HIS MAJESTY THE KING.....PLAINTIFF;

AND

DOMINION CARTRIDGE COMPANY LTD. .....DEFENDANT.

1923
Feb. 8.

Revenue—Excise tax on price of goods—Sale, when completed—Special War Revenue Act, 1915, as amended by 10-11 Geo. V, c. 71—Interpretation.

The defendant company, manufacturers of cartridges, determined the yearly quantity to be manufactured upon the orders received from customers generally. Upon receipt of such orders and their acceptance by the company, the manufacturing of cartridges was proceeded with, and the goods placed as part of the general stock. Subsequently when preparing to make delivery under the orders, the cartridges were counted, sorted and appropriated to each shipment or contract.

Held that, under the provisions of Article 1474 C.C., the mere giving of the order and its acceptance did not amount to a complete sale, which indeed was only perfected when the goods had been so manufactured, sorted, counted and appropriated to the respective shipments or contract, and notification thereof given to the purchaser, which, in the present case, took place at the time of delivery.

2. That the agreement arising upon the order and acceptance thereof resulted in an executory and not an executed contract.

3. That the excise tax of 10 per cent on the total purchase price of goods mentioned in subsections 1 and 4 of section 19 (*bb*) of the Special War Revenue Act, 1915, as amended by 10-11 Geo. V, c. 71, s. 2, is properly and completely imposed and recoverable under the provisions of said subsections, apart from the provisions of subsection 5 of said section 19 (*bb*).

4. That subsection 5 of section 19 (*bb*) in no way detracts from the full force and complete effect of subsections 1 and 4 of said section; but only provides machinery for the mode of ascertaining the purchase price, upon which the tax is to be levied, in a case where the goods are imported.

INFORMATION by the Attorney General of Canada seeking to recover $59,095.22 representing 10 per cent of the total purchase price of sale of firearms, shells, etc.

January 26, 1923.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

Aimé Geoffrion, K.C. for plaintiff.

Eugène Lafleur, K.C. for defendant.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (February 8, 1923) delivered judgment.

This is an information, exhibited by the Attorney General of Canada, whereby it is sought to recover from the

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defendant, the sum of $59,095.22 as representing a tax of 10 per cent on the total purchase price upon sales of firearms, shells, or cartridges for use other than for militia purposes, as imposed, in 1920, under the amendments to "The Special War Revenue Act, 1915," sec. 2 by adding sec. 19 (*bb*) thereto (10-11 Geo. V, c. 71), and which came into force, under sec. 3 thereof, on the 19th May, 1920.

The operating clauses of the statute under which the tax in question in the present controversy is claimed read as follows, to wit:—

19 (*bb*) (1) The following excise taxes shall be imposed, levied and collected on the total purchase price of the article hereinafter specified:—

Then come subsections 2 and 3 which have no bearing upon this case and that takes us to subsection 4 which reads as follows:—

(4) The following excise taxes shall be imposed, levied, and collected on the articles hereinafter specified, namely:—

(*c*) a tax of ten per cent on . . . . . firearms, shells, or cartridges for use other than for militia purposes.

Then comes subsection (5) upon which centers much of the conflict in this case and which reads as follows, to wit:—

(5) The excise taxes as imposed by the preceding subsection four shall be payable on the duty paid value in addition to the present duties of excise and customs at the time of sale by the Canadian manufacturer or when imported or when taken out of customs or excise bond, but shall not apply to such aricles when exported, and shall be accounted for to His Majesty in accordance with such regulations as may be prescribed.

It is well to bear in mind that there is nothing in this recited subsection (5) which detracts from the meaning, force and effect of section 1 and subsection 4, the first clauses of the section, which say that the tax shall be imposed, etc., on the "total purchase price" of the articles "hereinafter" specified. Most of the goods forming part of the enumeration in subsection 4 are not subject to customs duties and it would be, so to speak, altering the nature and economic purpose of the present excise tax to contend that it is only to be imposed upon imported goods.

Briefly stated, the evidence and admissions of counsel establish that the transactions in question consisted in the defendant receiving orders for goods, in the form shown by exhibit A, the defendant to answer by forwarding an acceptance (exhibit B) of such order with a special nota-

tion in the margin, and that while all the goods in question were ordered before the 19th May, 1920 (date of the Act coming into force) they were all delivered after that day.

The cartridges in question in this case were not for "military purpose" and the present tax becomes thereby essentially a luxury tax.

Two substantial grounds of defence are advanced at bar.

The first one is that the sales in question, made through these orders and acceptances, are all prior to May, 1920, and were thereby perfected and completed sales prior to the time the Act became in force—before the 19th May, 1920—and that they are therefore not subject to the tax in question although the goods were all delivered subsequent to May, 1920. I am unable to assent to that view: an executory contract is the result of these transactions. The fallacy of the argument lies in that there is not at the time of the order or acceptance, a definite, specific, physical substance ear-marked as sold—since the goods have either to be manufactured, or taken from the stock, counted, sorted and appropriated to a specific shipment.

These transactions all took place in the province of Quebec and therefore the liability, in the present controversy, is to be determined by the laws of the province wherein the cause of action arose, B.N.A. Act, section 92, subsection 13; *The King* v. *Desrosiers* (1); *The King* v. *Armstrong* (2); *The King* v. *The Hudson's Bay Co. et al* (3).

The manufacturing of cartridges by the company, as established by the evidence, is dependent upon the estimate of sales to customers generally and when the goods are manufactured they are added to the stock and sorted. Then prior to the shipment, as per the orders above mentioned, the goods are taken apart, sorted, counted and appropriated to a particular shipment or person according to directions.

It may be casually mentioned that the company at the beginning of the period in question, in May, 1920, made their first shipments with the tax paid and discontinued doing so upon the representation and objections by their

(1) [1908] 41 S.C.R. 71, at p. 78. (2) [1908] 40 S.C.R. 229 at 248.
(3) [1921] 20 Ex. C.R. 413, at p. 423.

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customers and that the shipments mentioned in this case only actually began with the 1st July, 1920.

Under the laws of the province of Quebec, as set forth in article 1474, of the Civil Code:

When things movable are sold by weight, number or measure, and not in the lump, the sale is not perfect until they have been weighed, counted or measured, etc.

The same principle obtains under the English law. See Benjamin, on Sale, 6th ed. pp. 7, 346 et seq.; Hals. 25, p. 167.

The agreement made under the order and acceptance results in an executory and not an executed contract.

Article 1026 C.C. further adds:

If the thing to be delivered be uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate, and he has been legally notified that it is so.

And the notification in the present instance takes place at the delivery, after the goods have been manufactured, sorted, counted and appropriated to the purchaser.

The same principle obtains under articles 1683 and 1684 of the Civil Code.

There was no completed sale in the present instance until the goods had been manufactured, had been set apart, counted and appropriated to the particular contract. If the goods were manufactured, they were not counted and appropriated except immediately before shipping and it was only by the shipment that the appropriation was notified to the purchaser and by receipt that it was accepted. The ownership of the goods is not transferred,—does not pass until it is known what is the subject matter of the sale in respect of which ownership would pass to the purchaser—until the goods are identified, and that would be only consonant with logic.

The sales were perfected after the 19th May, 1920. The matter is clear and not open to the possibility of conjuring upon some nicety of thought in regard to such transaction. No perfected sale arises until the property in the goods passed to the buyers or before the goods are delivered, under the circumstances.

The manufacture of cartridges covers a variety of different grades and when manufactured they have to be selected, counted and set apart according to the orders. So

long as the goods remain undetermined and unascertained the ownership does not pass. Delivery is an obvious appropriation, but short of delivery, appropriation on notification may be procured. See also Art. 1200 Civil Code.

In cases of executory agreement of sale it is the appropriation of the unascertained goods that completes the sale, followed by the notification of such ascertainment.

Something might indeed occur between the date of this order and acceptance, and the date when the goods can be manufactured, etc., that would prevent the very manufacturing of the article upon which that tax might have been imposed if the statute had been in force before.

Moreover, let us take the converse of the present case as an hypothetical one producing results which would illustrate the present transaction. Assuming, for the sake of argument, that the statute under which the tax in question was being collected had been in force since the 19th May, 1919, and had been repealed on the 19th May, 1920, could it be contended that the tax on the orders and acceptances bearing a date previous to the 19th May, 1920, could be levied, when as a matter of fact the goods were actually set apart, counted and appropriated after the latter date? The answer is necessarily in the negative and it is with the same logical force that it must be found that the present transactions, under the circumstances of the case, are subject to the tax as claimed.

Therefore, upon this first ground of defence, I find that the sales or agreements of sale were never perfected before the 19th May, 1920, when the Act in question came into force and that all such sales mentioned in this case are declared subject to the tax of 10 per cent upon the purchase price as established by the invoice which is *prima facie* evidence of the value of the goods, and is recoverable when the sale is perfected in the manner above set forth. See also *Cohen* v. *Stone* (1).

Coming to the second ground of defence advanced by the defendant and which amounts to saying, as set out in the statement of defence, that there is no provision, no method or machinery provided by the Act, whereby the amount of

(1) [1922] 70 D.L.R. 85.

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the tax can be calculated in respect of the goods in question; or, in other words, that, under subsection 5, there must be a custom duty paid on the property before it can become taxable.

In the consideration of this all important question I may say as a prelude that there is found, in the first volume of Blackstone's inimitable Commentaries, a valuable rule of guidance for the interpretation of a text of law and that is:

> The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and the spirit of it; or the cause which moved the legislator to enact it.

Now going into preliminary principles it must be found that the very economic necessities of a Government depend upon the collection of revenue and there is an inherent condition in the ownership of property that it shall contribute to the public revenue. This method of imposing and levying taxes is vested in the legislative power, which it is presumed, will always exercise such power with equal regard to the security of the public and individual rights.

The object of the Act of Parliament in question in this case is to raise revenue. It is, as set forth by its title,

> An Act to supplement the Revenue required to meet War Expenditures.

(5 Geo. V, ch. 8 (1915)).

Under section 15 of the "Interpretation Act" (R.S.C. 1906, ch. 1) "every Act and every provision and enactment thereof shall be deemed remedial." It would therefore seem that if the Act of 1915 is an Act to supplement the Revenue, that it is an Act, which in its remedial aspect, would add revenue to those collected under the customs and not to be exempted in the cases where custom duties are levied, as contended at Bar when interpreting subsection 5 of the Act of 1920, unless words to the contrary can be found in the statute.

Section 15 of the Interpretation Act further enacts that

> every Act and every provision and enactment thereof . . . . shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Article 12 of Civil Code (P.Q.) also provides that

when a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the end for which it was passed.

The preamble which forms part of the Act, assists in explaining it.

Then approaching the construction of section 19 (*bb*) (10-11 Geo. V, c. 71, sec. 2) as affecting the tax thereunder imposed upon cartridges—in the light and with the help of the principles above set forth—I am primarily of opinion that this section 19 (*bb*) when placing an interpretation or meaning upon any of its subsections, must be read *dans son ensemble,* as a whole.

By the first paragraph of section 19 (*bb*), the tax in question is called an excise tax and is

imposed, levied and collected on the total purchase price of the articles hereinafter specified.

The next paragraph having any bearing upon the present case is subsection (4) of section 19 (*bb*), reading as follows:

The following excise tax shall be imposed, levied, and collected on the articles hereinafter specified.

That is—as will be seen by reference to this long section (19 *bb*) of the Act—a new class of article and by paragraph 5 of subsection (*c*) of said subsection 4, the tax of ten per cent is imposed on cartridges.

Therefore, so far we have complete and exhaustive provisions and enactments of a statute imposing on the total purchase price (according to the first article of section 19 (*bb*) which must be read together with subsection 4) of cartridges a ten per cent tax, as specified ("hereinafter"—says first article of section 19 (*bb*)) by subsection 4.

The enactments of the first paragraph of section 19 (*bb*), read together with subsection 4, constitute full power and authority to impose, levy and collect the tax in question on the total purchase price of the articles mentioned in subsection 4.

However, a different construction of this section 19 (*bb*) has been propounded at Bar. It is contended by the defence that subsection 5 would absolutely control all taxes imposed by subsection four and declare the tax payable only on the duty paid value

in addition to the present duties (these words seem to be overlooked) of excise and customs at the time of sale by the Canadian manufacturer,

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etc., and as there is no customs or excise bond duties payable upon the article in question the Act remains without authority or machinery to levy the tax.

This contention has been answered by the plaintiff in asserting that the expression "duty paid value" is defined by section 19 (*a*) of the Act of 1918, and that for the purpose of ascertaining the same, reference must be had to section 40 of the Customs Act (R.S.C. 1906, ch. 48) which says that:

> 40. Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country, whence and at the time when the same were exported directly to Canada.

See also section 2 of ch. 18 of 12-13 Geo. V, amending above section 40 respecting the depreciation of foreign currency.

Now, I have came to the conclusion that this subsection 5 has no application when the goods affected by the tax imposed by the previous sections or subsections of 19 (*bb*) (i.e. subsection 1 and subsection 4) is not subject to the additional duties of "custom, or when the goods are imported or taken out of customs or excise bond," etc.

This subsection (5) provides only for machinery in case the goods taxed by 19 (*bb*) (subsection 1, subsection 4) are subject to further customs or excise duties.

The tax in question is properly imposed and duly recoverable from the defendant under the full provisions of subsection 1 and subsection 4 of section 19 (*bb*) above cited apart from subsection 5; and there is nothing in this subsection 5 of the Act to detract from the force and effect of the enactments of the said subsection 1 and subsection 4 of section 19 (*bb*).

All that subsection 5 in question provides is that

> the excise taxes as imposed by the preceding subsection four on the total purchase price of the article—subsection 1 of 19 (*bb*) shall be payable on customs duties, when payable, etc.,

and is quite consistent with the previous section 1 and subsection 4 that impose a tax on the purchase price of the article in question,—in that it provides first that the excise duty imposed by the present Act will also be imposed and run upon imported goods subject to customs duties or excise bond as well as upon such duties, and secondly provides the machinery for finding out the purchase price (as

enacted by subsection 1 of section 19 (*bb*) in cases of importation. That is, in cases of importation, the mere purchase price may not be—according to principles obtaining under the "Customs Act"—the amount, as in normal cases, upon which the tax should be imposed. In customs cases, to avoid dumping in Canada the surplus of a glutted market at slaughtered prices, below market value, the Customs Act provides that the valuation for duty shall be arrived at in a manner to afford protection to the Canadian trader and that is fixed by section 40 of "The Customs Act," R.S.C. 1906, ch. 48. Repeating myself that means that in cases of imported goods the tax shall not necessarily be ascertained upon the actual purchase price but in the words of the "Customs Act" upon

> the fair market value thereof (of the article) when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

In other words subsection 5 is an enactment only by way of supplement, to the previous sections (subsection 1 and subsection 4 of section 19 (*bb*)) in that it provides that this new tax runs upon customs duties and further provides how the valuation for duty of the purchase price (the amount upon which the tax is recoverable in such cases) is ascertained and arrived at in a case where customs duties are also payable and that such purchase price is only due at the time of sale—that is when the sale is perfected.

This new tax is called excise tax. Yet the word excise—which is a corruption of the old French word *assis*—merely means here assessment or imposition. And the French word *accise,* says Littré, rather comes from the Latin "*accidere,* couper, tailler et signifie *taille*—de *a* et *cidere* pour *caedere* couper." Therefore, subsection 5 by way of an extension, as explanatory or curative but not interfering with the previous enactment, acting only as a logical sequence to the imposition of this new tax, provides that it shall be recoverable over and above customs duties and provides further the manner in which the purchase price, mentioned in subsection 1 of section 19 (*bb*), shall be in such cases arrived at—and no more.

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There is no enactment in the statute suggesting any intention or intimation of leaving the subject matter out of the field of taxation, under any circumstances.

While not disregarding the meaning of the words in subsection 5, taken even by themselves they must be considered as plainly declaring that this 10 per cent runs over customs duties; but reading and construing this section 19 (*bb*) as a whole, *dans son ensemble,* I find that no other meaning than the one mentioned above can be attached to subsection 5 thereof which is controlled by the whole of section 19 (*bb*). It cannot be denied that the phraseology of that subsection could be improved; but that is only to admit that it is another striking illustration of the ineptitude and want of care that beset the modern method of drawing our statutes. Indeed, as said by Bentham IV, 281:

Les paroles de la loi doivent se peser comme des diamants.

And these words have been quoted and amplified in an able article of *The Honourable Mr. Justice Rivard,* in La *Revue du Droit,* 1 p. 149, wherein citing J. E. Prince, he says that:

Pour écrire des lois, il faut savoir le droit, la logique et la langue.

Since section 6 of the Act, referred to by me at Bar, provides that in cases of any difference or doubt as to whether any war excise tax is payable, gives the Board of Customs the power to decide the same, in case no previous decision upon the question by any competent tribunal binding throughout Canada, it would seem that this last branch of the phrase or proviso would also give the Court jurisdiction to pass upon the same and further seem to detract from vesting the decision of all such matter exclusively to the Board, which does not become, under the circumstances, *cula designata,* thereby taking away the jurisdiction of this Court and I am therefore assuming jurisdiction. Under section 20 of the Act of 1915 (5 Geo. V, c. 8) all taxes imposed by the Act are recoverable in the Exchequer Court of Canada. I may also add that I am unable to follow the decision cited at bar in the unreported case of the *Attorney General* v. *Karson,* of the 21st July, 1921.

It is admitted, on behalf of the defendant, that if the question of liability is decided against the company, that

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the amount recoverable herein is the amount claimed by the information.

It was further asserted at bar that if effect were given to the plaintiff's claim it would impair existing rights. The answer to this is that parliament is supreme and moreover that similar conditions present themselves on every occurrence when any change is made in our Canadian Customs Act. Perfect equality in adjusting such matters is beyond the pale of human achievement.

There will be judgment in favour of the plaintiff against the defendant for the sum of $59,095.22 with interest thereon at the rate of five per centum per annum from the 22nd day of June, 1922, and with costs.

Judgment accordingly.