

1928

March 21.
April 21.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

DOMINION PRESS CO.....DEFENDANT.

Revenue—Sales tax—Section 19BBB. of the Special War Revenue Act, 1915—Sale by licensed manufacturer to licensed manufacturer.

By a contract between it and its managing president (U.), the D.P. Co. was to obtain orders and sublet them to him to carry out, and U. was to give his entire time to the D.P. Co. and to pay D.P. Co. \$6,000 per annum for the use of its premises and plant for said purposes, the said \$6,000 to be paid by credit note upon the work done for the company, but said credit never to be in excess of \$500 for any one month. The D.P. Co. was to continue to purchase the paper and other supplies, to pay U. each week a sum sufficient to cover the wages of the workmen, for which U. was to give credit, to receive the completed goods in the shop, and pack and deliver same at its expense, and to pay U. at the end of each month, for work done by him, 60 per cent of the contract price thereof. U. remained, during all the period covered by the contract, president and manager of the D.P. Co., and also a large shareholder. Being sued for sales tax on the contract price to the consumer, the D.P. Co. refused to pay, claiming it should only pay 60 per cent of the tax as wholesaler's price, making allowance for retailer's profit, and the balance paid by the retailer, and also that, by reason of the contract, its transactions with U. were analogous to those between two corporations, and came under the exemption in the proviso to section 19BBB.

Held, on the facts, that the contract in question was but an attempt to avoid paying the tax and did not change the situation of the company under the law. That there was no sale from the company to the contractor, or by the company to a licensed manufacturer or producer; the only sale being that between the company and the outsider or consumer, and that the company could not claim the exemptions contained in the proviso in section 19BBB. of the Special War Revenue Act, 1915, and was liable for the full tax on the price to its customer.

2. That that section of the statute deals only with producers and manufacturers and that the tax is due by the producer and manufacturer upon his price and not upon the wholesaler's and the retailer's price.

INFORMATION by the Crown to recover from the defendant certain sales tax.

The action was tried before the Honourable Mr. Justice Audette, at Montreal.

Aimé Geoffrion, K.C. for plaintiff.

E. Lafleur, K.C. and *E. Languedoc, K.C.* for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now (April 21, 1928) delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it is sought to recover, from the defendant company, the sum of \$490.17, as a balance of the amount due for "sales tax," under the provisions of sec. 19 BBB. of The Special War Revenue Act, 1915, and amendments thereto, covering the period extending between the 18th February and the 31st July, 1927.

The total amount of the duty or tax due for the period chargeable to the defendant, as producer and manufacturer, was \$1,213.79, and the defendant contends and claims that it should only pay 60 per cent thereof as wholesaler's price making allowance for the retailer's profit, and the balance of 40 per cent should be paid by the retailer. The whole as more fully explained hereafter, and as resulting or not from a contract between the company and its managing President. The amounts claimed by the information are not in dispute, the only controversy before the Court being as to whether in law the defendant is liable therefor, under the circumstances of the case.

It is alleged, proved and admitted that the defendant during the relevant period and since long before 1927 has

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been and still is producing goods of a value exceeding \$10,000 per annum (Reg. 16 etc.). This requirement has been reduced to \$3,000 after 1st May.

The material part of sec. 19 BBB., as affecting this case reads as follows, viz:—

19BBB. 1. In addition to any duty or tax that may be payable under this Part, 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 produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption. 13-14 Geo. V, c. 70, s. 6 (1).
(Effective January 1, 1924.) 14-15 Geo. V, c. 68, s. 1 (1).
(Effective April 11, 1924.) 17 Geo. V, c. 36, s. 3.

For the purposes of this section, printers, publishers, lithographers and engravers shall be regarded as producers or manufacturers. 17 Geo. V, c. 36, s. 4. (Effective February 18, 1927.)

For the purpose of calculating the amount of the consumption or sales tax, "sale price" shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto. 13-14 Geo. V, c. 70, s. 6 (1). (Effective January 1, 1924.)

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported; or on goods sold by a licensed manufacturer or producer to another licensed manufacturer or producer if the goods are to be used in, wrought into, or attached to articles to be manufactured or produced for sale and which are articles subject to the consumption or sales tax (Effective January 1, 1924.)

On the 4th May, 1927, the Dominion Press Company entered into an agreement or contract with Henry Upton, its Managing President, for a period of 5 years,—the first five clauses thereof, which are of importance to this issue, reading as follows, viz:—

Dominion Press Limited has consented, agreed and promised, and does hereby agree, consent and promise to sublet to the said Upton all and every piece of work of printing, engraving, embossing, lithographing, etc., for which it may receive orders, upon the following terms and conditions, to wit:

1. The said Upton consents and agrees that he will do such work and that he will devote all his skill and experience as a printer exclusively to the service of the said Dominion Press Limited.
2. The said Upton shall pay the said Dominion Press Limited the sum of Six Thousand Dollars per annum for the five years following, for the use and enjoyment of that part of the premises, Nos. 529-531 Cathedral street, presently occupied by the Printing, Lithographing and Embossing Works of the said Dominion Press Limited and for the use of the

plant, machinery, tools, type, fixtures, furniture, etc., now in and upon the said premises, such payment to be made by a credit note upon the work to be done for the said Dominion Press Limited, but no credit shall be claimed in excess of Five Hundred Dollars for any one month, and then only at the end of the month. The said Upton shall further pay the cost of insurance of such plant and equipment.

3. The said Upton shall maintain in good working condition, at his own expense, the machinery, etc., hereby leased to him, and, at the expiration of this agreement, shall restore same to the said Dominion Press Limited in good order and condition, ordinary wear and tear excepted.

4. The said Upton agrees to execute promptly and correctly all orders entrusted to him and to deliver such goods, duly completed but not packed, on the floor of his shop, the packing and delivery to the customers of said Dominion Press Limited to be at the expense and cost of the said Dominion Press Limited. The said Dominion Press Limited agrees to pay the said Upton at the end of each and every month for the work executed by him at the rate of sixty per cent (60%) of the price at which it has contracted to deliver such work to its customers, provided, however, that no price shall be made without the consent thereto of the said Upton or his representative duly designated for that purpose.

5. To facilitate and simply the financing of this undertaking the said Dominion Press Limited shall continue, as heretofore, to purchase, in its own name and on its own responsibility, the necessary paper and other supplies, and shall pay each week to the said Upton a sum sufficient to cover the wages of the workmen engaged in the execution of its orders. The said Upton agrees to give a credit each month for the moneys so paid on account. 6, 7, 8, 9.

This contract is filed as exhibit No. 3.

The business of the company is that of "contracting printers and lithographers."

Henry Upton, the party to the above contract, was during the whole period combining the positions of President and Manager of the company, of contractor and was also a large shareholder. The company is to some extent a family company with, however, several outsiders connected with it.

By that contract the printing end of the business is taken over by the President and Manager. This is done with the intent of creating two ends to the business with the idea of involving two sales. In the result the company is willing to pay on the assumed wholesale price of the manufacturer or producer; but it is refusing to pay what it would be on the retail price to the individual consumer.

In other words, the defendant contends that by entering into this contract it intended to establish a parallel situation where there would be two separate corporations involved. Its contention being further that when the company is dealing with a retailer, that retailer incurs 40 per

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cent of the selling expenses. It further contends that if there is a wholesale transaction, the sale tax is collected and the Government is satisfied with the sales tax on the wholesale price. And if by chance the producer does his own retailing and incurs this assumed 40 per cent extra, then the Government insists upon him paying that 40 per cent and that is what the defendant is trying to avoid.

The contractor does not manufacture or do any work for anybody but the company defendant.

Now the present action is taken to recover a tax on the sales price by the producer or manufacturer and there can be no doubt that the defendant company is a manufacturer or producer, within the meaning of sec. 19BBB.

The contract is but an attempt to avoid paying the tax, and in analyzing the real situation and approaching the case on its true merits one must guard against taking the shadow for the substance. This contract does not change the situation of the company under the law. With or without the contract the tax is due. Indeed, it results from the contract that Upton, a printer, has done nothing else thereby than perform work and services. *Minister of Customs and Excise v. The Dominion Press Ltd.* (1); *King v. Irwin Printing Company* (2). He is a servant of the company, being paid in a given and special manner. He buys none of the materials used in producing or manufacturing. The company is a licensed manufacturer, but Upton is not. There is no sale here by a licensed manufacturer to another licensed manufacturer. There is no sale as between Upton and the company. Upton, the contractor, is in the same position as any of the other employees of the company receiving wages or remuneration for his work. The payment of the wages is financed by the company who buys the material unless supplied by the customer, and Upton prints or lithographs, as the case may be, for the company; and the goods are produced and manufactured by the company through its servants and employees, and the contractor does not sell to the public. It would seem, however, that it does not really matter whether Upton or anybody else does the printing. The defendant company is in the same position as any other

(1) (1927) S.C.R. 583 at p. 586

(2) (1926) Ex. C.R. 104.

producer or manufacturer who sells. Therefore the only sale and the only possible sale that takes place here is the sale made by the company to its customer or vendee of the finished product; and this sale is not made to another licensed producer or manufacturer, and that is what must control. The company does the financing, the contractor does the work. The contract practically makes no material change to effect the present case. This contract amounts to nothing more than a fictitious scheme that can neither deceive the Court nor escape the law. It fails entirely to create two ends to the business of the company, as above claimed. The business is carried on before and after the passing of the contract in a similar manner, excepting that the managing president is paid for his services in a different and roundabout manner. That is all.

Turning now to the language of the taxing clause (19BBB.) we find that the

sales tax is 4 per cent on the sale price of all goods produced or manufactured in Canada and that it shall be payable by the producers or manufacturers at the time of the sale thereof.

The Act further proceeds in defining printers as producers and manufacturers.

The tax is not upon the goods but in respect of the sale thereof and is calculated on the sale price. There is no question in this section of a wholesaler or a retailer. The tax is due by the producer and manufacturer upon his price and not upon the wholesaler's price which is quite different, and there is no question of a rebate such as that suggested by the defence. The statute deals only with producers and manufacturers.

There is in this case but one sale under the contract price between the company and the outsider or third party, and that is the sale and the only sale upon which the tax is due. It could not be otherwise: it could not be upon the sale (if it could be called a sale) of the services of the managing president—the contractor—because he does the work of the company under an internal agreement between the company and himself, using the company's machinery. The raw material is purchased by the company and the printing done upon remuneration by Upton, and the company sells the finished article to cover the cost of the work and the raw material. Upton the contractor never sells.

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It is contended on behalf of the defence that the sale price should be the wholesaler's price as distinguished from the retailer's price; the former to be 60 per cent and the latter 40 per cent of the price; and that if it is done otherwise an injustice is done. The defence further relies upon art. 6 of the Regulations saying that the Minister is to fix such prices. Now the statute says no such thing and if such a construction were to be placed upon the Regulations, it must be found that when the statute conflicts with the Regulations, that the statute is paramount. The Regulations cannot alter the statute; they are made only for the purpose of carrying the Act into effect and not for altering or varying the effect of the statutory provisions. No part of art. 6 of the Regulations apply to the present case. The statute only provides five cases in which the Minister is to make any determination, and they are to be found in secs. 13 and 15 of the Act and the present case does not come within the ambit of either of those cases.

Moreover, if the Minister has to fix the price, as contended by the defence,—a view I am unable to share—the Minister has then wrongly or rightly done so, as appears by the correspondence filed of record as exhibit No. 4, and the Court could not sit on appeal from such decision if exercised in its statutory and judicial discretion. Neither the Minister nor the Court are there to make the law. The Minister is there to collect the tax and the Court to construe the law.

I have, therefore, come to the conclusion that the text of sec. 19BBB. is unambiguous and is imperative. There is nowhere any question of wholesale or retail when it comes to fix the tax on the sale price, and the sale price contemplated by the statute is the one on the goods produced by the defendant, and which is payable at the time of the sale thereof by it. The defendant has failed to discharge the onus cast upon it to prove it fell within any of the exemptions mentioned in the statute.

There will therefore be judgment in favour of the plaintiff, as prayed, for the sum of \$490.17, with interest and costs.

Judgment accordingly.