BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada ..... PLAINTIFF;

1937
Sept. 28 & 29
—
1938
April 29.

AND

BOULTBEE LIMITED ..... DEFENDANT.

Revenue—Sales tax—Excise tax—Special War Revenue Act (R.S.C., 1927, c 179 and amendments) ss. 80 (1), 86 (1) (a) and 87 (c)—"Goods manufactured and produced"—"Tires manufactured by contract for labour only"—Used tires treated and retreaded for customers, or bought and retreaded, and retreaded tires sold or exchanged for used tires—Liability for taxes.

Defendant's business is that of retreading used automobile tires. Some of these tires are retreaded for customers to whom defendant returns the identical tires given it for treatment, the customer paying the usual charge for this work. Defendant also sells retreaded tires from stock to the public, and in other instances exchanges a retreaded tire from stock for an old tire, receiving as consideration the usual charge for retreading a tire.

Held: That where defendant retreads tires for customers to whom it returns the identical tires given it for treatment there is no liability for sales tax or excise tax.

2. That the tires defendant sells or exchanges from stock after retreading are "goods produced or manufactured" by defendant within the meaning of s 86 (1) (*a*) of the Special War Revenue Act (R.S.C., 1927, c. 179 and amendments) and are "tires manufactured or produced" by defendant within the meaning of s. 80 and schedule 11 (item 3) of the said Act; and defendant is liable to pay in respect thereof the sales tax and excise tax imposed by said sections accordingly. *The King* v. *Biltrite Tire Co.* (1937) Ex. C.R. 1 and (1937) S.C.R. 364 followed.

ACTION by the Crown to recover from defendant certain money alleged due for sales tax, excise tax and licence fees on motor vehicle tires alleged to have been manufactured and sold by it.

1938

THE KING v. BOULTBEE LTD.

Maclean J.

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

G. E. McCrossan, K.C. and *J. R. Tolmie* for plaintiff.

R. L. Maitland, K.C. and *J. G. A. Hutcheson* for defendant.

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

THE PRESIDENT, now (April 29, 1938) delivered the following judgment:

In this Information the plaintiff seeks to recover from the defendant specified sums as consumption or sales tax, and as excise tax, under the provisions of the Special War Revenue Act. Paragraph 2 of the Information states the grounds of the plaintiff's claim in the following words:

> The defendant manufactured, sold and delivered tires for automotive vehicles, or manufactured such tires by contract for labour only, not including the value of the goods that entered into the same, or in or under unusual or peculiar manner or conditions so that the transactions were for the purpose of the Special War Revenue Act to be regarded as sales.

This paragraph of the Information virtually pleads s. 86 and s. 87 (*c*) of the Special War Revenue Act, to which reference will later be made.

The facts necessary to disclose the question for determination may be stated in fairly brief terms. The defendant operates a garage or shop, at Vancouver, B.C., and a substantial part of its business is the retreading of tires for automotive vehicles, the tread of a tire being that portion which strikes the pavement. The process of retreading a tire was described by the president of the defendant company. A portion of the old tread, or all of it, as the case may be, is removed leaving bare and intact that part of the fabric which holds the tread; the side walls of the tire are not disturbed. There is then cemented on the fabric a new tread, what is called camel-back, a solid semi-cured piece of rubber, manufactured expressly for this purpose. After the camel-back is cemented on the exposed fabric, the tire is placed in a mould and cured, and, as I understand it, it is while the tire is in the mould that the tread is given its non-skid features, by means of a die. The defendant's business of retreading tires cannot, I think, be said to be carried on in any very large way, but I

assume it is quite substantial. Its business is confined to one shop or garage, it employs no agents to dispose of retreaded tires nor does it sell them by means of mail orders or distributing houses; and there is no evidence that the defendant purchases used or discarded tires from the public for the purpose of retreading and selling them, subject, however, to what I am about to say.

If a customer brings to the defendant's garage a tire to be retreaded, he gets back the identical tire, newly retreaded, and for this work the customer pays the defendant the charges usual in such a case. If it is inconvenient for a customer to wait for his own tire to be retreaded, as will sometimes happen, the defendant will retain the customer's tire and deliver him a retreaded tire, one from stock, charging him therefor only the regular price for retreading a tire; it seems that this is also frequently done in the case of dealers in used cars requiring newly retreaded tires; transactions of this kind the defendant claims to be a mere exchange and not a sale. If a customer purchases a new manufactured tire, which the defendant also carries in stock for sale, the defendant will take over the customer's old tire, if it is suitable for retreading, making the customer an allowance for the same on the purchase price of the new manufactured tire. This will explain how the defendant comes into possession of used tires, which in due course it retreads or repairs and carries in stock, either for sale to the public, or for the purpose of exchanging the same for a customer's used tire, in the circumstances I have just explained.

The plaintiff contends that, in all the transactions which I have described, the defendant is a manufacturer or producer of a tire or tires, and is brought within either sec. 86 or sec. 87 (*c*) of the Special War Revenue Act, and is liable for the taxes claimed. The defendant, it is claimed, takes a tire which is no longer of use, particularly when stripped of the old tread, and it has produced a new article of commerce. It is contended also on behalf of the plaintiff that there is no distinction between the case of a sale of a retreaded tire from stock to the public, and the case where a tire is retreaded to the order of a customer and to whom it is returned when the retreading has been completed, and that the latter transactions are to be regarded as sales.

1938

THE KING v. BOULTBEE LTD.

Maclean J.

The relevant provisions of the Special War Revenue Act may now be referred to. Sec. 80 (1) has reference to the excise tax claimed and reads as follows:—

80. (1) Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and sold, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned

(*a*) in Schedule I, at the rate set opposite to each item in the said schedule computed on the duty paid value or the sale price, as the case may be;

(*b*) in Schedule II, at the rate set opposite to each item in the said schedule.

Sec. 86 (1) is in part as follows:

There shall be imposed, levied and collected a consumption or sales tax of eight 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 delivery of such goods to the purchaser thereof.

Sec. 87 of the Act reads thus:

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

(*a*) a lease of such goods or the right of using the same not the right of property therein is sold or given; or

(*b*) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or

(*c*) such goods are manufactured by contract for labour only and not including the value of the goods that enter into the same, or under any other unusual or peculiar manner or conditions; or

(*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.

I propose first to discuss the transactions where the defendant has merely retreaded the customer's tire. Under s. 86 the tax is imposed when goods manufactured or produced in Canada have been sold, and delivery made to the purchaser. I am unable to appreciate how the contention can be seriously advanced that a person who neither owns nor sells an article, but which he has repaired for the owner, is liable to the sales tax under s. 86, in the absence of precise words imposing the tax. I do not think it can be said that the defendant in retreading or repairing a tire at the request of its owner, and who on completion of the work delivers back to the owner the identical tire he was given to retread, has manufactured or produced a tire, or that he has made a sale. In such cases there is never a

sale and unless there is a sale no sales tax is imposed; the tax is not on goods manufactured, it is on goods manufactured and sold and in my opinion the defendant is not liable for the tax in such cases, under s. 86 of the Act. These transactions with customers, or owners of tires, must, I think, be looked at as single transactions, for material supplied and labour performed, and nothing else.

Next, we must consider if s. 87 has the effect of making the defendant liable for the sales tax, based on the amount paid by the customer for having his tire retreaded,—not on the value of the tire claimed to be manufactured. It is upon this section of the Act, particularly s. 87 (*c*), that the plaintiff must rely for the recovery of the tax, in connection with tires retreaded for the customer. It is my opinion, that when the defendant retreads a tire for a customer it does not manufacture a tire, by contract for labour only, and I cannot think that s. 87 (*c*) has any application whatever to transactions of this nature. In such cases there is no contract on the part of the defendant to manufacture or produce a tire for the customer, nor does the customer deliver to the defendant any material with which to manufacture or produce a tire, that is, in the sense intended by s. 87 (*c*). The defendant merely repairs or retreads a tire, a simple and ordinary operation. There is no distinction between repairing an automobile tire and repairing anything else, for the owner. There is nothing unusual or peculiar about a transaction which merely involves the repair of an article by a tradesman, and payment by the owner of the article for the services rendered. There is no particular significance in the word "retreading" and one can only say it is a very convenient and descriptive term to use, just as the word "sole" is used in respect of shoes. To say that when a tire is delivered to the defendant by a customer for retreading, it is no tire at all, particularly at the instant of time when the old tread is removed, is not, I think, in fact true, and it is a contention that is not at all impressive to me. I cannot think that the words "manufacture," or "goods," mentioned in 87 (*c*) include, or were intended to include, transactions of the nature which I am discussing, or that such transactions were intended to be treated as sales.

It is common knowledge that finished goods are sometimes manufactured or produced by business concerns, and

1938

THE KING v. BOULTBEE LTD.

Maclean J.

frequently by individuals—men and women—for persons who provide the material entering into such goods, under contract for labour only, and this practice is known to prevail to a considerable degree in branches of the clothing trade, and other examples of this practice might be given. It may be that it was the intention of 87 (*c*) to tax, in such cases, as a manufacture and as a sale, the cost of the labour performed by those who convert the furnished raw material into finished garments. If it were intended to include in the same category repair work performed upon a used article belonging to another, then, I think, it should appear as a separate section, and in clear and unmistakable language. The purpose of s. 87 (*a*), (*b*) and (*d*) is readily understood. I do not think the sales tax was intended to apply in the case of repair work applied to an automobile tire, owned by a customer, in order to prolong its life, the customer never having parted with his possession of the same. It is my opinion therefore that the defendant is not liable for the tax, upon such transactions under s. 87 of the Act.

I have now to consider the balance of the transactions which I have earlier described, sales of retreaded tires made from stock to the public, and the trading or exchanging of old tires for newly retreaded tires held in stock, the additional consideration being the usual charge for retreading the customer's tire. I think these two classes of transactions are to be treated as being in substance the same, and they are both readily distinguishable from the case where the tire is retreaded for the customer and owner. If there is a taxable sale in the first mentioned class, there is, I think, a taxable sale in the other class. The way in which the latter transactions are carried out may differ, the form of the consideration may differ, but the substance of the transaction is the sale of a retreaded tire. The receipt of the old tire as part of the consideration in the second mentioned class, does not, I think, negative the idea of a sale. While not entirely free from doubt that is the conclusion I have reached in respect of that point.

Now, in respect of these two classes of transactions, was there a manufacture or production? The facts in the *Biltrite Tire Company* case (1) strongly supported the

(1) (1937) Ex. C.R. 1.

1938

THE KING v. BOULTBEE LTD.

Maclean J.

contention of the Crown that there was a "manufacture." There, the business of retreading and selling tires was carried on in a very large way, as will appear from the report of that case. Here, the defendant does not buy old tires from the public, it acquires them by way of trading old tires for newly manufactured tires, or by way of exchanging newly retreaded tires for old tires. There is that distinction between the *Biltrite Tire Company* case and the one under consideration, but that distinction is largely quantitative, and while I cannot state the exact volume of the defendant's transactions falling within the two classes mentioned, yet they must have been substantial, and at least they were not merely occasional transactions. What the defendant does is to acquire used tires, and by retreading and repairing them they are made more valuable and marketable, their life is prolonged, and the defendant deals in them, and makes such transactions a part of its business. There is, I think, a distinction between the case where one retreads or repairs a tire for an individual owner, a casual and unknown customer in some instances, and the case where one procures used tires in substantial quantities, for the purpose of repairing or improving them for the purpose of selling them to the public at a profit. I think, for the purposes of the Act, this may fairly be said to constitute a manufacture and so I hold.

My conclusion therefore is that the defendant is not liable for the tax claimed in the case where it merely retreads the tire of a customer and delivers it back to the customer, but in all other cases I think the defendant must be held liable for the tax claimed. There will be a reference to determine the amount of the sales which I hold to be taxable, unless the parties can agree upon this themselves. Until this has been determined the matter of costs will be reserved.

Judgment accordingly.