1957

*Apr. 8, 9
Oct. 1

F. W. WOOLWORTH CO. LIMITED ....APPELLANT;

AND

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Provincial sales tax—Failure of seller to remit taxes collected—Remedies of Commissioner—Inspection, "estimate", "assessment"—Retrospective operation of statute—The Social Services Tax Act, R.S.B.C. 1948, c. 333, as amended by 1953, 2nd sess., c. 36, ss. 13, 25.

The British Columbia *Social Services Tax Act* provides for a tax to be paid by buyers of "tangible personal property" and makes the seller the agent of the Crown for the collection of this tax. Section 13 of the Act provides that if a seller fails to make a return or remittance, or if his returns are not substantiated by his records, the Commissioner appointed under the Act "may make an estimate of the amount of the tax collected by such person for which he has not accounted, and such estimated amount shall thereupon be deemed to be the tax collected by that person and he shall pay that amount to His Majesty". Section 25 provides that an appointee of the Commissioner may inspect records, and subs. (2), enacted in 1953, provides that if it appears from the inspection that the Act or regulations have not been complied with, the inspector "shall calculate the tax collected or due in such manner as the Commissioner may deem adequate and expedient, and the Commissioner shall assess the person for the amount of the tax so calculated", subject to a right of appeal against "the amount of the assessment".

An inspection was made of the appellant company's books for the years 1951, 1952 and 1953 and as a result of this inspection the Commissioner "assessed" the appellant in the amount of $15,792.95. This assessment was affirmed on appeal, both by the Supreme Court and by the Court of Appeal.

Held (Locke and Cartwright JJ. dissenting): The judgment should be affirmed.

Per Rand and Fauteux JJ.: In substance, the proceeding was not an action for taxes but a claim by a principal against his agent for money had and received by the latter. It was agreed that the tax had been properly collected by the appellant. Both s. 13 and s. 25 dealt solely with means of ascertaining the amount of collected taxes that had not been paid over to the Crown and s. 25 did not create a new means of proceeding against the seller for failure to collect. Subsection (2) of s. 25 therefore created only additional procedure and it could not be successfully argued that the subsection was not applicable to transactions that took place before its enactment.

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*PRESENT: Rand, Locke, Cartwright, Fauteux and Abbott JJ.

As to the argument that no taxes should have been collected under the terms of the statute on sales of 15¢ and 16¢, this contention should be rejected on the single ground that since tax had been collected by the appellant company on such sales it could not now be heard to say that they were not recoverable by the Crown.

Per Abbott J.: The appeal should be dismissed for the reasons delivered in the Court of Appeal. Section 25(2) of the Act imposed no new tax liability but merely provided an alternative and perhaps more effective way of compelling a seller to discharge the obligations imposed on him. The subsection was therefore procedural only and as such was intended to be retrospective in operation.

Per Locke and Cartwright JJ., *dissenting*: Section 25(2) went beyond the provision of an additional or alternative method of procedure since it empowered the Commissioner to impose a substantive liability for an amount determined by his appointee. Unless there was a clear provision to that effect, such an enactment would not be construed as retrospective and s. 25(2) could therefore not be applied to taxes collected before its enactment. The fact that the appellant had availed itself of the subsection to appeal did not, in the circumstances, preclude it from raising this point at this stage.

The Act, so long as the rate of tax remained at 3 per cent, did not impose a tax on the buyer of an article costing either 15¢ or 16¢, but if a seller in fact collected tax on such a sale he would be bound to account for it and pay it to the Crown

APPEAL from a judgment of the Court of Appeal for British Columbia (1), affirming a judgment of Wood J. dismissing an appeal from an assessment in respect of provincial sales tax. Appeal dismissed.

C. K. Guild, Q.C., and *E. E. Hickson*, for the appellant.

Lee Kelley, Q.C., for the respondent.

The judgment of Rand and Fauteux JJ. was delivered by

RAND J.:—This appeal comes before us on questions of law only. They arise out of provisions of the *Social Services Tax Act*, R.S.B.C. 1948, c. 333, as amended and renamed by 1953, 2nd sess., c. 36. The tax created is on purchases for consumption and is payable by the purchasers. Its application here is to sales made in retail stores of the well known "five and ten" variety, sales with prices ranging from one cent to several dollars. In the calculation of the tax at 3 per cent. a fraction less than half a cent and that of half a cent or more is diminished or increased to the nearest cent. With the immense volume of small purchases these fractional portions become of importance and out of them arises the difficulty here.

(1) *Sub nom. Re F. W. Woolworth Company Limited Vancouver Store No. 17* (1956), 18 W.W.R. 322.

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It was found impracticable by the company, in the ordinary administration of its business, to follow the practice of stores with larger sales items, of issuing with each sale a slip showing the price and the tax. Instead of that, the sale price including the tax is rung up on a cash register, not as an individual item but only in a cumulative total. Besides exempted sales at prices under 15¢, other items, among them clothing and footwear, were exempted. In the result, with such a recording system, it was impossible, from the tape of the register, to make any check of the taxes collected based on the individual sales.

What was devised was a roll of tickets furnished by the Province each representing one cent to be supplied at each register, and as a sale was made tickets to the amount of the tax were torn off by the sales clerk. As they were numbered consecutively, the number so destroyed in any period was easily determined. The weakness of this mode was that the correctness of the amount so shown depended upon the completeness with which the clerk matched destroyed tickets with the taxes collected. In the rush of recording these small transactions the manual act of reaching to the ticket roll and, as part of a single operation, of tearing off one or more tickets was one that could easily be overlooked or postponed. Any number could subsequently be torn off and that estimates of prior sales were from time to time used to make up for omissions is, in my opinion, unquestionable if not inevitable.

The collection in each case is not in dispute and the only issue is the amount. The claim is for a period of three years, 1951, 1952 and 1953. Owing to the incidence of the fractional adjustment the practical mode of relating the total tax in any period adopted is its percentage of gross sales. For example, in 1951 that average percentage in relation to merchandise sales, including food sold at the coffee bar, was 2.3201, in 1952, 2.2824, and in 1953, 2.1557. Since the tax was 3 per cent., these figures and other comparisons made by the Commissioner raised doubts that the returns from the tickets were showing the full amount of the collections and in the autumn of 1953 steps were taken to have the situation clarified.

In November of that year an audit inspector began his enquiry. He made an examination of the returns for the previous months of July and August and found that the ratios of the tax to total merchandise were 2.12 per cent. and 2.007 per cent. respectively: with the elimination of the coffee bar sales, they were 2.37 per cent. and 2.326 per cent. This was followed by a visual inspection throughout the store of the classes of goods sold, prices, the routine of the clerks, etc., but owing to the approach of the Christmas season further action was deferred. It is of some significance that the ticket returns following this inspection showed changes. For example, for the weeks ending November 13 and 20 the percentages of tax to merchandise sales, excluding the coffee bar, were 2.394 and 2.293; for the weeks ending November 27, December 4, 11, 18, 24 and 31, they were 2.533, 2.508, 2.723, 2.508 and 2.373, and for January 6 and 13, 2.324 and 2.566.

Early in January 1954 the examination was renewed. The inspector requested a tally of all sales but, owing to the then necessities of the store, that was at the time refused. But the manager, at the inspector's request, distributed a letter addressed to the sales clerks and signed by all of them calling on them to pay the strictest attention to the ticket cancellations. On the first day after this notice, January 14, the tax percentage rose to 2.98; for the week ending January 20 it was 2.931; and for the weeks of January 27, February 3, 10, 17, 24 and March 3, the percentages were 2.931, 2.861, 2.846, 2.852, 2.841 and 2.841. This striking and sustained advance in the percentage as evidenced by the ticket cancellations stands unchallenged and that it was brought about by the inspection with its accompanying incidents is equally beyond serious dispute.

A tally was then taken for five days during the latter part of January and the early part of February of all sales from 15¢ to 25¢ both inclusive and of those at 49¢. The former were numerous and represented the highest percentages. For example, a 15¢ article carried a tax of 1¢, which is 6.67 per cent. of the price. On the other hand, the tax on a 49¢ article is also 1¢ and the percentage is the lowest, 2.04. These actual items were suggested as being the significant items and limiting the check to them was obviously to save unnecessary inconvenience or disturbance

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to the ordinary course of operations in the store. No question of its adequacy as a test was raised by the management and it proceeded on the assumption that what it showed would be pertinent to the matter in controversy.

That the tally test is the practical means of checking the collection is evidenced by the resort to it made by the company in 1949. In that year a month-long record in the same store of non-taxable sales showed their percentage to total sales to be 15.02, and similar tests in 1951 and 1952 showed percentages close to that figure. They are to be contrasted with the average percentage of the same sales reported by the company to the Commissioner of 23.8569. In the five-day test of 1954 the percentage of tax to taxable sales was found to be 3.155. The total sales during the three year period were $2,404,048.68. Deducting 15.02 per cent. as non-taxable, the taxable sales were $2,042,960.55. Tax on this amount at the rate of 3.155 is $64,353.28 as against $54,220.38 returned by the company and $65,589.06 assessed.

The results of the tally, summarized, showed that the ratio of tax to merchandise, excluding the coffee bar, was 3.0408 and on this basis the claim is made. It is contended that as a test it is "weighted" against the company by the fact that the prices between 26¢ and 48¢ and from 50¢ to the highest limit have been assumed to be in balance at 3 per cent., that is, that the number of fractional cents dropped is about equal to those advanced. This does not, admittedly, touch the quantity sold at any figure, but in the opinion of the Commissioner the substantial balancing at 3 per cent. can, short of a total tally over representative periods, be taken as being as nearly correct as can be obtained by any means available. No evidence of quantities was offered by the company, which rested on the ground that the absence of that evidence was fatal to the Government's claim.

The provisions of the Act which bear directly on such a matter are ss. 13 and 25 and they are as follows:

13. (1) When a person having sold tangible personal property fails to make a return or remittance as required under this Act, or if his returns are not substantiated by his records, the Commissioner may make an estimate of the amount of the tax collected by such person for which he has not accounted, and such estimated amount shall thereupon be deemed to be the tax collected by that person, and he shall pay that amount to His

Majesty, and the Commissioner may give notice in writing either by mailing or by serving to the vendor, his heirs, administrators, executors or assigns, or to his custodian or trustee in bankruptcy, requiring that such estimated amount shall be paid over to the Commissioner or otherwise accounted for within thirty days from the date the notice is mailed or served.

(2) Proof that notice under subsection (1) has been given shall constitute *prima facie* evidence that the amount stated therein is due and owing, and the onus of proving otherwise shall rest on the person who sold the tangible personal property.

25. [as re-enacted by 1953, 2nd sess., c. 36, s. 18] (1) Any person appointed by the Commissioner may enter at any reasonable time the business premises occupied by any person, or the premises where his records are kept, to determine whether this Act and the regulations are being and have been complied with, or to inspect, audit, and examine books of account, records, or documents, or to ascertain the quantities of tangible personal property on hand or sold by him, and the person occupying the premises shall answer all questions pertaining to these matters, and shall produce such books of account, records, or documents as may be required.

(2) Where it appears from the inspection, audit, or examination of the books of account, records, or documents that this Act or the regulations have not been complied with, the person making the inspection, audit, or examination shall calculate the tax collected or due in such manner and form and by such procedure as the Commissioner may deem adequate and expedient, and the Commissioner shall assess the person for the amount of the tax so calculated, but the person so assessed may appeal the amount of the assessment under sections 14 and 15 of this Act.

A considerable portion of the argument revolved around the distinctions to be made between "estimate" in s. 13 and "calculation" and "assessment" in s. 25; but I am unable to pay to the argument the respect I should ordinarily do. What is confused is the nature of the claim: it is taken to be an action for taxes. But it is not such an action at all: in substance, it is the simple claim by a principal against his agent for money had and received by the latter, nothing more; and it is agreed that the taxes were properly collected. In determining the amount we are at large with the statute and the long-established principles governing an agent's obligation to account.

It should be emphasized that the statute creates two distinct liabilities: that of the purchaser of goods to pay the tax, and that of the seller to collect and remit. Throughout the provisions these obligations are dealt with as disparate both substantively and procedurally and different remedies are provided for their enforcement.

Section 13 deals with the recovery of collected taxes from a seller. As can be seen from the facts of this dispute,

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the determination of the amount after some time has elapsed from the collection will necessarily depend upon the seller's records: and if these are such as do not furnish all the essential evidence there must necessarily be something less than mathematical correctness. Here is a good example of a business, in its own interests, adopting a mode of recording transactions which prevents a strictly accurate check and which puts the Government at the risk of the performance of duty by clerks.

To meet that known situation, s. 13 enables the Commissioner, once on reasonable grounds he has come to the conclusion that a seller has failed to "make a return or remittance under this Act, or if his returns are not substantiated by his records" to make "an estimate of the amount of the tax collected" and that estimate is declared to be, *prima facie,* the amount of the collected taxes and to be due and owing, with the onus of proving "otherwise" placed upon the seller. It is unnecessary to point out that the seller is in possession of all the available facts, that they are his facts, and that if they can be used to falsify the estimate he is the person possessing the best, if not the only, means of doing it.

Under the provisions of s. 25, where it appears "that this Act or the regulations have not been complied with" the person making the examination shall "calculate the tax collected or due in such manner and form and by such procedure as the Commissioner may deem adequate and expedient". This deals likewise with collected taxes which have not been paid over to the Crown. By s. 8 the moneys are to be "remitted to the Commissioner at the times and in the manner prescribed by the regulations". The "tax collected or due" is a description of moneys so collected and not paid over in accordance with the regulations. From the language of the section, it is confined to cases of a failure to remit: it does not create a new means of proceeding against a seller for failing to collect the tax. Section 30(2) deals specifically with that liability by way of summary conviction and the clear and precise terms in which that procedure is made available against default excludes that liability from the scope of s. 25. In this view of the section, there is created only additional procedure and the objection that it is not applicable to

prior transactions must be rejected. But even if the word "due" extends to uncollected tax the objection raised would go only to an action on such a breach and would not affect a proceeding to recover collected tax, which this is.

The warrant for action by the Commisioner under each section is in substance the same, that the Act has not been observed as required; and that a *prima facie* case against the company has been shown is, I think, beyond any reasonable doubt. The method followed in evidencing that is one deemed by the Commissioner to be "adequate and expedient" and in the circumstances it is one that he could use as a fair and rational means of reaching an estimate of the amount of a presumptive deficiency. The action is analogous to an accounting by an agent and the proof offered, buttressed by the onus of s. 13 and the ordinary obligation of accounting, puts the issue of law beyond doubt.

There was finally a challenge to the inclusion of the money collected as tax on items of 15¢ and 16¢. It was contended that as the percentage tax produced less than half a cent, the operation of the direction relating to fractional amounts excluded tax on these prices. Three answers are given to this contention. By s. 5(*m*) sales of a price of less than 15¢ are exempt from the tax, which seems to imply that to the 15¢ items the tax attaches; that to compute the tax "to the nearest cent and one-half cent shall be counted as one cent" necessarily extends to every fraction of a cent, that zero is not a "nearest cent", and that the minimum of 1¢ is thus established: and finally that as the moneys were demanded by the seller and paid by the purchaser as taxes, to the use of the Crown, the agent cannot be heard to say that they are not recoverable by the Crown. The first and second of these answers need not be considered; that the third is sound appears from 1 Halsbury, 3rd ed. 1952, p. 187; and at this stage no distinction between an action for their recovery and these proceedings under the Act should be countenanced.

I would, therefore, dismiss the appeal with costs.

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The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Wood J. which in turn had affirmed, subject to the correction of an arithmetical error, a decision of the Minister of Finance of British Columbia rejecting an appeal of the appellant from an assessment purporting to have been made pursuant to the *Social Services Tax Act*, R.S.B.C. 1948, c. 333, as amended, hereinafter referred to as "the Act", and particularly subs. (2) of s. 25 added by amendment, 1953, c. 36, s. 18, which came into force on October 17, 1953.

The Act provides, subject to a number of exemptions, for the collection by the vendor from the purchaser on the sale of tangible personal property of a tax based on the purchase-price of the property sold, and for the payment by the vendor of the tax so collected to the Commissioner. At the times with which we are concerned the rate of the tax was 3 per cent.

The following statement of facts is taken from the reasons of Coady J. A., who delivered the unanimous judgment of the Court of Appeal (2):

> The appellant operates a number of stores in the province of British Columbia. The tax to which this appeal relates was levied against store No. 17, operated by the defendant at 632 Granville Street, Vancouver, B.C.
>
> In stores where invoices are made out covering all purchases and the amount of tax is shown on each invoice, the calculation of the tax received by the vendor to be remitted to the Department of Finance will cause little difficulty if correct records are maintained. The appellant company herein, however, does not in its business make out invoices but, instead, the price of the article sold, plus the tax payable, is rung up on the cash register. No separate cash register record is kept showing the amount of tax collected as distinct from the sale price of the article. That being so, a system was devised, after consultation between the appellant and the Commissioner appointed to administer the Act, whereby the Commissioner supplied to the appellant rolls of tickets serially numbered, each ticket representing one cent tax. This roll was attached to the cash register and the clerk was instructed that on each taxable sale tickets were to be torn off and delivered to the customer equal in amount to the tax collected. In this way a record of the amount of tax collected could be maintained by the company. The plan would be a satisfactory one so long as the clerks performed their part by tearing off the correct number of tickets

(1) *Sub nom. Re F. W. Woolworth Company Limited Vancouver Store No. 17* (1956), 18 W.W.R. 322.

(2) 18 W.W.R. at pp. 323-4.

on each taxable sale. If they failed to do so then there would be no accurate record of the tax collected and the amount remitted would consequently be less than the amount collected.

The commissioner under the Act, in the course of time, felt that the amount of tax remitted by the appellant did not bear a proper relation to the volume of sales. The amount remitted was over a period of time considerably less than 3 per cent. This by itself, however, would not be conclusive, since under the Act the percentage of tax collected might vary from 6.67 per cent. to 2.04 per cent. (see Ex. 28). The full amount of the tax collected by the appellant, the commissioner felt, was not being remitted for the reason that the clerks failed to tear off the tickets as instructed. It is not suggested that the appellant was not remitting the amount of tax collected shown by the number of tickets torn off by the sales clerks nor that the failure to remit was intentional. The commissioner, therefore, conducted a survey on the store premises in question and carried out certain tests and made certain investigations and checked records, with the result that the commissioner came to the conclusion that the tax collected amounted to 3.0408 per cent. of the total sales, and thereupon assessed the appellant on that basis for a three year period from 1951 to 1954.

The grounds of appeal to the Court of Appeal are summarized by Coady J. A. as follows (1):

First, "that what was done here in making the assessment complained of was not a proper calculation pursuant to sec. 25(2) of the Act".

Second, "that the amount assessed includes tax collected on sales at 15 and 16 cents, and that such sales are not taxable under the Act".

Third, "that the assessment is improper in that it assesses the appellant for a period of time prior to sec. 25(2) of the Act coming into effect".

I propose to deal first with the third of these grounds, and in so doing it will be convenient to consider what were the rights of the parties prior to the enactment of s. 25(2).

Under s. 3 of the Act every purchaser, as defined in s. 2, was required to pay a tax at the rate of 3 per cent. of the purchase-price of the property purchased unless the property was of a class exempted by s. 5. Under s. 6 the appellant was deemed to be an agent for the Minister of Finance and as such was required to levy and collect the tax imposed by s. 3. Under s. 8 the appellant was required to remit the tax collected to the Commissioner at the times and in the manner prescribed by the regulations. None of these underlying liabilities were altered by the enactment of s. 25(2).

Prior to the enactment of 1953, 2nd sess., c. 36, the provisions for the recovery of the tax were as set out in ss. 13 to 24 of the Act.

(1) 18 W.W.R. at p. 325.

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Section 13 provides:

13. (1) When a person having sold tangible personal property fails to make a return or remittance as required under this Act, or if his returns are not substantiated by his records, the Commissioner may make an estimate of the amount of the tax collected by such person for which he has not accounted, and such estimated amount shall thereupon be deemed to be the tax collected by that person, and he shall pay that amount to His Majesty, and the Commissioner may give notice in writing either by mailing or by serving to the vendor, his heirs, administrators, executors or assigns, or to his custodian or trustee in bankruptcy, requiring that such estimated amount shall be paid over to the Commissioner or otherwise accounted for within thirty days from the date the notice is mailed or served.

(2) Proof that notice under subsection (1) has been given shall constitute *prima facie* evidence that the amount stated therein is due and owing, and the onus of proving otherwise shall rest on the person who sold the tangible personal property.

No change has been made in this section.

Section 14 provided:

14. (1) If a person disputes liability for the amount stated in the notice as provided in subsection (1) of section 13, he may personally or by his agent, within thirty days after receipt of the notice, serve notice of appeal upon the Minister.

(2) The notice of appeal shall be in writing and shall be addressed to the Minister of Finance at Victoria.

(3) The notice shall set out clearly the reasons for the appeal and all facts relative thereto.

(4) Upon receipt of the notice the Minister shall duly consider the matter and affirm or amend the estimate and forthwith notify the appellant of his decision.

Section 15, by subss. (1) to (5), provides for an appeal from the decision of the Minister to a judge of the Supreme Court or to a judge of the County Court, and by subs. (6) provides:

(6) There shall be an appeal from the decision of the Judge to the Court of Appeal upon any point of law raised upon the hearing of the appeal, and the rules governing appeals to that Court from a decision of a Judge of the Supreme Court or a Judge of a County Court, as the case may be, shall apply to appeals under this subsection.

The only change made in s. 15 by the 1953 amendment was the extension of the time for appealing to a judge from 30 days to 60 days.

Sections 16 to 22 inclusive of the Act have not been amended and are as follows:

16. Any estimate made by the Commissioner under section 13 shall not be varied or disallowed because of any irregularity, informality, omission, or error on the part of any person in the observation of any directory provision up to the date of the issuing of the notice of the estimate.

17. Neither the giving of a notice of appeal by any person nor any delay in the hearing of the appeal shall in any way affect the due date, the interest or penalties, or any liability for payment provided under this Act in respect of any taxes due and payable or that have been collected on behalf of His Majesty that are the subject-matter of the appeal or in any way delay the collection of the same; but in the event of the estimate of the Commissioner being set aside or reduced on appeal, the Minister shall refund the amount or excess amount of taxes which have been paid or collected on behalf of His Majesty, and of any additional interest or penalty imposed and paid thereon.

18. The purchaser or user shall be and remain liable for the tax imposed under this Act until the same has been collected and, in the event of failure on the part of the person selling tangible personal property to collect the tax, he shall immediately notify the Commissioner, and the purchaser or user may be sued therefor in any Court of competent jurisdiction.

19. Every person who collects any tax under this Act shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this Act; and the amount shall, until paid, form a lien and charge on the entire assets of his estate in the hands of any trustee, having priority over all other claims of any person.

20. Before taking any proceedings for the recovery of any taxes that are due and payable under this Act or that have been collected on behalf of His Majesty in the right of the Province, the Commissioner shall give notice to the taxpayer or collector of his intention to enforce payment, but failure to give the notice in any case shall not affect the validity of any proceedings taken for the recovery of taxes or moneys collected as taxes under this Act.

21. The amount of any taxes that are due and payable under this Act or that have been collected on behalf of His Majesty in the right of the Province may be recovered by action in any Court as for a debt due to His Majesty in the right of the Province, and the Court may make an order as to the costs of such action in favour of or against His Majesty.

22. Where default is made in the payment of any taxes that are due and payable under this Act or that have been collected on behalf of His Majesty in the right of the Province, or any part thereof, the Commissioner may issue his certificate stating the amount so due, the amount thereof remaining unpaid (including interest and penalties), and the name of the person by whom it is payable, and may file the certificate with any District Registrar of the Supreme Court, or with the Registrar of any County Court, and when so filed the certificate shall be of the same force and effect, and all proceedings may be taken thereon, as if it were a judgment of the Court for the recovery of a debt of the amount stated in the certificate against the person named therein.

Section 23, which also has not been amended, is as follows:

23. The powers conferred by this Act for the recovery of taxes or moneys collected as taxes, by action in Court and by filing a certificate, may be exercised separately, or concurrently, or cumulatively; and the liability of a person for the payment of any tax under this Act or the liability to remit taxes collected shall not be affected in any way by the fact that a fine or penalty has been imposed on or paid by him in respect of any contravention of this Act.

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It is not necessary to consider whether the claim of the respondent could have been supported under the sections quoted above without resort to subs. (2) of s. 25 for throughout the proceedings the respondent has taken the position that it is upon the last-mentioned subsection that the claim is based. In the reasons for his decision the Minister said in part:

> While it is not admitted that the assessment fails to comply with Section 13(1) of the Act, it is pointed out that this Section is irrelevant because the assessment was made under Section 25(2).

and in his reasons for judgment Coady J. A. says (1):

> It is common ground that the assessment herein was made under sec. 25(2) of the Act.

In the 1948 Act s. 25 read as follows:

> 25. Any person appointed by the Commissioner may enter upon the premises occupied by a vendor during ordinary hours of business or at any other reasonable time in order to verify that the tax is being duly collected and paid, or to inspect and examine the books of account, records, or documents of the vendor, or for the purpose of ascertaining the quantities of tangible personal property on hand or sold by him; and the vendor shall answer all questions pertaining to these matters and shall produce such books of account, records, or documents as may be required.

By 1953, 2nd sess., c. 36, s. 18, s. 25 was repealed and the following substituted therefor:

> 25. (1) Any person appointed by the Commissioner may enter at any reasonable time the business premises occupied by any person, or the premises where his records are kept, to determine whether this Act and the regulations are being and have been complied with, or to inspect, audit, and examine books of account, records, or documents, or to ascertain the quantities of tangible personal property on hand or sold by him, and the person occupying the premises shall answer all questions pertaining to these matters, and shall produce such books of account, records, or documents as may be required.
>
> (2) Where it appears from the inspection, audit, or examination of the books of account, records, or documents that this Act or the regulations have not been complied with, the person making the inspection, audit, or examination shall calculate the tax collected or due in such manner and form and by such procedure as the Commissioner may deem adequate and expedient, and the Commissioner shall assess the person for the amount of the tax so calculated, but the person so assessed may appeal the amount of the assessment under sections 14 and 15 of this Act.

(1) 18 W.W.R. at p. 325.

By ss. 12 and 13 of the same chapter, subss. (1) and (4) of s. 14 were amended, by inserting the words which I have italicized, to read as follows:

14. (1) If a person disputes liability for the amount stated in the notice as provided in subsection (1) of section 13, *or if he disputes an assessment made under subsection (2) of section 25,* he may personally or by his agent, within *sixty* days after receipt of the notice *or assessment,* serve notice of appeal upon the Minister.

* * *

(4) Upon receipt of the notice the Minister shall duly consider the matter and affirm or amend the estimate *or assessment* and forthwith notify the appellant of his decision.

It will be observed that the Legislature distinguishes an "estimate" under s. 13(1) from an "assessment" under s.25(2); and that there is a substantial difference between the two does not appear to me to admit of doubt. The former section, under certain conditions, permits the Commissioner to make an estimate of the amount of tax actually collected by a vendor for which he has not accounted and to give notice requiring such estimated amount to be paid over to the Commissioner within 30 days. Proof that this procedure has been followed constitutes *prima facie* evidence that the amount stated is owing. It provides a method of making a *prima facie* case and shifting the burden of proof to the vendor in regard to moneys actually collected by him. It does not appear to touch the vendor's liability for failing to collect taxes which it was his duty to collect.

Section 25(2), on the other hand, under conditions described differently from those in s. 13, empowers the appointee of the Commissioner to calculate not only the tax collected but also the tax "due", which expression I take to mean tax which it was the duty of the vendor to collect and which he has failed to collect, and requires the Commissioner to "assess" the vendor "for the amount of the tax so calculated".

If I were able to construe subs. (2) of s. 25 as merely providing an additional or alternative method of procedure whereby the Crown was enabled to prove, or to make a *prima facie* case as to, the amount of a liability which by the terms of the Act prior to the 1953 amendment was already imposed upon the appellant, I would agree with the view of the Courts below that it should be given

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retrospective effect. But I cannot so construe it. It appears to me to empower the Commissioner to impose a substantive liability for an amount determined by his appointee, upon the appellant in the event of the latter having failed to comply with the Act or the regulations. To hold that the imposition of such a liability could, in the absence of words clearly so providing, be based upon acts or omissions of the appellant prior to the date of the amendment, would, I think, be contrary to the well-settled rules for the construction of statutes.

In my opinion, therefore, the third ground of appeal must be upheld.

This makes it necessary to examine a submission which is put as follows in the factum of counsel for the respondent:

> Alternatively, it was pursuant to Section 25(2) that the appellant obtained its right of appeal to the Minister and its further right of appeal to the Supreme Court and to the Court of Appeal. Since the appellant has taken advantage of the sub-section, it is submitted, he cannot be heard to argue that the sub-section cannot be employed. The fact that he has proceeded by appeal demonstrates the converse of his argument.
>
> Further, it is pointed out that the appeal is allowed only as to "the *amount* of the assessment". The appellant cannot in these proceedings attack the technical validity of the assessment.

It appears from the terms of the appellant's notice of appeal to the Minister that, at that stage of the proceedings, it regarded the "assessment" as having been made in intended compliance with s. 13 of the Act, and that it was not until the statement quoted above from the reasons of the Minister that it appeared that it purported to be made under s. 25(2). There is nothing in the reasons for judgment in the Courts below to indicate that the point now under consideration was put forward in those Courts; but, assuming that the point is open to the respondent, there appear to me to be two answers to it. First, where, as here, an enactment empowers a tribunal or official under prescribed conditions to make a decision imposing liability and gives to the person on whom such liability is imposed a right of appeal from such decision, I think it would be too narrow a construction to hold that the appeal could not be based on the ground that the decision, in fact made, was one not authorized by the enactment. Second, in one sense the appeal may be regarded as an appeal from the

amount of the assessment, which covers the period from January 1, 1951, to December 31, 1953. On the assumption that s. 25(2) has no retrospective operation, it would still have been open to the Commissioner to make an assessment covering the period from October 17, 1953, to December 31, 1953, provided the conditions prescribed by the section were fulfilled, as to which I express no opinion. The respondent did not ask that the assessment be amended to cover that period.

The conclusion at which I have arrived as to s. 25(2) makes it unnecessary for me to deal with the other grounds on which the appeal was based; but I think it desirable to add that, in my opinion, the Act, so long as the rate was 3 per cent., did not impose a tax on the purchaser of an article costing either 15¢ or 16¢. The tax is imposed by s. 3, subs. (6) of which is as follows:

(6) The tax imposed by this Act shall be calculated separately on every purchase, and shall be computed to the nearest cent, and one-half cent shall be counted as one cent, but where, on the same occasion or as part of one transaction, several items of tangible personal property are purchased, the total of the purchases shall be deemed one purchase for the purposes of this Act.

Three per cent. of 15¢ is 45/100 of a cent and 3 per cent. of 16¢ is 48/100 of a cent, both of which amounts are less than one-half cent and are nearer to the amount, "no cent" or zero, than to the amount "one cent" or one. I can find no ambiguity in s. 3(1) or s. 3(6), and would reject the argument that a tax can be imposed on the transactions mentioned by implication from the wording of s. 5(*m*) reading as follows:

5. The following classes of tangible personal property are specifically exempted from the provisions of this Act:

* * *

(*m*) Sales at a price of less than fifteen cents.

If, however, a vendor in fact collected tax on such transactions from the purchasers, I agree that he would be bound to account for it to the Commissioner as moneys paid to him to the use of the Commissioner.

In the result, I would allow the appeal and set aside the judgments below and the decision of the Minister, with costs throughout; but I would provide that our judgment should not prevent the Commissioner taking

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such steps, if any, as he may be advised, under the provisions of the Act which were in force prior to October 17, 1953, to establish the liability of the appellant arising from transactions prior to that date, and under any provisions of the Act as amended in 1953 to establish the liability of the appellant arising from transactions during the period from October 17, 1953, to December 31, 1953.

ABBOTT J.:—I am in agreement with the reasons of Coady J. A. (speaking for himself, Sidney Smith and Bird JJ. A.) in the Court below and there is little that I can usefully add to them.

The only point raised by appellant which has given me some difficulty is as to whether or not s. 25(2) of the *Social Services Tax Act*, R.S.B.C. 1948, c. 333, as amended, under which the respondent's claim was asserted, should be considered as having had retrospective effect.

Under the provisions of the Act, sales tax had been collected, or should have been collected, by the appellant and remitted to the provincial Finance Department. Information as to total sales and taxable sales was all information peculiarly within the knowledge of the appellant and if the method used to record tax collections was imperfect, presumably it was because the appellant preferred not to incur the expense involved in keeping more adequate records. Section 25(2), which is a familiar type of section in taxing statutes of this kind, imposed no new tax liability upon the appellant. It merely provided an alternative and perhaps more effective way of compelling appellant to discharge the obligations imposed upon it under the Act. In my opinion, therefore, the section is merely procedural and as such was intended to be retrospective in its operation.

The appeal should be dismissed with costs.

Appeal dismissed with costs, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

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