

His Majesty The King - - - - -

v.

Dominion Engineering Company Limited - - - Respondent

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1946

Present at the Hearing :

LORD THANKERTON
LORD MACMILLAN
LORD WRIGHT
LORD PORTER
LORD UTHWATT

[*Delivered by* LORD MACMILLAN]

The Crown is here the appellant in a claim to recover from the respondents, the Dominion Engineering Company Limited (hereinafter called " the Dominion Company ") the sum of \$10,844.46 as sales tax, together with penalties, under Section 86 of the Special War Revenue Act, Chapter 179 of the Revised Statutes of Canada, 1927, as amended by subsequent enactments. The claim of the Crown has been rejected by the Exchequer Court of Canada (Angers J.) and by a unanimous judgment of the Supreme Court.

The terms of Section 86 (1) of the Special War Revenue Act under which the Crown seeks to impose liability on the Dominion Company are as follows:—

" 86.—(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, payable by the 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 instalments, 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."

The transaction which has led to the present claim was entered into between the Dominion Company and the Lake Sulphite Pulp Company Limited (hereinafter called "the Pulp Company") in 1937. On 6th August of that year a contract was concluded between these two companies whereby the Dominion Company undertook to manufacture for and supply to the Pulp Company a pulp-drying machine with accessories and spare parts for the sum of \$488,335. The contract provided that the price should be paid in nine monthly "progress payments" of \$48,800 each, the first instalment to be payable on 5th July, 1937 (the contract proposal having been made on 5th June) and the remaining eight instalments on the 5th day of each succeeding month until a total of \$439,200 had been paid. Final payment of the balance of the price was to be made after the machine was placed in operation but in no event later than six months from the date of final shipment or offer of shipment of the apparatus from the Dominion Company's works.

The contract expressly provided that the property and right of possession of the apparatus should not pass from the Dominion Company to the Pulp Company until all the stipulated payments should have been fully made in cash.

The first six progress payments were made by the Pulp Company to the Dominion Company, the last payment being made on 11th January, 1938, of the instalment due on 5th December, 1937, which was delayed because the Dominion Company had fallen behind with the construction of the machine. Sales tax was paid by the Dominion Company on each of these instalments.

Early in February, 1938, the Dominion Company became aware that the Pulp Company had become involved in serious financial difficulties. Work on the machine was thereupon stopped. On 22nd February, 1938, an order was made for the winding up of the Pulp Company. No further payments were received by the Dominion Company and the three last instalments of the price of the machine as well as the final sum remain unpaid. The claim of the Crown is for sales tax on these three unpaid instalments.

The machine was never delivered to the Pulp Company and all that was shipped to it was a consignment of sole plates of the value of about \$1,200 which both parties agreed should be disregarded in deciding the present case.

In imposing a sales tax one of the difficulties which confront the Legislature lies in the selection of the point of time at which the tax shall attach and become due. In the case of an ordinary retail sale for cash across the counter of a shop, the stages of agreement, appropriation of the goods to the contract, delivery, payment of the price and passing of the property are all practically simultaneous. But in more complicated transactions for the sale of goods to be produced or manufactured these stages may be spaced in time in various ways. The point of time which Section 86 has selected as in general the time for imposing, levying and collecting sales tax is the time of the delivery of the goods to the purchaser. Liability for the tax, as was pointed out for the Crown, is not made dependent on the price being paid, for the goods may be delivered on credit and the purchaser may default in payment.

In the present case, however, the goods were never delivered and the general rule is inapplicable. But the leading words of the enactment are followed by two provisos, which are both designed to qualify the generality of the main rule in the matter of delivery. The first proviso introduces the conception of a notional delivery which is to be held to take place in certain specified cases, a feature of which is that the property in the goods sold does not pass to the purchaser until a future date. In particular where the contract provides that the sale price shall be paid to the manufacturer or producer as the work progresses the tax is to be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the contract. The Crown not unnaturally relies on this as exactly and literally fitting the present case. Mr. Justice Angers in his judgment valiantly combats this conclusion the injustice

of which has obviously seemed to him more shocking than it perhaps appears to their Lordships who have by long experience become indurated to the arbitrariness of taxation. In the Supreme Court also the Crown's contention on the first proviso is countered and rejected. Their Lordships, however, do not find it necessary to pursue or review this argument for, however aptly the first proviso may seem to fit the Crown's case, they find in the second proviso a sufficient and complete answer to it.

The second proviso qualifies the main enactment in the matter of delivery no less than does the first proviso, and it also qualifies the first proviso itself. For it provides "further" that "in any case where there is no physical delivery of the goods," the tax is to be payable when the property in the goods passes to the purchaser. Thus where there is no physical delivery the notional delivery which the first proviso introduces is rendered inapplicable. Mr. Justice Anger found in the second proviso an alternative ground for his decision against the Crown and it is the main ground of Mr. Justice Hudson's judgment in the Supreme Court. In their Lordships' view this proviso presents an insuperable obstacle to the Crown's claim. There has been no physical delivery of the goods by the Dominion Company to the Pulp Company. The proviso enacts that "in any case" where there has been no physical delivery the tax is to be payable when the property passes. The property in the goods in question has never passed to the Pulp Company. Consequently the tax has never become payable. If the second proviso is repugnant in any way to the first proviso it must prevail for it stands last in the enactment and so, to quote Lord Tenterden C.J., "speaks the last intention of the makers" (*Rex v. Justices of Middlesex* (1831), 2 B and Ad. 818 at p. 821). The last word is with the respondent, the Dominion Company, and must prevail.

Their Lordships recognise that the result of their view may lead to anomalies. It would indeed have absolved the Dominion Company from liability to pay sales tax on the six instalments which they in fact received and on which they paid tax. But anomalies in tax legislation are far from being uncommon, and the remedy lies to the hand of the Government which has apparently since 1927 passed some twenty amending statutes affecting the Special War Revenue Act.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

The appellant will pay the respondent's costs of the appeal.

In the Privy Council

HIS MAJESTY THE KING

v.

DOMINION ENGINEERING COMPANY
LIMITED

DELIVERED BY LORD MACMILLAN

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