

BETWEEN:

1962
Mar. 26
Sept. 20

HER MAJESTY THE QUEEN PLAINTIFF;

AND

CONTINENTAL AIR PHOTO LIM- }
ITED } DEFENDANT.

AND BETWEEN:

CONTINENTAL AIR PHOTO LIM- }
ITED } SUPPLIANT;

AND

HER MAJESTY THE QUEEN RESPONDENT.

Revenue—Excise—Sales tax—Exemption—Meaning of term “portrait photographers” under the Excise Tax Act and Old Age Security Act—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 34(2), Schedule III, as amended by S. of C. 1960, c. 30—Old Age Security Act, R.S.C. 1952, c. 200 as amended by S. of C. 1959, c. 14.

The Crown brought action to recover sales tax and penalties from the defendant under the provisions of the *Excise Tax Act*, R.S.C. 1952, c. 100, as amended, and the *Old Age Security Act*, R.S.C. 1952, c. 200 as amended, on sales affected between December 1959 and April 1960. The defendant, a company carrying on business of photographing farms from the air and selling such photographs to the farm and home owners, claimed exemption under the provisions of s. 34(2) of the *Excise Tax Act* and Regulation 11 thereof, which regulation provides exemption from sales tax to portrait photographers who sell exclusively to the consumer or user.

By petition of right the above-named defendant brought action to recover from the Crown sales tax paid by it on such photographs made by it between May and December 1959. The two actions were tried together. The sole point at issue in both cases was as to whether the defendant was a “portrait photographer” within the meaning of the *Excise Tax Act*, regulation 11.

Held: That although one meaning of “portrait” (in English) is the representation of an object, the predominant meaning, and that attributed to it by usage of the trade, is that of a representation of a person, either of his face or his whole person.

2. That as there is no definition of the word “portrait” in the *Excise Tax Act* or the *Regulations*, and as it is not defined in any other acts in *pari materia*, it must be given the meaning ascribed to the word by persons familiar with the subject matter of the legislation.
3. That in construing the words “portrait photography” the court must apply the rule that an exemption provision in a statute must be given its strictest meaning in order to give the benefit to the narrowest group

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possible and on applying the rule the court concludes that the defend-
 ant company's operations do not fall within the exemption provided
 under the term "portrait photography".

INFORMATION by the Crown to recover sales tax and
 penalties

and

PETITION OF RIGHT to recover sales tax paid to
 Crown.

The actions were tried before the Honourable Mr. Justice
 Noël at Edmonton.

J. D. Lambert for plaintiff-respondent.

T. H. Miller and Barry Vogel for defendant-suppliant.

The facts and questions of law raised are stated in the
 reasons for judgment.

NOËL J. now (September 20, 1962) delivered the follow-
 ing judgment in *The Queen v. Continental Air Photo
 Limited*:

This is an information in which the plaintiff claims from
 the defendant payment of the sum of \$2,479.22 for sales tax
 in respect of sales of aerial photographs in the period
 December 1, 1959 to and including the 31st day of March
 1960, penalties for non-payment thereof and costs.

The defendant company carries on business in Canada
 and has its head office in the City of Edmonton, in the Prov-
 ince of Alberta. Its method of operation is to have its
 photographers fly down country roads in the Province of
 Alberta and take pictures of private homes and farm build-
 ings from the air. In order to sell the pictures to the owners
 of the houses or farms, the photographers must get the
 house or farm from the best possible angle. They, therefore,
 have the pilot fly around three or four times and then direct
 him to go down in that particular position where they think
 the picture will be best after which they take the picture.
 The photographs are taken from an approximate distance
 of one thousand feet and from a height that varies between
 four hundred and six hundred feet.

The films are then developed and a negative of each is
 printed and turned over to a salesman who calls on the
 owners of the homes or farms and tries to sell them a pic-
 ture of their property as a souvenir or for whatever use the

owners may have. These photographs are made available in various sizes and can be either black and white, or coloured, or painted pictures. Ninety per cent of the defendant company's sales in dollar volume are of coloured and painted pictures and ten per cent in black and white. However, in the number of pictures, the black and white would outnumber the coloured. In the event the customer indicates he is willing to purchase the picture and wants to have it done in colour, the salesman has to mark down all the colours of all the buildings, machinery and flowers, trees and lawn and everything that appears in the picture, by means of a numerical colour key chart, thus establishing how to complete the photograph in accordance with the wishes of the customer. The order is then forwarded to the defendant's office, in Edmonton, where the photographs are enlarged to the desired size, mounted on a masonite backing and turned over to a colourist. The latter is one of several employees of the defendant company, trained in the use of colours by the president of the defendant company and his wife, and familiar with the colour key. Some of these colourists work in their homes and some in the defendant's office. The evidence is to the effect that the work of a colourist is a difficult one and that out of twenty-five applicants for the job of colourist, one only usually turns out to be suitable. Once the colouring is completed, the photograph is sprayed with a clear varnish in order to protect the oil and the picture. In some instances the owner of the property desires changes to be made in the picture, such as removing objects or adding some and, in such cases, the defendant company complies with such requests and has a trained man for such retouching jobs.

In some instances, approximately one in four or five, the photographs contain people who are attracted by the noise of the plane and come out for a look and in one in ten or twelve, they contain livestock.

A consumption or sales tax of eight per cent on the sale price of all goods produced or manufactured in Canada is imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100 and one of three per cent is imposed by s. 10 of the *Old Age Security Act*, R.S.C. 1952, c. 200 as amended by S. of C. 1959, c. 14.

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It is not disputed that if the defendant is liable therefore the amount now claimed for tax is the amount to be paid by the defendant.

Indeed the only point at issue is as to whether the work done by the defendant company comes under the classification of portrait photography or not. If it does, then the defendant company is exempt from payment of sales tax during the period under review. If it does not, it cannot benefit from the exemption provided by the regulations and it must pay the tax.

These regulations are established under authority of s. 34, s-s. 2 of the *Excise Tax Act*, R.S.C. 1952 c. 100.

Regulation 11 which applies in this case reads as follows:

11. *Small Manufacturers Exempt under Section 34, Subsection 2.*

* * *

The following manufacturers, when selling exclusively by retail, i.e., to consumer or user, are classified as small manufacturers and are not required to obtain sales tax licences,— . . . portrait photographers who sell exclusively to the consumer or user.

In the 1960 Statute of Canada, c. 30, Schedule (III) of the *Excise Tax Act* was amended and *inter alia*, the words "of individuals" were added to the words "portrait photographers".

The question for determination, therefore, is whether or not the operations of the defendant company fall within the description of portrait photography.

Mr. Henry Kreisel, Ph.D., professor of English and head of the English Department of the University of Alberta, after looking up the meanings and uses of the words "portrait, portray or portraiture" in a number of dictionaries, such as Webster International and the Great Oxford English, stated that the original meaning of the word "portrait" was simply a picture of an object; this meaning, however, is now more or less obsolete; the meanings now in standard use are a pictorial representation of a person, especially of the face; also a likeness; and then the dictionaries move on to the other meanings which are also given, i.e., a visible representation, an image, a copy, a similitude, and finally a lifelike or realistic representation. He stated that in the *Tamarack Review*, some time ago, he saw an article about Montreal and Toronto and the title was "Portrait of Two Cities". He admits that the word "portrait" is certainly at times used in this derivative sense.

The meaning of the word "portrait" was scrutinized in *The Duke of Leeds v. Lord Amherst*¹. The Vice-Chancellor, Sir L. Shadwell had this to say at p. 179:

Now, with respect to the word "portrait", a definition has been given in the course of the argument; and I have looked into the matter myself to see what is the origin of the word, and what meaning is ascribed to it not only in English but in French dictionaries; and it seems that, to a certain extent, it is used in a more enlarged sense in the English than it is in the French language.

The first thing that I have to observe about it is that, in an edition of Richelet's Dictionary, which was printed in the year 1732, the author speaks of the word "portrait" as a French word, and explains the meaning of it in Latin, and then gives an interpretation of it in French. He says: "Portrait: *Imago, picta effigies. Ce mot se dit des hommes seulement; et en parlant de peinture, c'est tout ce qui représente une personne d'après nature, avec des couleurs.*" In the French dictionary which has been lately published by Fleming & Tibbins, the explanation is this: "Portrait: Resemblance d'une personne;" and there it stops. The word is evidently taken from the Latin words "*pertrahere*" or "*pertractare*", both of which words derive their force from being compounded, in part, of the preposition *per*, which, when used in composition, signifies doing an act completely, thoroughly, or with labour; as in our word "perfect", and the Latin word "perfectum".

Then at p. 180 he refers to a definition of "portrait" in the English dictionaries by Dr. Johnson: "A picture drawn after the life", that is, corresponding to the life and by Bailey, which in his opinion is a very good dictionary because it is not confined to words found merely in books of authority, but contains also words which are in common use; according to Bailey "portraits" (with painters) are pictures of men and women either heads or greater lengths, drawn from the life.

In the *Duke of Leeds* case, the question to determine was whether a picture of the Duke represented on horseback with a battle in the distance passed together with all the other portraits by the bequest, the testator having bequeathed the portrait of himself, his grandfather and grandmother and of the Duke of Shomberg. The Vice-Chancellor was of the opinion and so added that "the miniature representation of a battle, which is introduced in the background, in order to denote that the principal subject was a great warrior, does not detract from its character as a portrait".

¹(1843) 60 English Reports 178.

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The meaning of "portrait" was also thoroughly examined in *Re Layard*¹. By his will, the testator gave to his wife a house in Venice and in London, together with the contents of those houses "excepting my pictures and excepting certain presentation testimonials".

The will then proceeded as follows:

As to all and singular my said pictures (except the portrait of my late uncle) as well those in Queen Anne-Street as those at Venice, and after the death of my wife I give and bequeath all my said pictures (except portraits) or such of my said pictures as the trustees and the director for the time being of the National Gallery may select unto the trustees of the National Gallery and their successors to be held by them for the use and enjoyment of the British public forever as part of the national collection. But the portraits of myself and all my family and other portraits (except the said portrait of my said uncle) I give and bequeath after the death of my said wife, free of legacy duty, to my nephew for his absolute use and benefit.

In this case, Astbury, J., at p. 18 states that:

The plaintiff's witnesses have stated, and I think rightly, that a portrait means, or at all events includes, a picture painted from life, intended to be a real representation of the sitter; or, secondly, a replica of a such picture; or, thirdly, copy of it, as distinguished from a picture which, though painted from an individual, is intended to represent not so much the character and features of the sitter as some particular vice, virtue, or other characteristic or ideal that the painter desires to express.

Lord Cozens-Hardy in this case, at p. 23, states that he accepts the definition of Mr. William Roberts that a portrait means: "a picture which has been painted from the life as a likeness or presentment of the person or persons the subject of the picture" or a replica or a copy of such a picture.

In the above case, in view of the context of the will, the word "portrait" was held to have the narrow meaning of family portraits as distinct from old masters and pictures of great artistic merit, but the definitions of the word here are, however, of some assistance in our present query in determining what is the meaning of portrait photography. Indeed it would appear here that it deals mostly or preponderantly with persons or individuals.

The dictionaries give the following definitions of "portrait":

Larousse:

Image d'une personne reproduite par la peinture, le dessin, la photographie, etc.: Hyacinthe Rigaud a laissé de remarquables portraits. Objet d'une ressemblance parfaite: enfant qui est le portrait de son père. Littér.

¹ (1916) 115 Law Times 15.

Description des traits ou d'un caractère, d'une époque, etc.: La Bruyère excelle dans les portraits. Portrait en pied, portrait qui représente la personne tout entière. Portrait parlant, portrait si expressif qu'il semble parler. Portrait de famille, celui qui représente un des aïeux de la famille. Pop. Figure: endommager le portrait d'un rival.

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Nouveau Larousse Illustré:

Ressemblance de quelqu'un, obtenue par un procédé artistique ou industriel: Portrait à l'huile, au pastel, au crayon.

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—Souvenir, profondément gravé, des traits d'une personne: Une mère garde toujours vivant le portrait de l'enfant qu'elle a perdu.

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—Description des traits ou du caractère d'une personne: Les portraits de La Bruyère. Description quelconque: Un portrait tout à fait satisfaisant de l'esprit français. (Ste Beuve).

—Pop. Figure: Endommager le portrait d'un rival.

—Loc. div.: Portrait en pied, Portrait qui représente la personne tout entière. Portrait parlant, Portrait si ressemblant, si expressif, qu'il semble qu'on ait sous les yeux l'original prêt à parler. Portrait de famille, Celui qui représente un des aïeux de la famille.

Littéré:

. . . Portrait en pied, portrait qui représente une personne entière. Portrait parlant, portrait si ressemblant qu'il semble parler. Portrait flatté, portrait qui atténue ce qu'il y a de mal dans le modèle. Portrait chargé, portrait qui exagère les défauts du modèle. . . Représentation exacte d'un objet quelconque.

Quillet:

Image d'une personne faite à l'aide du dessin, de la peinture, de la photographie, etc. Portrait à l'huile.—Portraits de famille, portraits des aïeux.

—Portrait en pied, portrait qui représente une personne entière, debout ou assise.—Fig. C'est son portrait, tout son portrait, se dit, au physique et au moral, de toute personne qui ressemble beaucoup à une autre.

Par anal. Description, soit de l'extérieur ou du caractère d'une personne, soit d'une chose quelconque. Portraits littéraires.

Funk & Wagnalls:

1. A likeness of an individual, especially of the face, produced by an artist in oils, watercolor, etc., or by photography. 2. Hence, a vivid description of something or someone having existence.

* * *

Portraiture: 1. A representation of an object. 2. The act or art of portraying; especially, the art or practice of making portraits. 3. Portraits or pictures collectively.

Portray: To represent naturally and vividly, whether by drawing, painting, etc., or by verbal description or by acting; depict. See synonyms under IMITATE.

1. The act of portraying by any method of depiction or delineation; as, the portrayal of a character on the stage. 2. The making of a likeness of persons, places, or things; picturing. 3. A portrait.

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1. A figure drawn, painted, or carved upon a surface to represent some object; spec. (now almost always) a likeness of a person, esp. of the face, made from life by drawing, painting, photography, engraving, etc. A solid image, a statue—1638. fig. An image, representation, type; likeness, similitude 1577. A verbal picture; a graphic description 1596.

Portray:—1. To make a picture, image, or figure of. transf. To make (a picture, image, or figure); to draw, paint, or carve; to trace—1604. To paint or adorn (a surface) with a picture or figure 1667. To picture to oneself; to fancy. To represent (e.g. dramatically). esp. To represent in words, describe graphically, set forth, late.

Webster:

1. A picture of an object. 2. Specif., a pictorial representation of a person esp. of the face, painted, drawn, engraved, photographed, or the like; a likeness, esp. one painted from life. 3. A carved or molded figure; a statute; a sculpture. 4. Portraiture; esp., painting of persons from or as from life. 5. A visible representation or likeness; an image; a copy; a similitude; a picture (sense 4). "Where that sad portraict Of death and dolour lay, halfe dead". Spenser. 6. Lifelike or realistic representation; unidealized delineation, description, etc.; as, a painting that fails as a portrait; a fair portrait of an age.

Portray:—1. To represent by drawing, painting, engraving, etc.; to make a picture or image of; delineate; depict; as, to portray a king on horseback. Take a tile . . . and portray upon it the city. 2. To describe or depict in words; to describe vividly; also, to represent dramatically; to act. 3. To draw, paint, carve, etc. To adorn with or as with pictures. To image mentally; to imagine; picture. To form; frame; fashion.

From all this I have no hesitation in saying that although one of the meanings of "portrait" (in English) appears to be that of a representation of an object, the predominant meaning is that of a representation of a person either of his face or even of his whole person. Should I, in view of this, have any hesitancy in arriving at this finding, I could, and I believe that I should, turn towards the popular sense of the word "portrait" or even its meaning by usage in the trade.

Mr. Bertran C. Hollingshead, manager for twenty-two years of McDermid Studios Ltd., portrait and commercial photographers, commercial artists, photographers, one of the larger photography businesses in Edmonton, states that his interpretation of the word "portraits" in the advertisements to be found in the yellow pages of the Edmonton telephone directory, is that it would be the photographing of people, mainly faces, but that it could be full length.

His interpretation of the word "commercial photography" is the photographing of objects, of houses, of buildings, scenes . . ." but ordinary commercial photography, as he interprets it, is pictures taken of objects other than people. At p. 32 of the transcript he was asked:

Q. If you were asked by someone to photograph a garden, their garden, what would—how would you classify that kind of photography?

A. We would classify that as commercial photography.

Q. If the people themselves wanted to be in the picture, in the garden, how would you classify that?

A. This would depend on whether or not the people—if the people were the most predominant thing in the picture, then we might classify this as portraiture; that is, if the people were the most important thing, because then we would have very little but background in the garden, it would just be a background; but if we were taking in the garden, taking in the whole yard, with the people in the background, then we would class this as commercial photography.

The division into commercial and portrait photography is, according to this witness, recognized throughout the photography business.

Mr. Arnskov Neilsen, president of Continental Air Photo, the defendant, implicitly recognizes this when he admits that his company is not listed under the classification of "portrait photographers" because it only does aerial photography and does not do portrait photography. Indeed, at p. 24 of the transcript, he says:

A. They would probably come expecting to get a picture taken of themselves, which we did not set up to do, or the children.

The evidence discloses also that when McDermid Studios Ltd. do aerial photography of industrial plants or areas under construction, they always send a commercial photographer.

The 1961-62 *Directory of Professional Photography*, produced as Exhibit B, contains a listing of members with this classification, the top one with a "P" opposite for portraiture (including studios, homes, passports, schools, groups, children) and then there is a different classification for commercial photography. According to Mr. Hollingshead, portraiture in the trade is associated with people posing, either full length or head and shoulders, with proper lighting to bring out certain features and perhaps hide certain features, or subdue them, and with the subject person's

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knowledge. He, however, admits that sometimes the word "portrait" can be used in connection with a pet, such as a dog or a horse, if there was a great deal of skill used in the lighting of the head.

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In cross-examination, however, he finally admitted that what he has done is to arbitrarily divide the skill employed by the people who take the picture between "commercial", "portraiture" and "industrial". With respect to the question as to whether the distance at which the picture is taken is of any importance in determining the nature of the photography, he has this to say:

It ceases to be a portrait when the distance between is such that the operator could not tell the person being photographed what he wanted him to do, how he wanted him to move, what action he wanted him to take.

If we revert to the case of the *Duke of Leeds v. Lord Amherst*, (*supra*), I believe that we can safely say, as argued by counsel for the Crown, that if a "portrait" was a representation of any object, then there would have been no difficulty in that case nor any hesitancy in finding, although there was a battle in the background of the picture of the Duke on horseback, that the picture was a portrait.

There is no definition of the word "portrait" in the *Excise Act* or the *Regulations*, nor is it defined in any other Acts in *pari materia*. It is an ordinary word in everyday use and is therefore to be construed according to its popular sense.

In Craies on *Statute Law*, 4th edition, p. 151, reference is made to *Grenfell v. I.R.C.*¹ in which Pollock B. stated that if a statute contains language which is capable of being construed in a popular sense such "a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning of course, by the words 'popular sense' that sense which people conversant with the subject matter with which the statute is dealing, would attribute to it."

In *Attorney-General v. Bailey*² it was held that the word "spirits being a word of known importance . . . is used in the *Excise Tax* in the sense in which it is ordinarily understood". In that case the Court said that in common

¹(1876) 1 Fx. D. 242-248.

²(1847) 1 Ex. 281.

parlance, the word "spirit" would be considered as comprehending a liquid like "sweet spirits of nitre" which is itself a known article of commerce not ordinarily passing under the name of "spirit".

As also stated by Craies on *Statute Law*, p. 152, the rule is that the particular words used by the legislature in the denomination of articles are to be understood according to the common commercial understanding of the terms used, and not in their scientific or technical sense.

There is some authority to the proposition that if there is a difference in meaning between the definition of the word in the dictionary and the usage by persons who are familiar with the subject matter of the legislation, or whether there is any doubt about which definition in the dictionary is to be preferred, then the meaning given to the word by the persons who are familiar with the subject matter of the legislation should be preferred. cf. *Unwin v. Hanson*¹ and *The King v. Planters Nut and Chocolate Co. Ltd.*².

Mr. Hollingshead who, as we have seen, has considerable experience in the photography business, stated that there is in the trade a definite and distinct usage for the words "portrait photography" and the words "commercial photography" and that persons in the photography business would not regard Continental Air Photo Ltd., the defendant, as portrait photographers. Regulation No. 11, quoted above, which establishes the exemption for portrait photographers, differentiates between portrait photographers, commercial photographers and industrial photographers, thus giving effect to the division adopted by the trade. Indeed, this Regulation gives two exemptions for photographers, one is for portrait photographers who sell exclusively to the consumers or users, and they are entirely exempt, and the other exemption is for commercial or industrial photographers or any manufacturer or commercial or industrial photographers and this exemption applies only if the sales do not exceed \$3,000.

We are not dealing here with a tax charging section but with an exemption provision, and therefore, if there is any doubt as to which of the two possible conclusions should be preferred, the narrowest and strictest should be adopted in

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¹[1891] 2 Q.B. 115.

²[1951] Ex. C.R. 126.

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order to give the benefit of exemption to the narrowest group, consistent with the meaning to be given to the words "portrait photography".

Authority for this can be found in *W. A. Sheaffer Pen Company of Canada Limited v. M.N.R.*¹. In this case, Thorson P. says:

While the appellant's submission appears attractive at first sight and merits consideration I am of the opinion that it is unsound and must be rejected. There are several reasons for this conclusion. While it is well established that all charges must be imposed by clear and unambiguous language and that a person is not to be subjected to tax unless the words of the taxing statute expressly impose it and he is caught by them; *vide Partingdon v. Attorney-General* (1869) 4 E & I App. 100 at 122 and *Tenant v. Smith* [1892] A.C. 150 at 154 and numerous decisions of this Court such as *Connell v. Minister of National Revenue* [1946] Ex. C.R. 562 at 566, *David Fasken Estate v. Minister of National Revenue* [1948] Ex. C.R. 580 at 588; it should be noted that in the present case there is no question of imposition of any charge. Here the appellant seeks the benefit of a right of deduction to which it would not be entitled except for section 5(p) the opening words of which refer to the exemptions and deductions to which what would otherwise be taxable income is subject. The manner in which an exempting provision in a taxing statute should be construed has been dealt with in a number of cases.

And he refers to *Wylie v. City of Montreal*². Sir W. J. Ritchie, C.J. of the Supreme Court, at p. 386, where he said:

I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed;

Attention was called to the change in Schedule (III) (Statutes of Canada 1960, c. 30) by the addition of the words "of individuals" and it was argued that the amendment shows that a change was intended to be made.

That this is not the case appears by s-ss. 2 and 3 of s. 121 of the *Interpretation Act*, R.S.C. 1927, c. 158:

2. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by Parliament to have been different from the law as it has become under such Act as so amended.

3. A repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

I must conclude that the amendment to remove all possibility of ambiguity was, I think, merely declaratory of what was always the true intendment of the previous words.

¹[1953] Ex. C.R. 251 at 254.

²(1885) 12 Can. S.C.R. 384 at 386.

My finding must, therefore, be that the defendant company's operations do not fall within the exemption provided under the term "portrait photography".

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In the result, the plaintiff is entitled to judgment against the defendant in the amount claimed for sales tax, namely \$2,479.22; the sum of \$28.69 for penalties for non-payment of the sales tax as prescribed by s-s. (4) of s. 48 of the *Excise Tax Act*, R.S.C. 1952, c. 100 as amended for the months of January, February, March and April, A.D. 1960, and in the amount of \$16.53 for each month thereafter from and including the month of May, A.D. 1960 to and including the date of payment of the said sum of \$2,479.22 and for costs to be taxed. The penalties provided in s. 48(4) are mandatory in the event of non-payment within the time provided for in s. 48(4) and there is no power in this Court to waive such penalties.

Judgment accordingly.

Noël J. now (September 20, 1962) delivered the following judgment in *Continental Air Photo Limited v. The Queen*:

Continental Air Photo Ltd., the suppliant in this case, is a body corporate incorporated under the *Companies Act* of the Province of Alberta with head office in the City of Edmonton, Province of Alberta, where it carries on the business of photographing homes and farms from the air. Its method of operation is to have its photographers fly down country roads and take pictures. In order to sell the pictures to the owners of the homes or farms, the photographers must get the house or farm from the best possible angle. They, therefore, have the pilot fly around three or four times and they direct him to go down in that particular position where they think the picture will be best, afterwards, they take the picture. The photographs are taken from an approximate distance of one thousand feet and from a height that varies between four hundred and six hundred feet. The films are then developed and a negative is printed and turned over to a salesman who calls on the owners of the homes or farms and tries to sell them a picture of their property as a souvenir or for whatever uses the owners may

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have. These photographs are made available in various sizes and can be either black and white, or coloured or painted pictures. Ninety per cent of the suppliant company's sales in dollar volume are of coloured or painted pictures and ten per cent in black and white. However, in the number of pictures, the black and white would outnumber the coloured. In the event the customer indicates he is willing to purchase the picture and wants to have it done in colour, the salesman has to mark down all the colours of all the buildings, machinery and flowers, trees and lawn, and everything that appears in the picture, by means of a numerical colour chart, thus establishing how to complete the photograph in accordance with the wishes of the customer. The order is then forwarded to the suppliant's office, in Edmonton, where the photographs are enlarged to the desired size, mounted on a masonite backing and turned over to a colourist. The latter is one of several employees of the suppliant company, trained in the use of colour by the president of the company and his wife and familiar with the colour key. Some of these colourists work in their homes and some in the suppliant's office. The evidence is to the effect that the work of a colourist is a difficult one and that out of twenty-five applicants for the job of colourist, one only usually turns out to be suitable. Once the colouring is completed, the photograph is sprayed with a clear varnish in order to protect the oil and the picture. In some instances, the owner of the property desires changes to be made in the picture, such as removing objects or adding some and, in such cases, the suppliant company complies with such requests and has a trained man for such retouching jobs.

In some instances, approximately one in four or five, the photographs contain people who are attracted by the noise of the plane and come out for a look and in one in ten or twelve, they contain livestock.

During a period extending from June 30, 1958, to December 31, 1959, the suppliant company remitted to the Department of National Revenue, Excise Tax Division, the sum of \$16,161.40 purportedly in payment of sales tax on the sales of aerial photographs. Section 5 of the petition sets out the gist of the action. It reads as follows:

5. Your Suppliant now states that the said sum of Sixteen Thousand One Hundred and Sixty-one Dollars and Forty Cents (\$16,161.40) was remitted by it during the period June 30th, A.D. 1958 to December 31st,

A.D. 1959 under mistake of law or fact as it was during this entire period exempted from the payment of such taxes under the provisions of the Excise Tax Act, R.S.C. 1952, Chapter 100 as amended, specifically Section 34(2) of the said Excise Tax Act and the regulation of the said Excise Tax Act under Section 34(2) as contained in Department of National Revenue Excise Division circular E.T. 1, Section 2(3)(a) and (b).

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At the trial the suppliant admitted that his reference in his pleadings to circular E.T. 1, s. 2(3)(a) and (b) was incorrect and that the proper reference was Regulation 11 entitled "Small Manufacturers Exempt under Section 34(2)".

To this the respondent replies that the suppliant "upon the sale and delivery of the said goods became indebted to Her Majesty in the amount of \$16,161.40 under the provisions of the *Excise Tax Act*, R.S.C. 1952, c. 100, as amended, and under the provisions of the *Old Age Security Act*, R.S.C. 1952, c. 200, as amended, and paid to Her Majesty the said amount.

A consumption or sales tax of eight per cent on the sales price of all goods produced or manufactured in Canada is imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, and one of three per cent is imposed by s. 10 of the *Old Age Security Act*, R.S.C. 1952, c. 200, as amended by R.S.C. 1959, c. 14.

It is not disputed that if the suppliant is liable, therefore, the amount now claimed as a reimbursement or refund is the amount the suppliant had to pay. Indeed, the only point at issue is whether the work done by the suppliant company comes under the classification of portrait photography or not. If it does, then the suppliant is exempt from payment of sales tax during the period under review and is entitled to a refund. If it does not, it cannot benefit from the exemption provided by Regulation 11 and the payment as made must stand. For the reasons set out in a decision of this Court *ante* p. 461 under number 167487 involving the same parties but where Her Majesty the Queen is plaintiff and the suppliant company is the defendant, I arrive here also at the same decision and find that the suppliant company's operations do not fall within the classification of "portrait photography" and, therefore, it cannot benefit from the exemption provided under the Regulations for

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portrait photography and doth order and adjudge that Continental Air Photo Limited is not entitled to the relief sought by its petition, and that Her Majesty the Queen recover from the said Continental Air Photo Limited her costs to be taxed, if any.

Judgment accordingly.
