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Nov. 24.
Nov. 29.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

HENRY K. WAMPOLE & COMPANY, LIMITED ..... } DEFENDANT.

Revenue—Sales Tax—Sections 86 (a) and 87 (d) of Special War Revenue Act, R.S.C. (1927) c. 179—Samples—Meaning of "Used by"—Free distribution—Interpretation of statutes.

The defendant put up in special small packages, samples of its products, which were distributed amongst the physicians and druggists for the purpose of acquainting them with the character and quality of these products. These samples were distributed free, as a part of a well defined policy, and in the ordinary course of business. The cost of production of the same was paid by the company as a necessary expense of business and was treated in their books as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company had paid the sales tax.

Held, on the facts and circumstances of this case, that the samples in question herein were not produced for use of the defendant in the sense contemplated by the Special War Revenue Act (R.S.C. (1927) c. 179, sec. 87), and that the defendant was not liable for the consumption or sales tax on or in respect of the same.

2. That words of a statute, when there is a doubt as to their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature had in view, but the language of the statute must not be strained to make it apply to cases which were not in view at the time the enactment was drawn.

INFORMATION exhibited by the Attorney-General of Canada, to recover from the defendant a certain sum for consumption or sales tax, under the Special War Revenue Act (R.S.C., 1927, c. 179).

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

No oral evidence was adduced, the facts material and relevant to the issues being admitted, in a special case filed.

Those particularly applicable are cited in the reasons for judgment.

F. P. VARCOE, K.C., for plaintiff argued that by distributing samples as aforesaid, defendant was manufacturing goods for his use, within the meaning of the statute (R.S.C. (1927) c. 179, sec. 87, ss. "*d*") and he referred to the definition of the word "use" to be found in the Oxford dictionary.

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H. A. O'DONNELL for defendant, argued that the "use" referred to in the statute, was use *by* the manufacturer and not *for*, that is actual use. That if it was intended to cover goods given away for any purpose, the statute could easily have said so. The statute refers to certain specific uses, but is silent as to distribution of free samples, and it must therefore be inferred that it was not the intention of Parliament to consider such distribution as a use within the meaning of the Act. *Expressio unius est exclusio alterius.* That in view of the mode of carrying on business by defendant, and its method of bookkeeping, set out in paragraphs 3 and 4 of the admissions, printed below, to tax these samples would amount to double taxation. He cited *In Re Billings* v. *United States,* (1914) 232 U.S. 261.

THE PRESIDENT, now (November 29, 1930), delivered judgment.

This is a special case stated for the opinion of the Court. Paragraphs 3 and 4 of the stated case reveal the relevant facts to be as follows:

3. The defendant in the course of its business as a manufacturer of pharmaceutical preparations put up in special small packages, samples of its products to be distributed amongst physicians and druggists as specimen or trial samples for the purpose of acquainting the physicians and druggists with the character and quality of the aforesaid pharmaceutical supplies. The said samples were, as a part of a well defined policy and in the ordinary course of business, distributed free of charge amongst the said physicians and druggists.

4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

The question for the opinion of the Court is whether on the facts disclosed in the stated case, the defendant is liable to pay to the plaintiff, on or in respect of the samples referred to, a consumption or sales tax, under the provisions of the Special War Revenue Act, R.S.C., 1927, chap. 179, sections 86 (*a*) and 87 (*d*). I have arrived at the conclusion that the question ought to be answered in the negative.

The important sections of the statute are as follows:

86. In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four per cent on the sale price of all goods

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him.

87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

* * * *

(*d*) such goods are for use by the manufacturer or producer and not for sale;

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

It has been laid down that the words of a statute, when there is a doubt as to their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which Legislature had in view, but the language of the statute must not be strained to make it apply to cases which were not in view at the time the enactment was drawn. In this case it is quite clear that the primary purpose of the enactment was to impose, *inter alia*, a consumption or sales tax on the sales price of all goods manufactured or produced in Canada. Anticipating that some goods were likely to be manufactured or produced and disposed of by the manufacturer or producer in a way other than by absolute sale to a purchaser, or, under conditions which would render it difficult to determine the value thereof for the purposes of the consumption or sales tax, the Legislature by sec. 87 of the enactment gave to the Minister administering the Act, the power to determine in certain cases the value of the goods for the purposes of this tax. This power was granted to the Minister, (*a*) where goods were leased and the use but no right of property passed; (*b*) when goods were subject to a royalty, and the royalty being uncertain it was difficult to estimate the value of the goods, (*c*) when goods were manufactured by contract for labour only and did not include the value of the material entering into such goods, and lastly, that which I have already mentioned, (*d*) when "such goods are for use by the manufacturer or producer and not for sale." In all such cases the transactions were for the purposes of the Act to be regarded as sales. The real point for decision therefore is the meaning to be given to ss. (*d*) of sec. 87 of the Act.

While one cannot be dogmatic as to the proper construction of the provision of the statute in controversy here, yet I am strongly of the opinion that it is not applicable to the

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facts of this case. I think that sec. 87 was intended to meet unusual transactions such as are set forth in ss. (*a*), (*b*) and (*c*), of section 87, and cases where a manufacturer or producer, for one reason or other, used or consumed his own productions; that, I think, was generally the intendment of sec. 87 (*d*). To make the consumption or sales tax easy of enforcement it was to be applied and collected at the source of production upon sale, but as might and does happen, some persons produce goods largely or solely for their own use and not for sale, and so the Legislature in such cases sought to make such goods taxable, in order to place such producers and consumers upon a parity with other producers and consumers. I mean to express the idea, that the Legislature must have had something like that in mind when the enactment was made; certain obvious cases of that nature were intended to be met and the language of the enactment is to be limited to the purpose which was in view when the enactment was made. The promotion of trade or sales by the distribution of samples is widely practised in all countries, in fact, though I do not speak from experience, products like grain, sugar, cotton, wool, etc., are probably bought and sold very largely upon sample. This practice is also adopted as a form of advertising and is calculated as an item in the cost of production of goods, just as in newspaper advertising, or the hire of a travelling salesman; in this case the samples distributed were calculated as a business expense. If the Legislature had in mind to tax samples of goods distributed by manufacturers among potential customers, for the purpose of making known their products, I think it would have said so, but as is probable, it never contemplated such a thing, and consequently did not definitely designate or include distributed sample goods as among those upon which the Minister might affix a value for taxation purposes. I venture to think that when the statute was drafted, and if it had been the intention to include free sample goods as taxable goods, that plain and clear words would have been used to indicate this intention. It is to be presumed that the Legislature was cognizant of the very general practise of distributing samples of goods, and it being generally considered a proper business practice and not barter

or sale or anything more than an ordinary business expense, I should think that the Legislature would have used very precise language had it intended to tax such transactions and would not have expressed that intention by placing transactions of that character in the same category as those where the producer was also the user or consumer of his own goods. I do not think such a thing was contemplated and I do not think I would be warranted in reading into the statute such a meaning or intention.

Moreover, I do not think one can say that the defendant's sample goods were produced for the use of the defendant in the sense contemplated by the statute. What happened was this: a small fraction of a variety of goods produced for sale were abstracted from the mass and distributed for the purpose of acquainting certain classes of persons with such goods so produced for sale, and not for the use of the producer. When the statute says "because such goods are for use by the manufacturer or producer and not for sale," I do not think it is to be inferred that "use" there, was the kind of "use" made by the defendant in this case, but was intended to mean an actual use or consumption by the manufacturer or producer to meet in whole or in part his own requirements of particular goods, and which otherwise he would have been obliged to purchase from other producers. The defendant did not "use" his samples, he gave them away to some one else as a sample of goods which they might purchase. In a very technical sense only can it be said that the defendant made "use" of the samples for advertising purposes, but that kind of use is not in my opinion the "use" which the statute speaks of. Another thing that weighs with me in my interpretation of the intention of the Legislature is the fact that it cannot reasonably be said that the Legislature would contemplate that the revenue from this particular source would suffer by the practice of free distribution of sample goods, or, that the failure to tax sample goods would be an invidious exemption in favour of one class of producers and therefore onerous upon another class. The practise of distributing sample goods is designed to promote the sale and consumption of goods, and the practise is open to all producers of the same class. On the other hand, if a

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consumer produces his own goods instead of purchasing them from another producer, one can understand the Legislature saying, as I think it did, that the consuming producer should pay a sales tax as well as he who produces for another consumer, thus making the incidence of taxation fall evenly, but that is not, I think, this case; I say that in the broad sense; I have not in mind particular cases and possibly there may be many proper exceptions to that construction of the section of the statute here in question.

My conclusion therefore is that the defendant is not liable to pay to His Majesty the consumption or sales tax referred to in paragraph 3 of the stated case. * * * *

Judgment accordingly.