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LORD NELSON HOTEL COMPANY LIMITED ..... APPELLANT;

AND

THE CITY OF HALIFAX ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Taxation—Assessment, municipal—Hotel—Whether assessment as hotel or lodging-house—Transient and permanent guests—Portion of building rented to tenants—Ss. 357 and 375(B) of the Halifax City Charter.

The appellant, who operates a hotel in Halifax, was assessed for business tax under s. 357 of the city charter for the whole building less a portion rented to tenants. There were 25 permanent guests residing therein and occupying 15% of the bedroom area. These received the same facilities and services as transient guests, although some had their own furniture. The appellant contends that it should have been assessed under s. 375(B) of the charter since its entire business was within its description, and alternatively that the rooms of the permanent guests should have been excepted.

By s. 357, a business tax is payable by the occupier of a real property for the purposes of any trade, profession or other calling carried on for purposes of gain, . . . and is payable by such occupier, whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

S. 375(B) deals with an occupier conducting the business of "a lodging-house or rooming-house or renting rooms for living purposes or for sleeping purposes only or who is engaged in the business of providing meals for gain in such real property and who has in any one building, . . . during the civic year . . ., provided accommodation for five or more lodgers, roomers, or boarders". The resulting tax under the latter section is less than under s. 357.

The appeal from the assessment was dismissed by the Court of Tax Appeals and by the Supreme Court of Nova Scotia in banco.

Held (Rand and Cartwright JJ. dissenting): The appeal should be allowed.

Per Kellock, Locke and Abbott JJ.: The business of the appellant was not that of a lodging-house or rooming-house, but in so far as the words "renting rooms for living purposes or sleeping purposes or providing meals for gain" are concerned, they describe one of the functions of a hotel, and, therefore, of the appellant.

The statute is to be applied distributively. It contemplates that if any part of a building is not occupied for one or other of these purposes, such part would fall outside the section.

Per Rand and Cartwright JJ. (dissenting): The language of s. 375(B) excludes the appellant's business. The appellant neither keeps a lodging-house nor conducts the business of a rooming-house nor is it the keeper of either kind of house. The words "or who is engaged

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

in the business of providing meals for gain in such real property" cannot be taken independently. They do not describe a restaurant. They refer back to the real property occupied by a person carrying on the business of lodging-house or rooming-house.

Except as to the rented portions, the appellant was in possession of the entire building and, therefore, within s. 357.

APPEAL from the judgment of the Supreme Court of Nova Scotia in banco (1), affirming the appellant's assessment for business tax under s. 357 of the Charter of the City of Halifax.

I. M. MacKeigan, Q.C. for the appellant.

C. P. Bethune, Q.C. for the respondent.

The judgment of Rand and Cartwright JJ. (dissenting) was delivered by:—

RAND J.:—This appeal is against the assessment of the business carried on by the appellant in the City of Halifax. The main contention is that the assessment should have been made under s. 375B of the city charter; a subsidiary claim is that if properly made under s. 357 it should have excepted the general bedroom space of the hotel as occupied for residential purposes and the rooms of permanent guests as being in their possession.

The only qualification of ordinary hotel activities here is the presence of these special guests. They reside in the hotel and are charged a weekly or monthly rate. A number of them are winter residents only but the remainder live there the year round. They receive substantially the same facilities and services as transient guests, though a number have brought furnishings of their own with them. Of a total of 170 rooms the permanent guests occupy 25, about 15% of the total bedroom area.

The two sections of the charter read as follows:

357 (1) The Business Tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by such occupier, whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

(2) (*a*) Except as in this section hereinafter provided such tax shall be at the rate fixed as hereinafter provided by sub-section 3 of section 409, on fifty per cent of the value of the premises so occupied, except in the case of premises the value of which is less than two thousand dollars and

(1) (1955) 36 M.P.R. 231.

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occupied solely for the purpose of selling merchandise by retail, in respect to which the tax shall be at the said rate on twenty-five per cent of the value of the premises so occupied.

(3) The occupant of any real property for any purpose other than for the purpose of any trade, calling or profession, or other calling carried on for purposes of gain, and not for residential purposes and not otherwise exempted, shall be liable to a tax and such tax shall be at the rate fixed as hereinafter provided on 25 per cent of the value of the premises so occupied.

375B (1) Any person occupying real property whether or not such person resides therein in which such person conducts the business of a lodging-house or rooming-house or renting rooms for living purposes or for sleeping purposes only or who is engaged in the business of providing meals for gain in such real property and who has in any one building, at any time during the civic year in which the assessment is being made, provided accommodation for five or more lodgers, roomers, or boarders, shall be liable to pay a Business Tax on twenty-five per cent of the total value of such real property at the rate then current in respect of real property of a business character or nature, in place of fifty per cent of the value of the premises occupied, as provided in sub-section (2) of section 357, and a Household Tax at the rate hereinafter provided for such tax on ten per cent of the remaining seventy-five per cent of such value.

(2) Where any person occupies real property, whether or not such person resides therein, and such real property is divided and let out by such person for living purposes but the occupants of more than one of the portions into which the said real property is let out use in common a bathroom or other sanitary facilities, such person shall be deemed to be conducting the business of a lodging-house or rooming-house in such real property and the persons occupying the said portions of such real property shall for the purpose of this Section be deemed to be lodgers or roomers.

It seems to have been assumed by MacDonald J. in the court below that the contention of the application of s. 375B was based on the occupancy of the special guests, but that was disclaimed on the argument before us; it is rather that the entire business carried on by the appellant is within the description of that section and alternatively as already mentioned.

I am unable to entertain any doubt upon either of these propositions. S. 375B is, in my opinion, an exception to s. 357 and the ordinary rule of interpretation is that one claiming under an exception must show that he is clearly within it. So far from that being so here, an examination of the language satisfies me that the section clearly excludes the company.

The person who comes within s. 375B is an occupant of real property who "conducts the business of a lodging-house, etc." The words "lodging-house" and "lodger" are

of current and long established meaning. Both are examined in the Encyclopedia of the Laws of England, vol. 8, pp. 385-395; and in Stroud's Judicial Dictionary, 2nd ed., vol. 2, pp. 1190 to 1192: and Black's Law Dictionary, 4th ed., deals with them at p. 1091. From the authorities cited by these works it is clear that, in its plain and ordinary meaning and although in any case there may be various incidental features annexed, "lodging-house" signifies a house containing furnished rooms which are privately let out by the week or month. In the complementary sense a lodger is a qualified occupier of a room so let in a house of and over the whole of which the owner or proprietor retains possession, dominion and control. The interest of the lodger is in the exclusive enjoyment, that of the owner in the control. The situation of a transient guest in a hotel resembles that of the lodger in the respect that the proprietor retains an underlying control and the guest a qualified possession; to that extent there is a minimum of apparent identical use of the property; but, as will appear, even that identity is not complete. Lodging-houses, rooming-houses and the renting of rooms for sleeping purposes ordinarily furnish modest and relatively cheap living quarters; and when meals are served in connection with the lodging there is the unmistakable category to which the word "boarder" in the section harks back. One who should describe the Lord Nelson Hotel as a "lodging-house" or "rooming-house" or as in the business of providing meals for "lodgers, boarders or roomers" in the context of the section would not be speaking in the vernacular of Canadians generally. Lodging-houses in most cases are undoubtedly maintained on a high level of care and cleanliness, but that does not qualify their main function as being to furnish more or less permanent accommodation to persons of moderate means. This, at one extreme, is illustrated by the fact that as to sanitary and other features "lodging-houses" at seaports are specifically subject to s. 214 of the *Merchant Shipping Act, 1894* (Imp.), c. 60; and that by 34-35 Vic., c. 112, s. 10 (Imp.), the *Prevention of Crimes Act, 1871,* the harbouring of thieves by a keeper of a lodging-house is punishable on summary conviction.

The characteristic differences between a hotel and a lodging-house are many and significant. An inn is bound by law, to the extent of its means, to receive as guests and

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to furnish lodging and food to all travellers; the innkeeper is, at common law, an insurer of the property carried by guests; that property is not liable to distress by a superior landlord: the innkeeper has a lien on goods and effects brought by the guest even though they may be stolen; if a guest ceases to be a traveller, the innkeeper may turn him out after reasonable notice: a guest has no contractual right to a particular room and, for good cause, he may be transferred. These incidents are dealt with in Halsbury (2nd ed.) vol. 18, pp. 144, 145, and Bullen on Distress (2nd ed.) p. 110. The lodging-house keeper has no such obligations; his lodgers or roomers, as licensees, are selected and, subject to contractual terms and, strictly at law, may, at any time, be ejected; his liability for their property is not that of an insurer; at common law he has no lien on the goods or effects of the lodger, and the latter were subject to distress by a superior landlord although by R.S.N.S. (1954), c. 287, s. 15 certain relief is now given. The unquestioned distinction between various modes of accommodation in the way of lodging and food is exemplified by the *Innkeepers Act*, R.S.N.S. (1954), c. 129, s. 2(6) where it speaks of "innkeeper, boarding-house keeper, lodging-house keeper" which puts beyond serious controversy their disparate classification by the legislature. In the Halifax charter itself, the distinction is made: s. 724 dealing with building restrictions and specifications defines "lodging-house" for those particular purposes as "a building in which persons are accommodated with sleeping apartments, and includes hotels and apartment houses in which cooking is not done in the general apartments."

It is argued that the sentence in the section "or who is engaged in the business of providing meals for gain in such real property" is to be taken as independent of and so detached from what has gone before that it extends the section to a restaurant. I think this would be an extraordinary circumlocution by which to describe a restaurant. The phrase "such real property" refers back to real property occupied by a person carrying on a business described; and its expansion to include restaurant keepers seems to be a conclusive demonstration of the error of such a construction.

The essence of the appellant's case is that we must look inside the concept of "the business of a lodging-house"—and similarly of the others—to the element of "lodging" in

its purely functional form: the hotel does give "lodging". But the section does not deal with lodging or the renting of rooms in that sense; it describes certain self-contained businesses; and the simple and testing question is whether the appellant can properly, in ordinary parlance, be said to conduct any such business or can be called a lodging-house keeper or rooming-house keeper. It seems to me that the answer is almost self-evident: the company neither keeps a lodging-house nor conducts the business of a rooming-house nor is it the keeper of either kind of house. The defect of the contention lies in the confusion of functional uses with business entireties.

These views furnish an answer likewise to the second ground. The company is, in law, except as to certain portions rented, in underlying possession of the entire building; that being so the assessment comes squarely within s. 357.

I would, therefore, dismiss the appeal with costs.

The judgment of Kellock, Locke and Abbott JJ. was delivered by:—

KELLOCK J.:—This appeal involves the interpretation of s-s. (1) of s. 375(B) of the Halifax City Charter, which provides for payment of a business tax on twenty-five per cent of the total value of real property in which the person "occupying" conducts the business of "a lodging-house or rooming-house or renting rooms for living purposes or for sleeping purposes only or who is engaged in the business of providing meals for gain in such real property and who has in any one building, at any time during the civic year in which the assessment is being made, provided accommodation for five or more lodgers, roomers, or boarders." Unless this section applies the appellant would fall within s. 357, under which it has been assessed.

In the construction of this statute it is relevant to refer to what was said by Viscount Simon in *Canadian Eagle Oil Company Limited* v. *The King* (1), as follows:

> In the words of the late Rowlatt J., ". . . in a taxing Act one has to look merely at what is *clearly* said. There is no room for any intendment. There is no equity about a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

The italics are mine.

(1) [1946] A.C. 119 at 140.

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As, however, s. 375(B) is to be regarded as an exception to the provisions of s. 357, it is also relevant to point out, as stated by Cohen L.J., as he then was, in *Littman* v. *Baron* (1), that

> . . . the principle that in case of *ambiguity* a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section *clearly* imposing liability.

Where the excepting provision is clear, however, the ordinary principle referred to by Viscount Simon applies.

In construing s. 375(B) I agree with the court below that merely because some of the guests of the appellant may have taken on the character of "lodgers", the appellant is not thereby brought within the meaning of "lodging-house" or "rooming-house" as those words are to be understood in this statute. I do not think that in ordinary parlance a hotel would be understood to be either a "rooming-house" or a "lodging-house" or be referred to as such. Probably the main difference in ordinary understanding between a "hotel" and either a "lodging-house" or a "rooming-house" is that the former holds itself out as accepting all applying for accommodation while the latter do not. If, therefore, there were nothing more in the sub-section, the appellant would fail.

However, that is not the case as the statute differentiates between businesses of the character mentioned and those of "renting rooms for living purposes" or "for sleeping purposes" or of "providing meals for gain". The question accordingly is whether these latter words, to which some effect must be given, include, in whole or in part, the business of the appellant which, as I have stated, is not that either of a "lodging-house" or a "rooming-house" within the meaning of the statute.

The respondent contends that the words "renting rooms for living purposes" are confined to rooms rented for the purposes of all the ordinary activities of living, including the getting of meals. I cannot accept this contention. In my opinion the business described by the statute would come within the fair meaning of these words whether the tenants do or do not prepare their own meals. "Living", in contradiction to "sleeping only" connotes merely something more than is comprised by the latter.

(1) [1951] Ch. 993 at 1103.

In consideration of the question as to what businesses, other than that of a lodging- or rooming-house, are included within the language of the section, one must have in mind not only hotels of the class of the respondent which supply a varied number of services under the one roof, but also the smaller and humbler hostelries whose only services, apart from the sale of liquor, may be confined to the renting of rooms and the provision of meals. In many cases, the renting of rooms and the provision of meals are the only services furnished. This is also the case with the modern "motel", many of whom do not, however, provide food. The motel is, of course, in direct competition with the hotel. In so far, therefore, as the words "renting rooms for living purposes" or "for sleeping purposes" are concerned, they clearly describe one of the functions of a hotel, and therefore of the appellant.

As to the words "providing meals for gain", it might, at first blush, appear, in the light of the presence in the section of the word "boarders", that they could be equated with "boarding-house", a term not normally applied to a hotel any more than the words "lodging-house" or "rooming-house".

It is significant, however, that the statute has not employed the word. Had this been the intention, it would have been very easy for the legislature to have so said, as it did in 1931 in c. 7 of the statutes of that year, by s. 3 of which provision is made for a lien in favour of every "innkeeper", "boarding-house keeper" and "lodging-house keeper" on the baggage of his "guest", "boarder" or "lodger" for the value or price of any food or accommodation furnished to him or on his account.

As the words "boarding-house" are not mentioned in the present statute, I do not think that the word "boarder", which is used, can be said to have been used to exclude its quite ordinary application to people who obtain meals at hotels as well as at private houses with some degree of regularity. In this view, the words "providing meals for gain" also apply to the appellant.

If it be the fact that any part of the appellant's premises are not occupied for one or other of the above purposes, it follows that such part or parts would fall outside the section. This is a situation which the statute expressly contemplates.

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By s. 379(A) the duty is imposed upon the assessor of determining, in the first instance, the character or nature of all real property which he proposes to assess. S. 381 provides that if any real property occupied for either residential, business or other purposes, is a part only of a property which has been valued as an entirety for real property tax, the assessor shall determine the value of such part for the purposes of the residential, business or other occupation tax as the case may be in respect of the occupancy of such part. If, therefore, for example, the appellant were carrying on a retail merchandising business in a part of the building otherwise occupied for the purposes of any of the businesses mentioned in s. 375(B), such part would require assessment under s. 357.

Nor do I think that the statute is to be interpreted as producing the effect that an occupier who carries on one or more of the specified businesses dealt with by s. 375(B) as well as other types of business in the same building, is, for that reason, to be classified as carrying on a business not named in the section with the result that the section ceases to apply to any part of the premises. In my opinion, the fair reading of the statute is that it is to be applied distributively so that such parts of a building occupied for the purposes of the kinds of businesses mentioned in s. 375(B) shall be assessed under the terms of that section and the remainder as may be otherwise provided for by the statute. I see no reason why a person carrying on the business of a rooming-house, who also provides meals for gain in the same premises, comes within s. 375(B) with respect to both businesses or what may be really one business, while if he also carries on in conjunction therewith the business of a retail gift shop, the sub-section would have no application to him at all.

In my opinion, therefore, the appeal should be allowed and the matter referred back to the Court of Tax Appeals to be dealt with in accordance herewith. The appellant is entitled to its costs here and below.

Appeal allowed with costs.

Solicitor for the appellant: *I. M. MacKeigan.*

Solicitor for the respondent: *C. P. Bethune.*