BETWEEN:

HER MAJESTY THE QUEEN on the Information of the Deputy Attorney General of Canada ..... PLAINTIFF;

1956
Jan. 23
Apr. 18

AND

REXAIR OF CANADA LIMITED ..... DEFENDANT

*Revenue—Excise tax—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(ii), 23(1), 30(1)(i)—Goods manufactured solely for defendant by another corporation—"Manufacturer or producer"—Defendant liable for tax.*

Defendant company entered into an agreement with a company herein called Radio for the manufacture and deliverance by Radio solely to defendant of electrical appliances made in accordance with drawings

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and specifications furnished by defendant and under patent rights owned by defendant's parent company. The price paid for such appliances was fixed by the agreement subject to variations under certain circumstances. Plaintiff contends that defendant is a manufacturer or producer of such appliances and seeks to recover excise and sales tax thereon.

*Held:* That the appliances in question were being manufactured on behalf of defendant and for no other purpose and defendant is liable for the excise and sales tax claimed by plaintiff.

INFORMATION exhibited by the Deputy Attorney General of Canada.

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

*K. E. Eaton* for the plaintiff.

*P. B. C. Pepper* for the defendant.

HYNDMAN, D.J. now (April 18, 1956) delivered the following judgment:

This is an information of Frederick Percy Varcoe, one of Her Majesty's counsel, and Her Majesty's Deputy Attorney General, on behalf of Her Majesty.

The total claim is for $9,672.02, claimed to be due and owing by virtue of the provisions of s-s. (1) of section 80 of the Excise Tax Act (numbered as s-s. (1) of section 23 of the said Act, being chapter 100 of the Revised Statutes of Canada); and s-s. (1) of section 86 of the said Act (numbered as s-s. (1) of section 30 of the said Act, chapter 100 of the said Revised Statutes).

The amount claimed for excise tax is $1,096.58, and for sales tax, $8,675.40.

It was admitted at the time that in the event of liability on the part of the defendant the amount claimed is correct in addition to any interest, penalties and license fees.

It is alleged that the defendant is the manufacturer or producer of electrical appliances adapted to household or apartment use, namely vacuum cleaners and attachments therefor sold under the trade name Model C Rexair Conditioner and Humidifier and delivery by it of such electrical appliances is liable for excise and sales taxes under the provisions of the Excise Tax Act.

It is alleged that during the period from February 1, 1951 to November 30, 1953 the defendant sold and delivered

8,224 of said electrical appliances which had been manufactured or produced by it in Canada, particulars of the sales of which and the excise and sales tax payable in respect of such sales are as follows:

| | *Units Sold* | *Sale Price* | *Sales Tax* | *Excise Tax* |
|---|---|---|---|---|
| Feb. 1 to Apr. 10, 1951 .. | 634 | 48,152.30 | 3,131.85 | 5,872.24 |
| Apr. 11, 1951 to Apr. 8, 1952 ..... | 3,177 | 259,371.15 | 19,212.69 | 48,031.68 |
| Apr. 9, 1952 to Nov. 30, 1953 ..... | 4,413 | 361,585.35 | 28,926.82 | 43,390.26 |
| | 8,224 | $669,108.80 | $ 51,271.36 | $ 97,294.18 |

It is claimed that by reason of the sale and delivery of the said 8,224 electrical appliances the defendant became liable for excise taxes totalling $97,294.18 under the provisions of the said Excise Tax Act, and also liable for sales tax in the amount of $51,271.36 under the provisions of the said Act.

In respect of the total amount of excise tax payable, the sum of $96,197.60 has been paid, leaving a balance owing of $1,096.58.

In respect of the total amount of sales tax payable the sum of $42,595.92 has been paid, leaving a balance owing of $8,675.44.

The defendant has neglected and refused to pay the said balance of its liability, although demand was duly made for payment thereof, the refusal being based on the ground that Canadian Radio Manufacturing Corporation Limited, and not Rexair, the defendant herein, was the manufacturer and producer of the said goods.

Plaintiff also claims the sum of $16 for license fees, and interest, and penalties, provided for in said Act.

The fact is that Canadian Radio Manufacturing Corporation Limited (hereinafter called Radio) was the actual manufacturer of the goods in question under agreement with Rexair.

The issue is as to whether or not, under the facts and circumstances of the case, Rexair of Canada Limited (hereinafter called Rexair), and not Radio, must be regarded as the manufacturer or producer, within the meaning of the Excise Tax Act.

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The legislation in question is section 2(*a*)(ii), which reads as follows:

(*a*) "manufacturer or producer" includes

(ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not,

Section 23 is as follows:

23. (1) Whenever goods mentioned in Schedules I and II are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, 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.

Section 30(1)(i):

30. (1) 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

(i) payable, in any case other than a case mentioned in subparagraph (ii) by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,

The material facts of the case are as follows. An American company called Rexair Inc., of Toledo in the State of Ohio, held patents for the manufacture of Model C Rexair conditioners and humidifiers complete with standard attachments. Subsequently, another American company, Martin-Parry Inc. of Toledo, acquired all the interests of the first-mentioned company, and later on incorporated a subsidiary in Ontario, called Rexair of Canada Limited, a purely selling organization, whose head office is 13 Adelaide Street East, Toronto, Ontario. The president of Martin-Parry Inc. was also the president of Rexair in Canada.

On the 10th of July, 1950, an agreement was entered into between Rexair of Canada Limited and Radio, in which it was provided that Radio would manufacture for Rexair and deliver to it, f.o.b. Radio's plant, 10,000 Model C Rexair conditioners and humidifiers complete with standard attachments, individually cartonized and enclosed, two

each, in master cartons, at the agreed unit prices of $40.18 for each of the first 3,000 units and $39.36 for each of the balance of 7,000 units, all in accordance with Rexair's drawings and parts lists 920-1 and 920-4, to be furnished without costs to Radio. Clause 1(*a*) states:

The foregoing unit prices are based on RADIO'S ability to obtain in Canada the required motors at SEVEN and 20/100 ($7.20) DOLLARS each f.o.b. Kitchener, Ont., and to import from the United States the following components at the price per thousand (1,000) indicated below, payable in United States Dollars at Toledo, Ohio, f.o.b. Martin-Parry Corporation Plant at Toledo, Ohio,—

A long list of the components and prices follows in the agreement.

Clause (*b*) reads:

Any increase or decrease in the cost to RADIO for any or all of the foregoing items shall be reflected in the unit price as to the units to which such costs apply.

Clause (*c*):

No change in material or design, and no substitution, shall be made in any of the goods manufactured hereunder without prior written approval by REXAIR and mutual agreement of the parties hereto as to any price change, upward or downward, involved therein. In the event of such substitution or change in material or design, payment shall be made by REXAIR to RADIO for any parts thereby made obsolete, at RADIO'S cost thereof.

Clause (*f*):

REXAIR shall pay the sales tax accruing by reason of the manufacture of goods produced under this agreement, and any other taxes hereafter accruing on account thereof, beyond the sales tax now in force.

Clause 7(*a*):

The parties hereto mutually agree that REXAIR shall hold RADIO harmless of any and all claims, actions, suits or proceedings for infringement or alleged infringement of any patent in carrying out this contract, and to indemnify RADIO against payment of royalties which may be payable in connection with any such patent; and for all damages, losses and expenses, including legal expense which RADIO may or shall suffer or incur in connection with any such claim, action, suit or proceeding, provided that RADIO shall advise REXAIR of the pendency of any such claims or the institution of any such suit or other proceeding herein contemplated within ten (10) days, and permit REXAIR at its cost and in the name and behalf of RADIO and itself, to defend or adjust any such claim or claims.

Paragraph 8:

REXAIR is hereby given the right to maintain its inspector in RADIO'S Plant either continuously or from time to time, as REXAIR deems advisable, at its own cost and expense; RADIO shall furnish reasonable facilities for such inspector to conveniently discharge his duties.

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The inspector's authority shall include approval and rejection of parts and/or completed machines which do not conform to REXAIR'S drawings and standard of finish and the test specifications for Canadian manufacture, a copy of which is attached hereto, made a part hereof, and marked Exhibit "B", or the approval of Canadian Standards Association.

Paragraph 9:

If, upon delivery of ten thousand (10,000) completed units herein contracted for, REXAIR and RADIO shall not have reached an agreement for subsequent manufacture by RADIO, REXAIR shall purchase from RADIO f.o.b. RADIO'S Plant whatever quantity of excess parts RADIO shall then have on hand up to a maximum of 500 of each item manufactured by RADIO and 1,000 of each item purchased by RADIO, and which shall pass inspection, at cost of production or procurement, plus five per cent (5%) upon exhibition of costs therefor.

The question to be determined, therefore, is, although Rexair is not an actual manufacturer, but merely a selling organization, whether under the provisions of section 2(*a*)(ii), above quoted, it nevertheless is to be regarded as the manufacturer or producer, or, if Radio only should be regarded as the manufacturer or producer.

The patents in question were the property of Martin-Parry, and not that of the defendant. But there is no doubt in my mind there was an understanding that Radio could use them without any danger of being charged with infringement, Rexair being a subsidiary of the proprietor of the patents.

It was argued that Radio, in whose corporation neither Rexair nor Martin-Parry had any interest, financial or otherwise, was in fact and law the manufacturer or producer, and selling the production in the ordinary way, the price having been fixed by agreement. But such price was subject to variations depending upon certain circumstances affecting the costs of necessary parts and tools. It was not, in my opinion, a straight sale at a firm price in the ordinary course of business.

The opening paragraph of the agreement, to my mind, has much significance. It says, "Radio agrees to manufacture for Rexair and to deliver to it f.o.b. Radio's plant" a certain number of Model C Rexair conditioners, etc., etc. A strict interpretation of these words indicates Radio was acting on behalf of Rexair. The production was entirely and only for the defendant company, and not subject to sale to any other person.

If I am correct in this interpretation of the said agreement, it seems to me one cannot escape the conclusion, examining the said agreement as a whole, that the units in question were being manufactured on behalf of Rexair, and for no other purpose.

In the case of *The King* v. *Ruben Shore* (1), the facts were that Shore, a merchandise distributor, entered into a contract with English and Metcalf of Toronto, known as Leyden Machine and Tool Company, to purchase from the said company twenty-five thousand toy electric irons at the price of forty-seven cents per unit. It was also stipulated that the said company should not in any manner whatsoever either directly or indirectly, through themselves or through any agent, manufacture a similar article of merchandise as mentioned in the agreement, for a period of two years after the completion of the said contract. It was claimed that the defendant, and not Leyden Machine Company, should be regarded as the producer or the manufacturer of the goods sold by him, and consequently liable for the sales tax.

Cameron J. at page 228 said:

> There can be no doubt, I think, that the defendant was the "manufacturer or producer" of the goods within the meaning of section 2(*c*)(ii) of the Act . . .

which is similar to the section above quoted. He goes on to say:

> It is clear from the contract and the evidence that English and Metcalf were manufacturing the toys for the defendant only. The dies to be used in their manufacture were made by English and Metcalf upon the instructions and at the expense of the defendant and they are still the defendant's property. English and Metcalf could not sell the toys to anyone but the defendant, and for a period of two years from the completion of the contract could not manufacture a similar article. At first the toys were painted but later, on the instructions of the defendant, were plated. On several occasions the prices to be paid therefor by the defendant to English and Metcalf were substantially increased beyond the price agreed upon in the contract, due to the fact that the agreed price turned out to be insufficient to meet the costs of English and Metcalf. The defendant held a sales or other right to the goods being manufactured on his behalf by English and Metcalf and therefore, in my opinion, was the manufacturer or producer of such goods.

In my view, the instant case is fundamentally similar to, if not stronger in favour of the plaintiff than the *Shore* decision, and, that being so, following the said decision,

(1) [1949] Ex. C.R. 225.

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which I feel bound to do, the conclusion must be that Rexair is liable for the excise and sales tax as claimed, together with any penalties or license fees provided for in the Excise Tax Act.

There will, therefore, be judgment in favour of Her Majesty for the amount claimed as above mentioned, together with interest, penalties, and license fees provided for in the Excise Tax Act, chapter 100, R.S.C. 1952 as amended, and cost of the action to be taxed.

If any dispute arises as to the amount of interest, penalties or license fees, the matter may be spoken to.

*Judgment accordingly.*