

In the Privy Council.

No. 40 of 1939.

ON APPEAL FROM THE SUPREME COURT
OF CANADA.

BETWEEN

CANADA RICE MILLS LIMITED - - - (*Defendant*) *Appellant*

AND

HIS MAJESTY THE KING ON THE INFORMATION OF
THE ATTORNEY-GENERAL OF CANADA (*Plaintiff*) *Respondent*.

CASE FOR THE RESPONDENT.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 20th February 1939 dismissing the appellant's appeal from a judgment of the Exchequer Court of Canada dated the 13th August 1938 which had held the appellant liable for arrears of sales tax and penalty interest in respect of sales of rice by the appellant between October 1933 and August 1936. RECORD
p. 19A.
p. 14.

2. No question of amount arises because it is common ground that liable for any arrears of sales tax the appellant is liable for the amount recovered by way of such arrears, and that if liable for penalty interest the appellant is liable for the amount thereof recovered. It is also common ground that sales tax is payable on sales of rice.

3. Sales Tax is imposed by the Special War Revenue Act, being chapter 179 of the Revised Statutes of Canada, 1927 as amended by chapter II of the Statutes of Canada, 1932, and chapter 50 of the Statutes of Canada, 1932-33. The principal relevant provisions are :

“ 85. In this part, unless the context otherwise requires, the expression

“ (a) ‘ sale price ’ for the purpose of calculating the amount of
“ the consumption or sales tax, shall mean the price before any

RECORD.

“ amount payable in respect of the consumption or sales tax is
“ added thereto, and shall include the amount of other excise duties
“ when the goods are sold in bond; and in the case of goods subject
“ to the taxes imposed by Parts X and XII of this Act, shall include
“ the amount of such taxes; in the case of imported goods the sale
“ price shall be deemed to be the duty paid value thereof;.....
“

“ 86. (1) There shall be imposed, levied and collected a con-
“ sumption or sales tax of six per cent. on the sale price of all goods :

“ (a) produced or manufactured in Canada, payable by the 10
“ producer or manufacturer at the time of the delivery of such goods
“ to the purchaser thereof. Provided that in the case of any contract
“ for the sale of goods wherein it is provided that the sale price shall
“ be paid to the manufacturer or producer by instalments as the work
“ progresses, or under any form of conditional sales agreement,
“ contract of hire-purchase or any form of contract whereby the
“ property in the goods sold does not pass to the purchaser thereof
“ until a future date, notwithstanding partial payment by instal- 20
“ ments, the said tax shall be payable *pro tanto* at the time each
“ of such instalments falls due and becomes payable in accordance
“ with the terms of the contract, and all such transactions shall
“ for the purposes of this section be regarded as sales and deliveries.
“ Provided further that in any case where there is no physical delivery
“ of the goods by the manufacturer or producer, the said tax shall be
“ payable when the property in the said goods passes to the purchaser
“ thereof;

“ (b) imported into Canada, 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;
“ or 30

“ (c) sold by a licensed wholesaler, payable by the vendor at the
“ time of delivery by him, and the said tax shall be computed on the
“ duty paid value of goods imported or if the goods were manufac-
“ tured or produced in Canada, on the price for which the goods
“ sold were purchased by the said licensed wholesaler and the said
“ price shall include the amount of the excise duties on goods sold
“ in bond.”

“ 98. Where goods subject to tax under this Part or under
“ Part XI of this Act are sold at a price which in the judgment 40
“ of the Minister is less than the fair price on which the tax should be
“ imposed, the Minister shall have the power to determine the fair
“ price and the tax payer shall pay the tax on the price so
“ determined.”

“ 106.

“ (5) In default of payment of the said tax or any portion thereof
“ within the time prescribed by this Act or by regulations established

“ thereunder, there shall be paid in addition to the amount in default,
 “ a penalty of two-thirds of one per centum of the amount in default,
 “ in respect of each month or fraction thereof, during which such
 “ default continues.”

RECORD.

By section 5 of chapter 45 of the Statutes of Canada, 1936 the rate in section 86 was increased to 8 per cent. with a proviso in respect of contracts of sale made before the 1st May, 1936.

- 10 4. The appellant is a company incorporated in British Columbia in 1929, and until October 1933 it sold milled rice in the open market to whole-sale dealers. In October 1933 for the purpose of segregating its costs of manufacture from its selling costs, and for the purpose of facilitating an exercise of the statutory power under section 98, which it was thought would assist the appellant against foreign competitors, the appellant formed a partnership known as the Canada Rice Sales Co. which, although registered as required by the Partnership Act being chapter 197 of the Revised Statutes of British Columbia, 1924 was not under that Act or otherwise a separate legal entity. p. 41, ll. 35-38.
p. 50, l. 44-
p. 51, l. 2.
p. 38, ll. 16-25.
p. 38, l. 37-
p. 39, l. 15.
p. 46, ll. 7-37.
pp. 54-57.
- 20 5. The membership of the partnership and the respective shares of the partners were so arranged as to represent exactly the shareholders of the appellant with interests precisely corresponding to their shareholding. To ensure this result an incorporated company holding shares in the appellant was represented in the partnership by its shareholders, including a trustee who had a proportionate share in the partnership as trustee for the same beneficiaries. p. 47, l. 10-
p. 49, l. 31.
p. 56,
ll. 21-24.
6. The appellant was a licensed manufacturer under the Special War Revenue Act but the partnership was not licensed as wholesalers. Had the partnership been licensed, sales to it by the appellant would have been exempt from tax but tax would have been levied on all sales by the partnership. p. 21,
ll. 22-24,
ll. 25-27.
- 30 7. From the formation of the partnership the appellant ceased to make direct sales of milled rice in the market but transferred the whole of its milled rice to the partnership at prices fixed from day to day by the appellant's directors, having regard to the current market prices. The partnership, adding sufficient to cover selling costs and a profit of $\frac{1}{2}$ per cent. endeavoured to find purchasers at the prices so increased. If sale at such prices proved impossible the appellants reduced the prices charged to the partnership. At no material time did the partnership buy rice from any person other than the appellant, although on one occasion after proceedings started the appellant ran short of supplies and the partnership bought a 40 parcel elsewhere. p. 41, ll. 17-19.
p. 44, ll. 21-24.
p. 44, ll. 13-22.
p. 53, ll. 18-20.
p. 44, l. 9.
p. 53,
ll. 18-28.
p. 9, ll. 10-12.
p. 40, l. 38-
p. 41, l. 7.
8. The partnership had no capital, it handled no cash, it had no banking account, it took delivery of no rice, it used the appellant's premises, the appellant paid its servants, and the appellant distributed its profits among the partners. The method of business was for the partnership on finding p. 51, l. 14-
p. 52, l. 39.
p. 51,
ll. 20-28.

- RECORD.
p. 69. a purchaser to notify the appellant who made delivery. Invoices headed in the firm's name and describing the firm as distributors for the appellant were sent to the purchaser. The full sale price (usually paid by bills of exchange) was taken by the appellant. Account was kept of the selling costs and these were debited to the difference between the sale price obtained in the market and the price fixed on transfer from the appellant to the partnership. The surplus was periodically distributed by the appellant among the partners in the proportions provided by the partnership agreement.
- p. 51,
ll. 40-47.
- p. 52,
ll. 5-31.
- p. 27, ll. 2-5. 9. By section 99 of the Special War Revenue Act power was conferred 10
on the Minister of National Revenue to make regulations for carrying out
p. 58, l. 16- the Act, and the Minister made regulations under the 6th of which in cases
p. 59, l. 36. where the vendor and purchaser are inter-related, associated or affiliated
p. 59, ll. 5-9. concerns tax is payable on the price at which goods are regularly sold to
bona fide independent wholesalers. The respondent respectfully submits
that these regulations constitute a valid exercise of the power conferred on
the Minister by section 98 of the Act.
10. The appellant duly paid sales tax on the prices at which rice was
transferred to the partnership but the respondent claimed to be entitled 20
to tax on the price obtained in the market from the purchasers, and on the
pp. 2-5. 15th December, 1936 filed an information in the Exchequer Court of Canada
claiming, with penalty interest, the difference between the tax paid and the
tax which the respondent claimed should have been paid. The information
p. 14,
ll. 14-16. was heard on the 27th and 30th September, 1937 by the Honourable Mr.
Justice Maclean, President of the Exchequer Court, who on the 13th August,
p. 14. 1938 gave judgment in the respondent's favour.
- pp. 10-13. 11. In his reasons for judgment Mr. Justice Maclean, after stating how
the issues arose and the purpose of forming the partnership, explained the
constitution of the partnership and the course of business. After stating
p. 11, ll. 12-24. that the appellant denied the relation of principal and agent whereas the 30
p. 11, l. 25- respondent claimed that the business activities of the partnership were but
p. 12, l. 7. a part of those of the appellant, the learned president found the appellant
p. 12, ll. 7-10. liable for the tax claimed. He stated the facts which led him to the con-
p. 12, ll. 13-18. clusion that the appellant was selling rice in the market under colour of the
p. 12, ll. 18-20. partnership and he disposed of the case on that finding of fact without
relying on the regulation mentioned in paragraph 9 of this Case, which he
p. 13,
ll. 15-25. was inclined to think was *ultra vires*.
- p. 16. 12. The appellant appealed to the Supreme Court of Canada and on
the 20th February, 1939 the appeal was heard before the Right Honourable
the Chief Justice of Canada (Sir Lyman Poore Duff) and the Honourable 40
p. 19A. Justices Crockett, Davis, Kerwin and Hudson. They unanimously agreed
with Mr. Justice Maclean's finding of fact that the partnership was carrying
on business for and as agent of the appellant. The appeal was accordingly
p. 19A. dismissed with costs.

13. The respondent does not seek to ignore that the appellant and the individuals constituting the partnership are in law separate and distinct persons, but contends that the appellant, being a corporation, can only act through agents, and that the question whether any particular group of persons has acted as the appellant's agents is a question of fact. The respondent (to use expressions of Lord Buckmaster in *Rainham Chemical Works Limited v. Belvedere Fish Guano Company Limited* [1921] 2 A.C. at page 475) does not seek to disregard a duly constituted partnership on the ground that it is a sham, but contends that it has been established by
 10 evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence. The respondent respectfully submits that there was in the present case abundant evidence to support, and indeed to compel, the concurrent findings of the Exchequer and Supreme Courts to that effect.

14. The respondent therefore submits that the judgment of the Supreme Court of Canada was right and should be affirmed for the following amongst other

REASONS

- 20
1. Because the question in dispute was a question of fact which has been determined in the respondent's favour by concurrent findings of the Exchequer and Supreme Courts.
 2. Because the evidence demonstrates that the partnership was the agency established and used by the appellant for selling in the market the appellant's goods, and the appellant is therefore liable to pay tax on the market price so obtained by it.
 3. Because regulation 6 validly provided that the price on which the appellant was bound to pay tax was the price obtained by the partnership from independent wholesalers.

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FRANK GAHAN.

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HIS MAJESTY THE KING ON THE INFORMA-
TION OF THE ATTORNEY-GENERAL OF
CANADA - - - (*Plaintiff*) *Respondent*.

CASE FOR THE RESPONDENT

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Solicitors for the Respondent.

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