1936
Sept. 21.
1937
Oct. 1.

BETWEEN:

WESTERN VINEGARS LIMITED.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income tax—Consolidated returns—Crown not bound by estoppel—Para. (d), ss. 1, s. 6 and ss. 3, s. 35, and sections 48 and 54 of the Income War Tax Act.

Appellant company on April 1, 1931, acquired all the issued capital stock of Reynolds, Moore & Company Limited, a corporation carrying on the same class of business as the appellant, payment being made partly in cash and partly in preferred stock of appellant company The fiscal year of appellant company terminates on the 30th November, whilst that of Reynolds, Moore & Company Limited ended on the 31st March. In April, 1932, appellant filed with the Commissioner of Income Tax consolidated returns for the taxing period ending 30th November, 1931, for itself and its subsidiary and forwarded to the commissioner a cheque purporting to be in full payment of the income tax due by appellant for that period. In 1934, the Commissioner of Income Tax made an assessment against appellant for the fiscal year ending 30th November, 1931; this assessment was confirmed by the Minister of National Revenue and from that decision the appellant appealed.

Appellant contended that the respondent was estopped from claiming further income tax from appellant for the taxing period ending 30th November, 1931; that appellant had the right to file for such taxation period a return consolidating its profit and the loss incurred by its subsidiary; that appellant was entitled to deduct from its revenue profits charged on the containers, in which it sold its products, returned by its customers, it being a condition of the sale that the containers could be returned and that in the event of such return the amount charged for them would be credited to the customers; that appellant should not be charged with interest on the difference between the amount of tax paid by appellant and that assessed.

Held: That the doctrine of estoppel does not apply against the Crown, neither can laches be imputed to the Crown.

2 That prior to the enactment of ss. 3 of s. 35 of the Income War Tax Act by 23-24 Geo. V, c. 41, s. 13, the Minister had no power to allow the filing of consolidated returns.

3 That the profits on the containers do not constitute a reserve within the meaning of par. (*d*) of ss. 1 of s. 6 of the Income War Tax Act, and that appellant should be allowed a deduction for the containers returned to it.

4 That appellant is liable for interest on the additional tax exigible as provided by sections 48 and 54 of the Income War Tax Act.

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APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Angers, at Winnipeg.

W. P. Fillmore, K.C. for appellant.

E. D. Honeyman, K.C. and *Wilbur Boyd* for respondent.

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

ANGERS J., now (October 1, 1937) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment made by the Commissioner of Income Tax for the taxation year 1931, notice of which assessment was given to the taxpayer on September 29, 1934. The appeal is taken under sections 58 and following of the Income War Tax Act.

The appellant, Western Vinegars Limited, is a corporation organized under the laws of the Province of Manitoba in 1928.

On April 1, 1931, the appellant acquired all the issued capital stock of Reynolds, Moore & Company Limited, a corporation carrying on the same class of business as the appellant.

On December 4, 1931, Riddell, Stead, Graham & Hutchison, chartered accountants, auditors of the appellant company, wrote to the inspector of income tax at Winnipeg the following letter:

> On 1st April, 1931, our clients, Western Vinegars Limited, Winnipeg. acquired all the capital stock of Reynolds, Moore & Co Ltd., Winnipeg. It is the intention of Western Vinegars Limited to prepare a consolidated income tax return of the two companies for 1931. The last fiscal period of Reynolds, Moore & Co. Ltd. ended 31st March, 1931, and they will again close their books on 30th November, 1931, so that in future their year-end may coincide with that of Western Vinegars Limited.
>
> Will you please advise us if the Department will permit the changing of the fiscal period as aforementioned?

On December 5, 1931, the inspector of income tax acknowledged receipt of the aforesaid letter, adding:

> I have forwarded a copy of your letter to the Commissioner of Income Tax, at Ottawa, for his consideration and decision, and shall advise you in regard thereto as soon as possible.

On December 16, 1931, the Commissioner of Income Tax wrote to the inspector at Winnipeg stating (*inter alia*):

It would appear from your letter of the 5th instant and stated enclosure that it will be in order to accept a consolidated return for 1931 covering the operations of Western Vinegars, Ltd. for twelve months ended 30th November, 1931, and of Reynolds, Moore & Co. Ltd., for the eight months ended 30th November, 1931. However, before final decision is given you will please advise how the capital stock of the subsidiaries was paid for.

On December 23, 1931, the inspector wrote to the appellant's auditors:

I submitted a copy of your letter to me of the 4th instant to the Commissioner of Income Tax for his decision. He advises me that he requires information regarding the date of acquirement of the capital stock of Reynolds, Moore & Co. Ltd. by Western Vinegars, Ltd, together with particulars of the manner in which the capital stock was paid for.

Will you kindly let me have this information.

On December 29, 1931, the auditors replied to the inspector as follows:

Further to our letter of the 4th December and in reply to yours of the 23rd December, we have to inform you that the capital stock of Reynolds, Moore & Company Limited was acquired by Western Vinegars Limited, as at 1st April, 1931.

Payment was made partly by cash and partly by issue of preferred stock of the purchasing company.

On or about April 29, 1932, the appellant filed with the Commissioner consolidated returns for the taxing period ending November 30, 1931, for itself and its subsidiary, Reynolds, Moore & Company Limited, and on the same day sent to the Commissioner a cheque for $946.50 to the order of the Receiver General of Canada, purporting to be in full settlement of the income tax due by the appellant for the said taxing period.

This cheque, which was filed as exhibit 9, was deposited to the credit of the Receiver General of Canada and duly paid.

The appellant submits that the payment of $946.50 satisfied all liability for income tax for the period ending November 30, 1931. The appellant contends, in the alternative, that, in view of the acceptance by the respondent of the consolidated returns and of the sum of $946.50, the latter is estopped from claiming further income tax from the appellant for the said taxing period.

It seems to me convenient to dispose of this contention before dealing with the intrinsic validity of the assessment.

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The doctrine of estoppel does not apply against the Crown: Chitty's Prerogatives of the Crown, 381; Robertson, The Law & Practice of Civil Proceedings by and against the Crown, 576; *The King* v. *Tessier* (1); *Humphrey* v. *The Queen* (2).

Laches cannot be imputed to the Crown; it is a privilege of the King not to be bound by the mistakes, omissions or neglects of his officers or servants: Robertson (op. cit.), 577; Chitty's Prerogatives of the Crown, 379; Bacon's Abridgment of the Law, vol. 8, 95; *Giles* v. *Grover* (3); *Liberty & Company Limited* v. *Commissioners of Inland Revenue* (4); *Anderton and Halstead Ltd.* v. *Birrell* (5); *The Queen* v. *Bank of Nova Scotia* (6); *Gunn & Company Ltd.* v. *The King* (7).

In the circumstances disclosed by the evidence I think that the Commissioner had the right to make an assessment in 1934, as he did, for the fiscal year ending November 30, 1931. Let us now consider the merits of this assessment.

There are three points arising for determination:

1. Had the appellant the right to file for the taxation period ending November 30, 1931, a return consolidating its profits and the loss incurred by its subsidiary, Reynolds, Moore & Company Limited?

2. Was the appellant entitled to deduct from its revenue the profit charged on the containers (barrels and kegs), in which it sold its products, returned by its customers, it being a condition of the sale that the containers could be returned to the appellant and that, in the event of such return, the amount charged for the same would be credited?

3. Is interest on the difference between the amount of the tax recoverable and the sum paid by the appellant ($946.50) exigible and, if so, from what date?

In my opinion, the first question must be answered in the negative.

(1) (1921) 21 Ex. C.R. 150 at 158.
(2) (1891) 2 Ex. C.R. 386 at 390; (1892) 20 S C R. 591.
(3) (1832) 9 Bing. 128 at 156
(4) (1924) 12 Tax Cases 630 at 639.
(5) (1931) 16 Tax Cases 200 at 207.
(6) (1885) 11 S.C.R. 1 at 10.
(7) (1906) 10 Ex. C.R. 343 at 346.

Prior to the amendment made to section 35 of the Income War Tax Act by 23-24 Geo. V, chap. 41, s. 13, by the addition thereto of subsection (3), there was no provision in the Act permitting a company to file a return consolidating its profit or loss with that of a subsidiary.

Subsection (3) of section 35, which is the only stipulation in the Act concerning consolidated returns, reads thus:

3. A company which owns or controls all of the capital stock (less directors' qualifying shares) of subsidiary companies which carry on the same general class of business and have fiscal periods substantially coincident with the owning or controlling company may, in respect of all such companies which carry on business in Canada, elect, before the commencement of the earliest fiscal period of any of the constituent companies in respect of which consolidation is desired and in such manner as may be prescribed by regulations hereunder, to file a return in which its profit or loss is consolidated with that of all of its subsidiary companies carrying on business in Canada, in which case the rate of tax provided by paragraph D of the First Schedule of this Act shall apply

By section 18 of chapter 41 of 23-24 Geo. V, section 13 of the same statute is made applicable to income of the 1932 taxation period. The retroactivity of subsection (3) of section 35 does not go beyond 1932.

As a general rule a statute is not retrospective unless the intention of the legislature that it should be is clearly expressed: Halsbury's Laws of England, vol. 27, p. 159; Maxwell on the Interpretation of Statutes, 7th ed., pp. 5 and 186; *McQueen* v. *The Queen* (1); *The Queen* v. *Martin* (2); *Winter et al v. Trans-Canada Insurance Company* (3); *Young* v. *Adams* (4).

Before the amendment in question to section 35, the Minister had no power to allow the filing of consolidated returns; as a matter of fact I do not think that he allowed it in the present instance.

After careful consideration of the facts and of the law, I have arrived at the conclusion that the second question must be answered in the affirmative.

The evidence discloses that the appellant sold its products in barrels and kegs. These containers were charged to the customers in addition to the price of the goods. The charge included the cost price of the containers and an approximate profit of 40%. The customers were at liberty to

(1) (1886) 16 S.C.R. 1 at 114.
(2) (1891) 20 S.C.R. 240.
(3) (1934) 1 Ins. Law Rep. 326.
(4) (1898) A.C. 469.

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return the containers, the agreement being that, if they were returned in good condition, the amount charged for them was to be credited.

I may perhaps cite an extract from the deposition of Edwin W. Isard, the manager of Western Vinegars Limited, regarding these containers.

Q. You understand that in submitting your income tax returns for 1928, 1929, 1931 and 1932 you set up estimated liabilities of the following amounts: 1928, $3,000; 1929, $1,000; 1931, $4,000; 1932, $2,000. Now will you tell his lordship what your practice was in those years regarding the containers? First, tell his lordship what goods you deal in and how you ship them.

A. We deal in the manufacture and sale of vinegar and these goods are sold, the largest quantities, in containers, which are returnable at the prices charged. The books of the company and the ledgers shew sales of these containers and shew returns from the customers at the time we receive them back.

Q. What do your containers consist of?

A. Wooden barrels and kegs.

Q. Do you invoice those barrels and kegs at a profit?

A. Yes.

Q. Approximately how much?

A. About 40%.

And further on:

Q. So that the container was sent out at an estimated profit of 40%, and what happened to that profit when the container came back?

A. Of course, it was entirely wiped out. It goes back into stock at inventory prices.

The witness said that the quantity of containers returned was between 75% and 85%.

Asked if it would be possible to keep the books of the company in such a way as to show exactly, at any time, the loss of profit arising from the return of containers, the witness replied:

A. We have tried. We have learned from general practice in our business over a period of years, even prior to the formation of Western Vinegars, that this has been found impossible. We have had different firms of auditors on our books and they have not been able to find a method of shewing exactly what is out in our customers' hands.

Later, dealing with the entries in the books relating to containers, Isard testified as follows:

Q. Have you set up a reserve for containers, actually?

A. No.

Q. You have endeavoured year by year to estimate the profit you have lost when containers come back?

A. That is correct.

Q. In your ledger you have shewn containers at a profit?

A. That is correct.

Q. And when those containers come back you lose the profit that has been charged up?

A. Yes.

James G. Mundy, resident partner for Winnipeg of the firm of Riddell, Stead, Graham & Hutchison, called as witness on behalf of appellant, speaking of the containers, said:

The Western Vinegars shipped their vinegar to customers in containers and the containers are charged against the customers. The customers have the privilege of returning the containers and when they are returned they are allowed the full amount which is paid for them. This return may take place at any time which they choose. The Western Vinegars claim that from previous experience they know that a certain amount of those containers will be returned, sales of which had been included in the profit and loss account, and, therefore, they set aside as unearned profits an estimated amount, which in the year 1928 is represented by this $3,000.

It was submitted on behalf of respondent that the profits on the containers constitute a reserve and that amounts credited to a reserve cannot be deducted in computing the profits or gains assessable, in virtue of paragraph (*d*) of subsection 1 of section 6 of the Act:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) ..... (*b*) ..... (*c*) .....

(*d*) amounts transferred or credited to a reserve, contingent account or sinking fund, except such an amount for bad debts as the Minister may allow and except as otherwise provided in this Act;

In support of his contention counsel for respondent cited: *Edward Collins & Sons Ltd.* v. *Commissioners of Inland Revenue* (1); *Commissioners of Inland Revenue* v. *The Anglo Brewing Co. Ltd.* (2); *H. Ford & Co. Ltd.* v. *Commissioners of Inland Revenue* (3); *Naval Colliery Co. Ltd.* v. *Commissioners of Inland Revenue* (4).

In my opinion, these decisions have no bearing upon the present case.

The profits on the containers are not, as I conceive, a reserve properly called; and the loss of these profits, on the returns of the containers, is not merely a contingency but a certainty. The only thing uncertain is the quantity of the containers which will be returned and the time at which the returns will be effected. I believe that an allow-

(1) (1924) 12 Tax Cases 773 at 780.

(2) (1925) 12 Tax Cases 803 at 813

(3) (1926) 12 Tax Cases 997 at 1005.

(4) (1928) 12 Tax Cases 1017 at 1046.

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ance should be made for the containers that are returned. If no allowance were made, it would mean that the appellant would have to pay tax on profits which it has not reaped. I do not think that this was the intention of the legislature in enacting the provision contained in paragraph (*d*) of subsection 1 of section 6.

The proof, however, is vague and uncertain and I am not in a position to determine definitely what proportion of the assessment appealed from was for the profits on the containers which were returned. I assume that the parties will be able to come to some understanding in this respect; if not, they will be at liberty to refer the matter to me and to adduce, if possible, further and more positive evidence on the point.

There remains the question of interest. Sections 48 and 54 of the Act apply; at the time material herein they read as follows:

48. Every person liable to pay any tax under this Act shall send with the return of the income upon which such tax is payable not less than one-quarter of the amount of such tax, and may pay the balance, if any, of such tax, in not more than three equal bi-monthly instalments thereafter, together with interest at the rate of six per centum per annum upon each instalment from the last day prescribed for making such return to the time payment is made

54. After examination of the taxpayer's return the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by him in his return.

2 Any additional tax found due over the estimated amount shall be paid within one month from the date of the mailing of the notice of assessment

3 If the taxpayer fails to pay such additional tax within one month from the date of the mailing of the notice of assessment aforesaid, he shall pay, in addition to the interest provided for by section forty-eight, interest at the rate of four per centum per annum, upon the said additional tax, from the expiry of the period of one month from the date of the mailing of the said notice to the date of payment.

The appellant was obliged to pay at least one-quarter of the tax owing not later than the 30th of April, 1932, and the balance in three equal bi-monthly payments thereafter, with interest at 6% upon each instalment from April 30, 1932, to the date of payment. The appellant paid $946.50 and in so doing purposed to pay the full amount of the tax it owed. The Minister found the amount insufficient and on September 29, 1934, sent to the appellant the notice of assessment filed as exhibit 6. The appellant had one month from the mailing of the notice of assess-

ment within which to pay the additional tax; on its failure to pay this additional tax or at least the portion thereof legally exigible, the appellant became subject to pay, in addition to the interest provided for by section 48, interest at the rate of 4% from the expiry of the period of one month from the date of mailing of the notice of assessment, to wit from the 29th of October, 1934. The appellant will accordingly have to pay interest on the additional tax exigible, as provided for by sections 48 and 54 of the Act.

The assessments pertaining to the containers are set aside; the profit on the containers returned ought to be deducted from the appellant's income for taxation purposes.

The appellant will be entitled to its costs against the respondent, which costs are hereby fixed at the sum of $250, disbursements included.

Judgment accordingly.