objections to a proposed assessment of $14,146.77 for retail purchase tax, and the said Frank H. Allison, Esq., and his solicitor having been advised during the course of the Inquiry hereinafter mentioned that the amount of the proposed assessment had been increased to $14,844.33, and having considered the evidence taken at an Inquiry held under Section 116 of the Excise Tax Act by J. S. Rankin, Esq., as Commissioner, the report made by the Commissioner, the reports made by A. G. Eggertson, Esq., K.C., Counsel for the Commissioner, and the representations made by G. Lyman

Van Vliet, Esq., on behalf of the said Frank H. Allison, and having made further enquiries and having given full consideration to the matter and being of the opinion that the said Frank H. Allison, Esq., while carrying on business as a jeweller in the City of Winnipeg, failed to keep records or books of account as required by Subsection 1 of Section 113 of the Excise Tax Act during the period from July 1st, 1944, to July 8th, 1946, by virtue of the powers vested in me do hereby assess pursuant to the provisions of Section 113 (8) of the Excise Tax Act, R.S.C. 1927, Chapter 179 and amendments thereto, the said Frank H. Allison, Esq., carrying on business as aforesaid for the said period, the amount of $14,844.33 as the amount of stamps that he was required by or pursuant to Part XVII of the Excise Tax Act to affix or cancel in or in respect of that period.

This assessment of $14,844.33 shall be in addition to the amount of stamps, if any, already affixed or cancelled in respect of the said period.

Dated at Ottawa, this 28th day of June, 1949.

(sgd.) 'James J. McCann'
James J. McCann.
Minister of National Revenue.

The Minister's authority to make such assessment is contained in s. 113 (8) of the Act, as follows:—

113. (8) Where a person has, during any period, in the opinion of the Minister, failed to keep records or books of account as required by subsection one of this section, the Minister may assess

(*a*) the taxes or sums that he was required, by or pursuant to this Act, to pay or collect in, or in respect of, that period, or

(*b*) the amount of stamps that he was required, by or pursuant to this Act, to affix or cancel in, or in respect of, that period

and the taxes, sums or amounts so assessed *shall be deemed* to have been due and payable by him to His Majesty on the day the taxes or sums should have been paid or the stamps should have been affixed or cancelled.

It is clear that, upon such assessment being made by the Minister, the taxes, sums or amounts so assessed became a debt due and payable by the defendant in respect of which proceedings could be taken by the Crown. This is the result of the latter part of s. 113 (8) which reads, in part, as follows:—

. . . and the taxes, sums or amounts so assessed *shall be deemed* to have been due and payable by him to His Majesty on the day the taxes or sums should have been paid or the stamps should have been affixed or cancelled.

It would seem that the action of the Minister in making such an assessment is not open to review by the Courts if it is found to be an administrative function conferred upon him by Parliament and I do so find.

In the case of *The King* v. *Noxzema Chemical Company of Canada, Limited* (1), the question for consideration was

(1) (1942) S.C.R. 178.

1950

THE KING
v.
ALLISON

Kelly, D.J.

the right of the Minister, under s. 98 of the Special War Revenue Act, Cap. 179, R.S.C. 1927, to fix fair prices upon which sales and excise taxes should be paid. Kerwin, J., at p. 185 says, in this regard:—

. . . we cannot be aware of all the reasons that 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 (1885) 10 App. Cas., 229 at 235, 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, *prima 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 to pay taxes on the basis of the prices determined by the Minister.

There is to be considered the question of the evidentiary value of the document purporting to be signed by the Minister of National Revenue, whereby the assessment of the defendant was made. This document, duly certified as follows:—

DEPUTY MINISTER OF NATIONAL REVENUE
Customs and Excise

OTTAWA, February 23, 1950.

I hereby certify that the document dated the 28th day of June, 1949, annexed hereto, is a document signed by the Honourable the Minister of National Revenue.

(sgd.) 'D. Sim'
D. Sim,
Deputy Minister of National Revenue
for Customs and Excise.
(Seal)

was filed, without further proof, by Counsel for the Crown.

In the case of *Rex* v. *Pacific Bedding Company Limited* (1), the Court of Appeal in British Columbia held that a similar document, under the hand of the Minister, was not admissible in evidence on a prosecution for non-payment of tax; that it was not evidence of the facts stated therein nor of the assessment of the Minister within the meaning of s. 113 (8) of the Excise Tax Act, and that it was not a certificate made under the authority of any Act. Sloan C.J.B.C., says at p. 578:—

It will be noted that the document signed by the Minister purports to be an assessment in the exercise of the authority vested in him by said sec. 113 (8). Is then the production of this document and proof of the Minister's signature conclusive or even *prima facie* evidence of such assessment?

and at p. 579:

The document signed by the Minister is not, in my opinion, a "certificate made under the authority of any Act." The "certificate" contemplated in that phraseology would be something in the nature of an analyst's certificate relating to drugs and given evidentiary value by sec. 18 of the Opium and Narcotic Drug Act, 1929, ch. 49, or, e.g. customs certificates under sec. 260 of the Customs Act, RSC, 1927, ch. 42. To give other provincial examples, the certificate of an analyst as to the percentage of alcohol in any liquor is made *prima facie* evidence by sec. 90 of the Government Liquor Act, RSBC, 1948, ch. 192, and would therefore fall within the definition as would a certificate of the provincial inspector issued under the authority of sec. 22 of the Milk Act, RSBC, 1948, ch. 208, showing the grades of a dairy farm. In the absence of statutory sanction these certificates, or any "certificate of a mere matter of fact, not coupled with any matter of law" is not admissible as evidence: Omichund v. Barker, (1774), Willes, 549, 550.

And at p. 581:—

It is sufficient for me to say in this case that in a criminal proceeding and in the absence of any express legislative provision authorizing its use the mere production of a signed document of this character cannot, in my view, be regarded as either conclusive or *prima facie* proof of the facts contained therein. That being so the document has no evidentiary value and ought not to have been admitted in evidence.

Following the decision in the *Pacific Bedding* case, the Excise Tax Act was amended by adding to s. 108 of the Act, the following subsections:—

(8) Where any question arises in a proceeding under this Act as to whether the Minister has formed a judgment or opinion or made an assessment or determination, a document signed by the Minister stating that he has formed the judgment or opinion or made the determination or assessment is evidence that he has formed the judgment or opinion or made the determination or assessment and of the judgment, opinion, determination or assessment.

(1) (1949) 2 W.W.R. 575.

1950

THE KING v. ALLISON

Kelly, D.J.

(9) In any proceedings under this Act a certificate purporting to be signed by the Deputy Minister that a document annexed thereto is a document or a true copy of a document signed by the Minister shall be received as evidence of the document and of the contents thereof.

This amendment was assented to on 10th December, 1949, and was obviously intended to meet the difficulties of proof as laid down by the *Pacific Bedding* case. I am invited by counsel for the Crown to say whether or not the amendment achieves the purposes intended.

The common law rule, in this regard, was thus:—

> At common law, certificates of matters of fact not coupled with matters of law are usually said to be inadmissible . . .; Halsbury (2nd Ed.) Vol. 13, p. 661; Taylor on Evidence (12th Ed.), p. 1123, and Phipson on Evidence, (8th Ed.), p. 356, citing Omichund v. Barker, (1774), Willes, 538, 549 and 550.

The rule appears to be the same whether applied to certificates of matters of fact or to certified or authenticated copies of documents which contain matters of fact.

However, Parliament has varied the common law rule, in many instances, by giving evidential value to both certificates and certified copies of documents, by designated public officials. As to these it is said:—

> The certificates, letters or returns of public officers, *intrusted by law with authority for the purpose,* are *prima facie,* but not generally conclusive, evidence of the facts authorized to be stated, but not of extraneous matters . . . (Phipson on Evidence, 8th ed., p. 356).

As to documents, 13 Halsbury (2nd Ed.) says, at p. 654:—

> . . . And by virtue of statutory provisions a number of documents can now be proved by means of copies of a prescribed kind.

Referring to the amendment in question, it will be seen that, "a document signed by the Minister stating that he has formed the judgment or opinion or made the determination or assessment *is evidence,*" not only of the fact that the Minister has exercised the administrative functions vested in him but also of the *judgment, opinion, determination or assessment* which he has reached or made.

Looking at s. 113 (8) of the Excise Tax Act, it is apparent that the Minister may, where in his opinion there has been a failure to keep records or books of account, assess the taxes or sums or amounts payable, and by the amendment his opinion and the assessment may be set forth in a document signed by him. Such

1950

THE KING v. ALLISON

Kelly, D.J.

document becomes of evidentiary value when accompanied by a certificate purporting to be signed by the Deputy Minister identifying the document in question.

The document, filed herein, has attached thereto the required certificate by the Deputy Minister, and sets out the opinion of the Minister as to the failure of the defendant to keep records or books of account and thereafter makes an assessment of $14,844.33 as the amount of stamps required to be affixed or cancelled by the defendant.

I must hold that the document filed is proper evidence of the opinion formed by the Minister and of his assessment against the defendant, having regard to the amendment, referred to.

During argument herein, I queried whether or not proof of the Minister's signature was still necessary. I should have thought that the concluding words of ss. 9, as added by the amendment, would have had greater clarity if they had read thus:—

> . . . shall be received as evidence of the document and of the contents thereof *and of the Minister's signature thereto.*

Upon further consideration of the matter, I have reached the conclusion that the "document", which is made evidence, includes the signature of the Minister or in other words everything contained therein, within the delegated power of the Minister. Further, the Deputy Minister is required to certify that the document or true copy of a document, as the case may be, is one signed by the Minister. This has been done in the present case and is, therefore, evidence of such signature in the manner directed by the Statute.

I might mention, in conclusion, that while this action was commenced on 15th September, 1949, the amendment, referred to, was not assented to until the later date. This raises the question as to the retrospective operation of the amending Statute. The law on this point is stated in Craies on Statute Law (3rd Ed.) at p. 324:—

> It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction.

and at p. 330:—

> It is a well "recognized rule that statutes should be interpreted, if possible, so as to respect vested rights," . . .

1950

THE KING v. ALLISON

Kelly, D.J.

and at p. 332:—

But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions, unless a contrary intention is expressed or clearly implied.

"It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, and do not extend to rights of action," (Jessel, M.R. in Re Joseph Suche & Co., Ltd. (1875), 1 Ch.D. 48, 50.) For "it is perfectly settled that if the Legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be", (Lord Blackburn in Gardner v. Lucas (1878), 3 App. Cas. 582, 603.) "A statute cannot be said to have a retrospective operation because it applies a new mode of procedure to suits commenced before its passing", (Sir James Wilde in Watton v. Watton (1866), L.R. 1 P. & M. 227, 229.) In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, "it will be held to apply *prima facie* to all actions, pending as well as future", (Blackburn J. in Kimbray v. Draper (1868), L.R. 3 Q.B. 160, 163.)

It cannot be doubted that the amendment is one dealing with procedure and I so hold. Its sole purpose was to deal with a matter of evidence and evidence has been held to come under procedure: Prendergast, C.J.M., in *Rex* v. *Kumps* (1).

In result there will be judgment against the defendant for the sum of $14,844.33 and costs.

Judgment accordingly.