REGINA INDUSTRIES LIMITED ..... APPELLANT;

AND

THE CITY OF REGINA ..... RESPONDENT.

1947

*Feb. 12
*May 13

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Taxation—Business tax—City Act, Sask., R.S.S. 1940, c. 126, ss. 460, 461, 463—Assessment of company for business tax—Company claiming that business in question was that of the Crown, that company was agent of the Crown and not liable—Contract between company and Crown for manufacture of gun-carriages—Construction of contract with regard to question in issue.

Appellant company, under an agreement with the Crown (Dom.), manufactured gun-carriages for the Crown (for which purpose it was incorporated in 1941) on property in the city of Regina held by the Crown under lease from the owner thereof. The City of Regina (respondent) assessed appellant in 1944 for a business tax under *The City Act*, R.S.S. 1940, c. 126, which provides that (s. 460) taxes shall be levied upon lands, businesses, and special franchises, that (s. 463(1)) the assessor shall assess either the owner or the occupant of every parcel

*Present:—Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

(1) [1945] 2 W.W.R. 273. (2) [1946] 2 W.W.R. 257.

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of land in the city, and every person who is engaged in business; and that (s. 461) the interest of the Crown in any property including property held by any person in trust for the Crown shall be exempt from taxation.

The said agreement contained, *inter alia,* terms under which the Crown provided to appellant the premises, the machinery and equipment, material to be used, funds for operation, specifications, etc.; the title to all equipment and supplies, completed and partially completed articles, was at all times in the Crown, which assumed risks and liabilities incidental to ownership thereof, and appellant was not liable for loss or destruction of or damage to articles and supplies except such as might result from its negligence or wilful misconduct; appellant hired employees and had control over and was responsible for the operation of the plant, but was subject to provisions for consultation with, furnishing information to, and supervision by, the Government Minister and inspector; appellant, upon acceptance of each gun-carriage, received a fee, to cover management and supervisory services; on cancellation by the Crown of the contract, appellant should be paid its cost to the date of its giving up possession, including a fee in respect of work not completed, and might be given an allowance for exceptional hardship resulting from cancellation; appellant was to be indemnified against losses, costs, claims, etc., arising out of performance of the contract and not resulting from gross negligence on its part.

Held, on consideration of all the terms of the agreement, the business was that of the Crown, not of appellant, who was the agent of the Crown, and was not a "person who is engaged in business" within the meaning of s. 463(1) of said Act, and was not subject to the business tax in question; the case came within the authority of *City of Montreal v. Montreal Locomotive Works Ltd.* (P.C.), [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.

Judgment of the Court of Appeal for Saskatchewan, [1944] 3 W.W.R. 741, reversed.

APPEAL by Regina Industries Limited from the judgment of the Court of Appeal for Saskatchewan (1) dismissing its appeal by way of stated case from a decision of the Saskatchewan Assessment Commission sustaining an assessment in the year 1944 by the City of Regina (the respondent) against the appellant for business tax in respect of certain property in the City of Regina, held by the Crown (in right of Canada) under lease from the owner thereof, on which the appellant manufactured gun-carriages for the Crown under contract with the Crown (therein acting and represented by the Minister of Munitions and Supply of Canada). The appellant contended that it did not carry on a business on the premises but managed and operated on behalf of the Crown a business

belonging to the Crown; that the Crown, and not the appellant, carried on the business in question; and that, therefore, the appellant was not liable to assessment for business tax under *The City Act* (R.S.S. 1940, c. 126). The Court of Appeal for Saskatchewan held that the appellant carried on the business for profit as an independent contractor, and was therefore subject to be assessed for business tax under the provisions of the said Act. It answered in the affirmative the questions in the stated case, which were: Whether the Saskatchewan Assessment Commission was right in holding (1) that the buildings and other property referred to in the assessment were occupied and/or used by the appellant for business purposes within the meaning of *The City Act* and that the appellant was liable to assessment for the whole of the said buildings and property, and (2) that the appellant was liable for assessment although solely engaged in performing a contract for the Crown.

P. G. Hodges K.C. and *W. R. Jackett* for the appellant.

E. C. Leslie K.C. for the respondent.

The judgment of the Chief Justice and Kerwin and Estey JJ. was delivered by —

ESTEY, J.—The appellant was incorporated under the Dominion *Companies Act* in October, 1941, for the express purpose of executing and performing its obligations under a contract with His Majesty in the right of Canada and the General Motors of Canada Ltd., dated October 17, 1941, and subsequently amended May 10 and June 30, 1943. The General Motors of Canada under this agreement agreed to lease, and did lease by a separate document to His Majesty the land and buildings in the City of Regina upon which the operations under the contract were carried out and also guaranteed the due performance of the appellant's obligations under this contract.

Under the terms of this agreement gun-carriages were manufactured for His Majesty, and both the Saskatchewan Assessment Commission and the Court of Appeal in Saskatchewan have held that the appellant was validly assessed in 1944 for a business tax by the City of Regina under the terms of *The City Act,* R.S.S. 1940, ch. 126.

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The appellant contends that it is not liable for the tax because it managed and operated the production of gun-carriages under the provisions of the contract not in its own right but on behalf of and, therefore, as agent for His Majesty in the right of Canada.

The relevant provisions of *The City Act* are as follows:

(1) [1944] 3 W.W.R. 741; [1945] 1 D.L.R. 220; [1945] C.T.C. 83.

460. Subject to the other provisions of this Act, the municipal and school taxes of the city shall be levied upon: (1) lands; (2) businesses; and (3) special franchises.

461. The following property shall be exempt from taxation:

1. The interest of the Crown in any property including property held by any person in trust for the Crown.

463. (1) The assessor shall assess either the owner or the occupant of every parcel of land in the city, and every person who is engaged in business or is the owner of a special franchise, and shall prepare an assessment roll showing the name of each person assessed, the property in respect of which he is assessed and the assessed value of the property.

The issue is determined by an examination of the contract in the light of the recent decision of the Privy Council in *City of Montreal* v. *Montreal Locomotive Works Ltd.* (1), a judgment affirming that of this Court (2). These judgments were not available to the Appellate Court as both were delivered after its judgment in this matter on November 25, 1944.

The Privy Council held that the Montreal Locomotive Works Ltd. were agents for the Crown in the manufacture of tanks and gun-carriages under a contract with His Majesty in the right of Canada dated October 23, 1940, and therefore not subject to the business tax imposed by the City of Montreal.

Lord Wright, in writing the judgment of the Privy Council, pointed out that while in earlier cases the single test of control had been used to determine whether the relationship of master and servant existed, then stated:

> In the more complex condition of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.

Under the terms of the contract in question, His Majesty provided to the appellant the premises, the machinery and all necessary equipment, material to be used in the pro-

(1) [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.

(2) [1945] S.C.R. 621.

duction of the gun-carriages, and the funds for operating purposes. His Majesty provided the specifications, plans and drawings for the gun-carriages, and, though the appellant was required to maintain a staff of inspectors, the decision of the government inspector was final.

The title to all equipment and supplies, completed and partially completed articles, was at all times in His Majesty. The risks and liabilities incidental to the ownership thereof was expressly assumed by His Majesty and, further, the appellant was not liable for loss or destruction or damage of such articles and supplies, except as might result from its negligence or wilful misconduct.

An estimate of the wages and of all costs of operation was made by the appellant before the 20th of each month, and when the amount so estimated was approved by the Minister, the Government deposited the amount thereof in a special account upon which the appellant drew cheques and made all necessary payments.

The appellant received a fee from His Majesty upon the acceptance of each gun-carriage by the government inspector, but the agreement provided that "such carriages may only be rejected by the inspector on the ground that the same do not conform to such specifications," and then provided "the cost of correction * * * shall be part of the cost of the work under this contract * * * unless the character and total value of such spoiled materials shall clearly indicate gross mismanagement or lack of competence on the part of the Contractor [appellant]."

It is provided that this fee payable upon acceptance of each gun-carriage "shall be deemed to include and cover all management and supervisory services * * * performed by the Contractor * * *" except those which are included as part of the cost in other sections of the agreement. This circumstance was expressly covered in the decision of the Privy Council in the following language:

> A "fee" was payable in respect of each completed vehicle, but, when the whole plan is considered, that was solely as a reward for personal services in managing the whole undertaking. It was something very different from the risk of profit or loss which an independent contractor has to assume; every item of expense was borne by the Crown, just as the Government took every possible risk of loss or damage except in the very unlikely event, as already noted, of bad faith or wilful neglect on the part of the respondent. The undertaking throughout was the

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undertaking of the Government and not the undertaking of the respondent which was simply an agent of mandatory or manager on behalf of the Crown.

In maintaining that the appellant was not an agent of the Crown but rather an independent contractor, counsel for the respondent indicated certain differences which he pressed as sufficient to distinguish this case from the *Montreal* case (1). In particular, that the appellant is described throughout the contract in question as "contractor" whereas in the *Montreal* case (1) it is specifically set out in the contract that the Montreal Locomotive Works Ltd. was an agent of His Majesty. The opening words of the agreement "Regina Industries Limited (hereinafter called 'the Contractor')" indicate merely that this word is used only for convenience in the drafting and reading of the contract. That which is significant is the provision that

> the Contractor agrees to manage and operate the plant for and on behalf of His Majesty and to manufacture therein for the account of His Majesty * * * anti-tank gun-carriages * * * in such quantities and proportions as the Minister may from time to time direct in writing, and to be supplied and delivered to or to the order of His Majesty from time to time, as manufactured hereunder.

It was also pressed that the appellant had control of the plant. This provision appears in the following language:

> Subject to the foregoing provisions of this clause the Contractor shall have control over and be responsible for the operation of the plant * * *

In "the foregoing provisions" referred to, the appellant agrees, as the Minister requests, to consult the Minister and the Inspector upon all matters pertaining to the performance of this contract, to permit examination of all contracts, plans, specifications, and to furnish the Minister with specified reports, and concludes with the general phrase "such other information and data with respect to the work and the progress thereof as the Minister may from time to time require."

The contract also provides:

> The Minister shall have general supervision and full control over all such costs and expenses.

This includes wages and expenditures of all types. The Minister shall determine whether any items of costs or

(1) [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.

expenditures are excessive or unnecessary. Then, after specifying how effect should be given to such determination, it is provided:

> The Minister will not in the exercise of this power and control over expenditures interfere with the management and conduct of the work by the Contractor in the absence of any gross negligence or wilful default on the part of the Contractor.

It was also pointed out that the workmen are the employees of the appellant and that it is optional with the appellant whether it extends to the workmen group, accident and sickness insurance benefits. A corporation may be an agent and, therefore, it does not follow as a necessary consequence that because the appellant hires the employees it is necessarily an independent contractor. It should be noted that if these benefits are extended to the workmen the cost thereof is provided by His Majesty.

These provisions and the contract read as a whole indicate the position of the appellant to be that of an agent with limited authority rather than that of an independent contractor managing and operating its own business to produce a product for a purchaser.

The contract expressly provides for cancellation on the part of His Majesty, in which event it is specifically provided that the appellant shall be paid the cost up to the date of his giving up possession including "a fair and reasonable fee in respect of the work not completed." There is a further clause providing that if "by reason of any action taken by the Minister" in effecting cancellation of the contract "exceptional hardship has resulted to the Contractor, then the Minister may * * * grant such allowance (not to include in any case, however, any allowance or compensation for loss or profit) to the Contractor * * *.

Then the further provision:

> His Majesty agrees to indemnify the Contractor against all losses, costs, expenses, liabilities and claims of any nature arising out of the performance of this contract and not resulting from gross negligence on the part of the Contractor.

These provisions make abundantly clear what is indicated throughout the contract that the Government supplies everything, including the costs of operation in advance, and that the appellant assumes no risk of loss except that which may arise out of his wilful or grossly negligent conduct.

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It was further pressed that the provisions for the surrender of the property and equipment at the termination of the agreement, the undertaking on the part of His Majesty to indemnify the appellant against any claim for infringement of patents, the guarantee of the due performance on the part of the appellant by the General Motors Ltd., all indicated the relationship of independent contractor. In general these do point rather to the relationship of independent contractor than that of agent, but they are not in themselves inconsistent with a contract of agency and do not outweigh the provisions of the contract under which the Government owns the land, equipment, materials, and supplies all of these and the funds as well as everything else for the conduct of the operations, retains the ultimate control and assumes the risks of the entire operation, which point so definitely to the relationship of agency.

All these circumstances bring this case within the authority of *City of Montreal* v. *Montreal Locomotive Works, Ltd.* (1). The appellant is, therefore, an agent of His Majesty under the provisions of this contract and is not a person who is engaged in business within the meaning of sec. 463(1) of *The City Act,* R.S.S. 1940, ch. 126, and therefore not subject to the business tax in question.

The appeal should be allowed, with costs to the appellant both here and in the Court below.

The judgment of Taschereau and Kellock JJ. was delivered by—

KELLOCK, J.—The appellant was incorporated in 1941 by Letters Patent under the Dominion *Companies Act.* General Motors of Canada Limited was at that time, and at all material times, the owner of certain land and buildings in the City of Regina and by lease dated October 17, 1941, the said property was demised by the last mentioned company to His Majesty the King in right of the Dominion. This lease was made in pursuance of an agreement of the same date between His Majesty, represented by the Minister of Munitions and Supply, the appellant, therein described as the "Contractor", and the lessor company therein called the "Controlling Company". The purpose of this

(1) [1946] 3 W.W.R. 748; [1947] 1 D.L.R. 161.

agreement and the lease was to bring about the manufacture of gun-carriages for His Majesty. The question in this appeal is as to the liability of the appellant for business tax in respect of the above premises in which the manufacture of these gun-carriages was carried on, having regard to the provisions of *The City Act,* R.S.S. 1940, ch. 126, as amended. The question arose by way of stated case which was answered in the affirmative and adversely to appellants. The question in the stated case was whether the Saskatchewan Assessment Commission was right in holding:

(1) That the buildings and other property referred to in the assessment were occupied and/or used by the appellant for business purposes within the meaning of *The City Act* and that the appellant was liable to assessment for the whole of the said buildings and property.

(2) That the appellant was liable for assessment although solely engaged in performing a contract for the Crown.

Since the decision appealed from, a similar situation has been considered by the Privy Council on appeal from this Court, in *City of Montreal* v. *Montreal Locomotive Works Limited* (1). In that case the substantial issue was whether the Locomotive Company was in occupation of certain premises itself so as to be taxable as the person carrying on business there or whether it was operating merely as a manager or agent of the Government. If the latter, the relation between the company and the Government under the contract would be one of mandate and it would not be on the premises in its own right and therefore not liable to tax under the legislation there in question. It was held that the Locomotive Company was acting throughout for and on behalf of the Government and was consequently not subject to taxation as the person carrying on or exercising a manufacture within the meaning of Article 363 of the Montreal Charter. That Article provided for a business tax on all trades or manufactures carried on or exercised by any person in the city, limited in amount to a percentage of the annual value of the premises in which such trades were carried on. The person engaged in carrying on the trade was made directly responsible for payment of the tax. In agreeing with the con-

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clusion of this Court that the Locomotive Company was not the person carrying on the trade, their Lordships said at p. 170 (1):

> The combined force of the whole scheme of operations seems to them to admit of no other conclusion. The factory, the land on which it was built, the plant and machinery were all the property of the Government which had them appropriated or constructed for the very purpose of making the military vehicles. The materials were the property of the Government and so were the vehicles themselves at all stages up to completion. The respondent supplied no funds and took no financial risk and no liability, with the significant exception of bad faith or wanton neglect: every other risk was taken by the Government. It is true that the widest powers of management and administration were entrusted to the respondent but all was completely subject to the Government's control. A "fee" was payable in respect of each completed vehicle, but when the whole plan is considered, that was solely as a reward for personal services in managing the whole undertaking. It was something very different from the risk of profit or loss which an independent contractor has to assume; every item of expense was borne by the Crown, just as the Government took every possible risk of loss or damage except in the very unlikely event, as already noted, of bad faith or wilful neglect on the part of the respondent. The undertaking throughout was the undertaking of the Government and not the undertaking of the respondent which was simply an agent or mandatory or manager on behalf of the Crown. The accuracy of the positive announcement in each of the contracts that the respondent was acting throughout under the contracts for and on behalf of the Government and as its agent cannot be controverted.

It is the contention of the present appellant that the principle of the above decision applies to the case at bar, notwithstanding any differences of fact or in the governing legislation.

The respondent raises the preliminary objection that under the relevant legislation the case was limited to a question of law only and it is submitted that the question upon which the decisions of the Assessment Commission and the Court of Appeal turned was whether or not the appellant was an agent of the Crown or an independent contractor. It is said that the finding of the Assessment Commission that the appellant was the occupant of the plant for the purposes of its business was a finding of fact and not of law. In my opinion, the question as to the person carrying on the business in question, depending, as it does, upon the construction of the contract here in question, is a question of law.

Under the provisions of sec. 463 of *The City Act*, R.S.S. 1940, ch. 126, an assessment may be made upon

(1) [1947] 1 D.L.R. 161.

"every person who is engaged in business" at a rate per square foot of the floor space "used for business purposes". By section 460 it is provided that municipal and school taxes shall be levied upon "(1) lands; (2) businesses; and (3) special franchises." While by section 463(1) it is the "owner" or the "occupant" of every parcel of land who is to be assessed, it is the "person who is engaged in business" and the "owner of a special franchise" who are to be assessed with respect to the two last mentioned species of property.

The definition of occupant reads as follows:

> "Occupant" includes the resident occupier of land or, if there is no resident occupier, the person entitled to the possession thereof, a leaseholder and a person having or enjoying in any way for any purpose whatever the use of land otherwise than as owner.

It was not contended by the respondent that if it were held that the appellant was merely an agent of the Crown in respect of the manufacture of the gun-carriages, there was another business being carried on upon the same premises at the same time, namely, the business of managing for remuneration that manufacture, and that the appellant was properly assessable in respect of that business. The Assessment Commission appear to have had that view, as they say:

> It is clear that while the appellant company is to manage and operate the plant for His Majesty it nevertheless is carrying on the business of so operating and managing the plant and manufacturing the gun-carriages therein.

Neither section 463 nor section 465, however, seem to contemplate assessment in respect of more than one business at the same time in respect of any one area or more than one "occupant" of that area and, as already stated, the contention on behalf of the respondent is limited to the contention that it ought to be held that the appellant was not an agent of the Crown but an independent contractor.

While the contract here in question is not exactly in the same form as that in question in the *Montreal* case (*supra*), it is clear that the draughtsman had before him the earlier contract. In my opinion, when the present contract is examined, it is clear that the considerations which led the Privy Council to conclude that the relationship of principal and agent existed between the parties in the *Montreal* case

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(1) are all present here also. The Crown and not the appellant was the lessee of the premises. The plant and machinery acquired and to be acquired were never at any time the property of the appellant but of the Crown. The materials and the completed carriages were also and at all stages the property of the Crown. The appellant supplied no funds and took no financial risk and no liability with the exception of gross negligence. Every other risk was taken by the Crown. The appellant had the widest powers of management and administration but these were completely subject to the control of the Crown. Section 38 of the General Conditions reads as follows:

> The Contractor recognizes and acknowledges that this contract is entered into for the purpose of or for purposes connected with the prosecution of the war in which His Majesty is now engaged and the Contractor agrees that notwithstanding this contract or any term or provision thereof the Minister shall have full power at any time and from time to time to take such steps and to do such acts and things as in his opinion may be necessary or advisable, in the interests of His Majesty, to facilitate, expedite or protect the work called for by this contract.

As in the *Montreal* case (1), a fee was payable in respect of each completed vehicle, but that was in payment of the management services. Every item of expense was to be borne by the Crown, including the cost of work which might be rejected by the Crown's inspector as not up to specifications unless the character and total volume of spoiled materials should clearly indicate gross mismanagement or lack of competence on the part of the appellant. While the contract does not contain the exact language of section 1 of the contract in question in the *Montreal* case (1) that "The government hereby acknowledges and agrees that the company is acting on behalf of the government and as its agent," it is provided by section 9 that "The Contractor agrees to manage and operate the plant for and on behalf of His Majesty". It is also recited by the amending contract of May 10, 1943: "Whereas by a certain contract * * * dated as of the 17th day of October, 1941, between the parties hereto providing for the equipment and operation by the Contractor on behalf of His Majesty * * * ." The considerations, therefore, which dictated the decision in the *Montreal* case (1) are all present in the case at bar and establish the correctness of the above recital.

(1) [1947] 1 D.L.R. 161.

While the contract does contain an agreement on the part of the appellant that on termination of the work it would deliver up to His Majesty possession of the plant for the remainder of the term of the lease, and while such a provision, taken alone, assumes that the appellant was in possession as against His Majesty, nevertheless, when all the terms of the agreement are considered it is plain, in my opinion, that the appellant never had possession in its own right but only as manager and operator for and on behalf of His Majesty. This provision was inserted *ex abundanti* to ensure that the appellant would discontinue its connection with the plant when the work was terminated. I, therefore, think that the business being carried on upon the premises was not the business of the appellant but that of His Majesty and that the appellant is not liable for the business tax.

Certain provisions of the contract in particular weighed in the view which the Court of Appeal took, namely, that it was provided in the contract that the Minister and inspectors should have access to the plant, that the Minister might exercise control over expenditures to see that the carriages were being produced at a reasonable price, that the equipment purchased should be the property of His Majesty, and the provision already referred to for delivery up of all government equipment and possession of the premises on termination, and the further provision that the Minister should not be liable for federal and provincial income taxes, excess profit tax and surtax. The substance of all of these are to be found in the Montreal contract and did not prevent the Privy Council from reaching the conclusion they did in that case.

I would allow the appeal, with costs here and below.

Appeal allowed with costs.

Solicitor for the appellant: *P. G. Hodges.*

Solicitors for the respondent: *MacPherson, Milliken, Leslie & Tyerman.*