THE ATTORNEY GENERAL OF BRITISH COLUMBIA (PLAINTIFF)..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... RESPONDENT.

1926
*Oct. 5, 6.
1927
*Feb. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Taxation—Direct or indirect—"First purchaser"—Validity of Fuel-oil Tax Act, 1923, c. 71—B.N.A. Act, 1867, s. 92 (2)

The British Columbia *Fuel-oil Tax Act,* 1923, c. 71, which imposes a certain tax per gallon on purchasers of fuel oil and defines "purchaser" as meaning "any person who within the province purchases fuel oil when sold for the first time after its manufacture in or importation into the province", is *ultra vires.* Idington J. dissenting.

Such tax is not a direct tax within s. 92 (2) of the B.N.A. Act, since at the time of payment its ultimate incidence is uncertain. Idington J. dissenting.

Apart from some special circumstances the presumable incidence and the general tendency of a tax imposed on the "first purchaser" in a province of a commodity susceptible of general use is that it will be passed on to the consumer, who may or may not—and in ordinary cases will not—be its "first purchaser", who is required by section 3 of the Act to pay the tax.

Judgment of the Court of Appeal ([1926] 3 W.W.R. 154) aff Idington J. dissenting.

APPEAL from the decision of the Court of Appeal from British Columbia (1), affirming the judgment of Morrison J. (2) and dismissing the appellant's action for taxes under the *Fuel-oil Tax Act,* (B.C.) 1923, c. 71.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

J. W. de B. Farris K.C. for the appellant.

E. P. Davis K.C. and *J. E. McMullen* for the respondent.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1926] 3 W.W.R. 154.

(2) (1926) 36 B.C. Rep. 551; [1926] 1 W.W.R. 937.

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The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—This action is brought by the Attorney General for British Columbia, on behalf of His Majesty the King, for the recovery of taxes on fuel oil from the defendant as "first purchaser" and also as holder thereof for consumption. To the claim made upon it as first purchaser the defendant offers two defences: (*a*) that it is not in fact "first purchaser" of the oil; (*b*) that the provincial legislation imposing the taxation is *ultra vires*.

It is perhaps difficult, on the evidence in the record, to say that the Canadian Pacific Railway Co. was the "first purchaser" of the fuel oil for which it is sought to collect the taxes; but that it was may, for present purposes, be assumed against it. That the railway company bought and held the fuel oil for consumption in its own operations and not for re-sale seems, however, to be abundantly clear.

The material provisions of the British Columbia *Fuel-oil Tax Act*, 1923, c. 71, read as follows:

2. In this Act, unless the context otherwise requires:—

* * *

"Purchaser" means any person who within the province purchases fuel-oil when sold for the first time after its manufacture in or importation into the province:

* * *

3. Every purchaser shall pay to His Majesty for the raising of a revenue for provincial purposes a tax equal to one-half cent per gallon of all fuel-oil purchased by him, which tax shall be levied and collected in the manner provided in this Act.

4. Every vendor at the time of the sale of any fuel-oil shall levy and collect the tax imposed by this Act in respect of the fuel-oil and shall on or before the fifteenth day of the month next following that in which the sale takes place pay over to the collector of the assessment district in which the sale takes place the full amount of the tax.

5. Every vendor shall, with each monthly payment, furnish to the collector a return showing all sales of fuel-oil made by him to purchasers during the preceding month, which return shall be in the form and verified in the manner prescribed by the regulations.

6. (1) Subject to subsection (3) after the expiration of one month from the commencement of this Act, every person who keeps or has in his possession or under his control for use or consumption by himself, his family, agent, or employee, or in any business or occupation in which he is interested or employed, any fuel-oil respecting which no tax has been paid under this Act shall, prior to the use or consumption of the fuel-oil, or any part thereof, pay to His Majesty for the raising of a

revenue for provincial purposes a tax equal to one-half cent per gallon of the fuel-oil.

(2) Subject to subsection (3), after the expiration of one month from the commencement of this Act, no person shall use or consume any fuel-oil unless a tax has been paid in respect thereof under this Act.

(3) No tax shall be payable under this section in respect of fuel-oil imported into the province for use in and which is used in the operation of vessels plying between ports in the province and ports outside of the dominion.

(4) Every person who uses or consumes any fuel-oil in violation of the provisions of this section shall be guilty of an offence against this Act.

(5) In any prosecution for failure to pay the tax imposed by this section, the burden of proving that a tax has been paid in respect of the fuel-oil used or consumed shall be upon the defendant.

Had section 6 been the only provision imposing the tax it would probably be difficult for the respondent to maintain its inapplicability to the fuel-oil in its possession from time to time, or successfully to challenge its validity. But it was common ground at bar that s. 6 assumes the validity of s. 3 and was meant to be operative only if the fuel-oil in respect of which it is sought to collect the tax was subject to taxation, under s. 3, in the hands of the "first purchaser"; and we are, in effect, asked to dispose of the appeal before us on that assumption and on the footing that its outcome should be dependent upon our view as to the validity or invalidity of s. 3. We accede to this request.

One ground of objection to the validity of s. 3 pressed at bar is that this section imposes an excise tax and that its enactment by the provincial legislature therefore contravenes s. 122 of the B.N.A. Act and s. 7 of the Terms of Union of British Columbia with Canada. This objection, however, involves considerations so far-reaching in their application and effect that they should be approached only in the event of the failure of the other ground of attack on s. 3, namely, that the tax which it imposes is not a direct tax within s. 92 (2) of the B.N.A. Act.

It may be that under some circumstances it would be a proper inference that in its common incidence, and under the normal operation in ordinary cases of its general tendency, such a tax as that imposed by s. 3 would in reality be borne by the very persons who are required to pay it and that it would, therefore, be proper to ascribe to the

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legislature the intention that its incidence should be so confined. But, apart from such special circumstances, the presumable incidence and the general tendency of a tax imposed on the "first purchaser" in a province of a commodity susceptible of general use is that it will be passed on to the consumer, who may or may not—and in ordinary cases will not—be its "first purchaser" who is required by s. 3 to pay the tax. The evidence in our opinion falls short of disclosing such special circumstances as might suffice to take this tax out of the category of taxes imposed on marketable commodities, such as customs and excise duties, which, according to their general incidence, it may be expected will ultimately be borne by persons other than those required by the taxing statute to pay them and are, therefore, indirect. It may sufficiently clearly appear that in the particular case of the respondent company all fuel-oil purchased by it is consumed in its own operations and that none of it is re-sold. But whether a provincial tax is direct or indirect, valid, or invalid, cannot depend upon its actual results in particular cases (*Bank of Toronto* v. *Lambe* (1)), or upon special events which may vary (*Attorney General for Quebec* v. *Reed* (2)).

The evidence discloses that there is already a very considerable use made of fuel-oil in British Columbia, many public and private buildings in the city of Vancouver being heated by it and public and private enterprises established in the province using it to generate power, etc. No doubt comparatively few cases of re-sale in British Columbia by purchasers from the two large vending corporations—the Union Oil Co. of Canada and Imperial Oil Co., Ltd.—were shown at the trial. But the evidence does disclose re-sales by the Union Steamship Co.—a purchaser from the Union Oil Co. of Canada—to the British Columbia Canneries when called upon to supply oil for a few isolated points along the coast. Apparently the Union Steamship Company's boats make a practice of selling fuel-oil to persons who may require it at their points of call up and down the coast. Such persons it is said have no other source of supply. Moreover, the evidence seems to make it reasonably clear that the Imperial Oil Co. "pur-

(1) (1887) 12 A.C. 575, at p. 582. (2) (1884) 10 A.C. 141, at p. 144.

chases " its fuel-oil " in the ordinary way," when it can get it, from the Imperial Oil Co. refineries plant at Ioco, B.C., and, when the refineries plant cannot supply its requirements, in the open market " from any person from whom it can buy."

There is also evidence of the prevalence in the United States of purchases and re-sales of fuel-oil by middle-men, and that, as the use of fuel-oil increases in British Columbia, there will be a tendency in that province towards such re-sales of this commodity becoming more prevalent. It cannot in our opinion be said that a case has been made out of such special circumstances existing in regard to the fuel oil business in British Columbia as would justify the courts in considering that, notwithstanding " the normal effect and tendency of (a) tax " on such a marketable commodity, the tax imposed by s. 3 is demanded from the very persons who it is intended or desired should pay it—" who are ultimately to bear the burden of it." That this is the test of a direct tax within s. 92 (2) of the B.N.A. Act does not now admit of question: *Attorney General for Manitoba* v. *Attorney General for Canada* (1). In the absence of proof of special circumstances establishing that, unless in very exceptional conditions, the actual normal operation of the tax on fuel-oil, as the legislature may be assumed to know it, would not prevail, that test must determine its validity.

Not only does the evidence fall short of establishing the existence of special circumstances which might negative an expectation on the part of the legislature that the tax paid under s. 3 would be passed on, but it rather lends support to the view implied in its imposition on the " first purchaser " that there will, or at least may, be subsequent purchasers on whom the burden of it would according to normal tendencies actually fall.

We are of the opinion that the judgment *a quo* should be affirmed.

IDINGTON J. (dissenting).—This appeal arises out of an action brought by appellant to recover from the respondent taxes imposed by virtue of the *Fuel-oil Tax Act* enacted by the legislature of British Columbia in 1923, being c. 71.

(1) [1925] A.C. 561, at p. 566.

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Section 6, subsection 1, thereof, is as follows:

6. (1) Subject to subsection (3), every person who keeps or has in his possession or under his control for use or consumption by himself, his family, agent, or employee, or in any business or occupation in which he is interested or employed, any fuel-oil respecting which no tax has been paid under this Act shall, prior to the use or consumption of the fuel-oil, or any part thereof, pay to His Majesty for the raising of a revenue for provincial purposes a tax equal to one-half cent per gallon of the fuel-oil.

That shews clearly upon what class of purchasing thereof it is intended to impose the tax.

Subsections (2), (3), (4) and (5), which read as follows:

(2) Subject to subsection (3), no person shall use or consume any fuel-oil unless a tax has been paid in respect thereof under this Act.

(3) No tax shall be payable under this section in respect of fuel-oil imported into the province for use in and which is used in the operation of vessels plying between ports in the province and ports outside of the dominion.

(4) Every person who uses or consumes any fuel-oil in violation of the provisions of this section shall be guilty of an offence against this Act.

(5) In any prosecution for failure to pay the tax imposed by this section, the burden of proving that a tax has been paid in respect of the fuel-oil used or consumed shall be upon the defendant.

make it, if possible, more abundantly clear that it is only fuel-oil intended for use or consumption in that part of British Columbia which is not travellable upon by vessels adapted to sailing outside thereof, and that it is only such other purchasers thereof as intended to so use the fuel-oil for consumption that are liable to pay the tax.

The reason for exempting the users of fuel-oil mentioned in said subsection (3), is, I apprehend, to avoid any possible conflict with, or overstepping the limitations of the powers of a province to extend any taxation beyond its own boundaries.

There is, I submit, not a shadow of doubt but that the claim herein is against the respondent company for the tax imposed herein upon what it used within the province.

The purview of the entire Act is, I submit, quite clear that its operation is to be confined within the province, and to fuel-oil bought with the intention of using it therein for fuel.

It is, I submit, conclusively proven that it is only an occasional, accidental sale, as it were, that is made to anyone else than a large consumer, or by anyone outside the

control of one or other of the two separate sets of business concerns each consisting of two or more separate legal entities co-operating to produce and sell fuel-oil to consumers thereof and both sets directly or indirectly involved in this litigation.

It is alleged that substantially the same situation had existed for thirteen years before the passing of the Act, although an increased amount of business has been produced. This increase has been proven to shew that there may be hereafter a different situation created and a change brought about that would render the tax in question an indirect, instead of a direct tax.

I submit there is no basis for such fears. Indeed I strongly suspect they are conjured up to try by some means to frighten the courts into such a conclusion.

The chief asset the respondent has in support of that contention is the peculiar frame of the Act in question, which begins with an interpretive clause that gives to the words "purchaser" and "vendor" respectively, the following meanings:—

"Purchaser" means any person who within the province purchases fuel-oil when sold for the first time after its manufacture in or importation into the province.

"Vendor" means any person who within the province sells fuel-oil for the first time after its manufacture in or importation into the province.

That is followed by three sections which can be read with the effect of dominating the whole of the rest of the Act. Doing so would so obliterate the clear meaning of the rest of the Act as to come sadly in conflict with that due consideration of the entire purview of the Act, which, in such cases, it is, I respectfully submit, our duty to appreciate and observe in reaching our conclusion.

The "first purchaser" referred to above and in question, is to my mind, the above party respondent, as three of the learned judges of the Court of Appeal below find.

The facts upon which Mr. Justice MacDonald relies in his reasons for so maintaining, I agree with. And furthermore I cannot see how the California company and the Canadian subsidiary thereof can be, though in a corporate sense separate legal entities, properly held, in light of the

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whole evidence, other than one and the same party operating together; solely directed from California, and the Canadian entity not the first purchaser, but the vendor, on behalf of its parent company to respondent.

If the appellant had brought the action against the said Canadian subsidiary, I submit he would have hopelessly failed to prove his case.

As to the other question raised of the said tax being an indirect tax, I cannot agree. It is to my mind clearly a direct tax, if read, as I have pointed out above, it should be.

The decisions referred to by counsel for respondent here, where not familiarly known to me long ago, I have read.

The weight of authority is surely against the respondent if the Act is interpreted and construed as I have done above.

The argument drawn from and founded upon section 122 of the B.N.A. Act by counsel for the respondent, I respectfully submit, is quite untenable.

The said section was simply needed temporarily for use at the crossing of each province, from being an independent province to forming part of the new dominion. And the British Columbia provision the counsel refer to is of same nature.

The attempt to form an argument on the word "excise" therein seems to me answered by the decision of the Privy Council in the *Brewers & Malsters Association of Ontario* v. *The Attorney General of Ontario* (1), and many other cases since.

I agree in the main with the respective reasonings of Mr. Justice Martin and Mr. Justice McPhillips in the court appealed from, dealing with leading authorities and the results they reach, and hence find no necessity for repeating same herein.

I should, therefore, allow this appeal with costs throughout, and reverse the judgments of the learned trial judge and the court appealed from.

Appeal dismissed with costs.

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*
Solicitor for the respondent: *J. E. McMullen.*

(1) [1897] A.C. 231.