BETWEEN:

1954

May 18, 19 20 & 25

Sept. 3

HER MAJESTY THE QUEEN .....PLAINTIFF,

AND

KOOL VENT AWNINGS LIMITED .....DEFENDANT.

Revenue—Sales tax—The Excise Tax Act, R.S.C. 1927, c. 179 as amended, ss. 86(1) and 89(1), Schedule III—Goods claimed to be exempt from tax—Building materials—Meaning of "prepared roofings" in Schedule III of the Act—Meaning of "roof" and "roofing" in common language —Words "awning", "canopy", "marquee", "covering" not understood in common language as meaning a roof—Failure to bring claim of exemption from tax within exempting provisions of the Act.

Defendant company carries on the business of processing sheets of aluminum into a product described by it either as "Kool Vent aluminum awnings, porch roofs, patio roofs and doorway coverings" or as "Kool Vent aluminum awnings and coverings for every type of building" and which it sells and delivers throughout Canada except Ontario. As a defence to an action for the recovery of sales tax on the sale of the goods together with certain penalties defendant company claimed exemption from tax on the ground that the goods are "prepared roofings" within the meaning of those words in Schedule III of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, and therefore, they fall within the exempting provisions of s. 89(1) of the Act.

Held: That the words "prepared roofings" in Schedule III of the Excise Tax Act do not apply to any particular science or art and are to be construed as they are understood in common language. *Attorney-General* v. *Winstanley* (1831) 2 D. and C. 302; *The Cargo ex Schiller* (1877) 2 P.D. 145, 161; *Dominion Press Ltd.* v. *Minister of Customs and Excise* [1928] A.C. 340; *The King* v. *Montreal Stock Exchange* [1935] S.C.R. 614; *The King* v. *Planters Nut and Chocolate Co. Ltd.* [1951] Ex. C.R. 122; *The King* v. *Planters Nut and Chocolate Co. Ltd.* [1952] Ex. C.R. 91; *The Queen* v. *Universal Fur Dressers and Dyers Ltd.* [1954] Ex. C.R. 247 referred to and followed.

2. That in ordinary language the word "roof" is related to a structure, building or house and is understood to have that meaning by the general public. The words "awning", "canopy", "marquee" or even "covering" cannot be construed to be understood in common language as meaning a roof. These words are well understood by the trade and public to be coverings over doorways, windows, stairways, balconies or patios.

3. That when a taxpayer claims the benefit of an exemption he must establish that his claim comes clearly within the provisions of the exempting section. *The Credit Protectors (Alberta) Limited* v. *Minister of National Revenue* [1947] Ex. C.R. 44; *Lumbers* v. *Minister of National Revenue* [1943] Ex. C.R. 202; *W. A. Sheaffer Pen Company of Canada Limited* v. *Minister of National Revenue* [1953] Ex. C.R. 251 referred to and followed. Here defendant company failed to prove that the processed material to make the finished articles came within the meaning of "prepared roofing" in Schedule III of the Excise Tax Act. The material employed in the processing

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of the articles, although usable as roofing material, was not prepared specially for roofing but prefabricated into awnings, canopies, marquees and umbrellas according to the specifications laid down in the order received from the customer.

INFORMATION to recover sales tax and penalties under the Excise Tax Act, R.S.C. 1927, c. 179, as amended.

Jean Martineau, Q.C. and *Paul Ollivier* for the plaintiff.

Roger Ouimet, Q.C. for the defendant.

The action was tried before the Honourable Mr. Justice Fournier at Montreal.

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

FOURNIER J. now (September 3, 1954) delivered the following judgment:

In this information the plaintiff, under section 86(1) of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, claims from the defendant the sum of $37,064.66 for sales tax said to be payable in respect of the manufacture and sale by the defendant of Kool Vent awnings, canopies, marquees and umbrellas in the period of May 1, 1950 to May 31, 1953, together with certain penalties and interest for non-payment thereof within the time limited by the Act. The proceedings are in the nature of a test case, the defendant having paid the full amount of the tax up to the time it became convinced it was not liable for said tax.

For the purposes of this action only and to cover the period of May 1, 1950 to May 31, 1953 only, the defendant admitted in writing at the trial that it produced or manufactured in Canada and sold and delivered in all the provinces of Canada, except Ontario, goods, amongst others those referred to in the plaintiff's information, and that payment in cash or on a deferred payment basis had been received for such goods. Furthermore, it was admitted that if the sales of the said goods were taxable under the provisions of the Excise Tax Act and its amendments, which is denied for the reasons given in the defendant's statement of defence, the defendant is liable for the amount of taxes claimed by the plaintiff. These admissions were made

under reserve of the defendant's plea that the manufacture, production and sale of the said goods come within the provisions of section 89 (1) of the Act and its amendments.

These admissions having been made, the only question to be determined is whether the goods mentioned in the plaintiff's information were subject to the consumption or sales tax imposed by section 86 (1) or were exempt from the said tax by section 89 (1) as they were included in Schedule III of the said Act.

Sections 86 (1) and 89 (1) of the Excise Tax Act read in part as follows:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and

(ii) payable, in a case where the contract for the sale of the goods (including a hire-purchase contract and any other contract under which property in the goods passes upon satisfaction of a condition) provides that the sale price or other consideration shall be paid to the manufacturer or producer by instalments (whether the contract provides that the goods are to be delivered or property in the goods is to pass before or after payment of any or all instalments), by the producer or manufacturer pro tanto at the time each of the instalments becomes payable in accordance with the terms of the contract;

89. (1) The tax imposed by section 86 does not apply to the sale or importation of the articles mentioned in Schedule III.

Included in that Schedule, under the heading of "Certain building materials", the following are exempted: "Prepared roofings" (matériaux préparés de toiture) and "Articles and materials to be used exclusively in the manufacture or production of the said building materials."

The sole dispute between the parties is whether the Kool Vent awnings, canopies, marquees and umbrellas manufactured and sold by the defendant are "prepared roofings" within the meaning to be given to those words in Schedule III. If these goods or articles or some of them are found to be "prepared roofings" they are exempt from the tax. There is no definition of "prepared roofings" in the Excise Tax Act nor in the Schedule under the heading of "Certain building

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materials". It would seem that the meaning to be given to these words would be that which an ordinary person would readily understand.

This principle has been recognized in most cases dealing with goods listed under Schedule III of the Excise Tax Act.

In *The King* v. *Planters Nut & Chocolate Co. Ltd.* (1) Cameron J. held "that Parliament in enacting the Excise Tax Act Part XIII and Schedule III was not using words which were applied to any particular science or art and therefore the words used are to be construed as they are understood in common language."

This judgment was confirmed by the Supreme Court of Canada and followed since in *The King* v. *Planters Nut & Chocolate Co. Ltd.* (2) and *The King* v. *Universal Fur Dressers & Dyers Ltd.* (3).

These decisions were based on judgments of the past in which the same principle was held. In *Attorney-General* v. *Winstanley* (4) Lord Tenterden at page 310 said that "the words of an Act of Parliament which are not applied to any particular science or art are to be construed as they are understood in common language." In *The Cargo ex Schiller* (5) James, L.J., expressed the same view as follows: "I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, lagan and jetsam."

In recent cases, the same was held in the following decisions: *Dominion Press Ltd.* v. *Minister of Customs & Excise* (6); *The King* v. *Montreal Stock Exchange* (7).

The words to be interpreted in the present case: "prepared roofings", are found in Schedule III of the Excise Tax Act, R.S.C. 1927, c. 179, and form part of the Statute. They do not apply to any particular science or art and should be construed as they are understood in common language.

The information alleges that the defendant produces and manufactures in Canada awnings, canopies, marquees and umbrellas and upon delivery by it of such goods to its purchasers was liable for the tax imposed by section 86 (1) of

(1) [1951] Ex. C.R. 122.
(2) [1952] Ex. C.R. 91.
(3) [1954] Ex. C.R. 247.
(4) (1831) 2 D. & C. 302.
(5) (1877) 2 P.D. 145, 161.
(6) [1928] A.C. 340.
(7) [1935] S.C.R. 614.

the Act and that it delivered a great quantity of these goods so produced and manufactured in Canada from May 1, 1950, to May 31, 1953.

The defendant is a corporation carrying on business in Canada and having its head office at Montreal. It has been in existence since 1949 and carries on the business of processing sheets of aluminum into a product described by it in some of its later advertisements as "Kool Vent Aluminum Awnings, porch roofs, patio roofs and doorway coverings" and in others "Kool Vent Aluminum Awnings and coverings for every type of building". At the outset in business, the defendant used advertising material prepared in the United States but as time went on it was found from experience that the American advertising was not suitable for Canadian consumption because in Canada the type of architecture was not the same as in the United States. Other illustrations were made and other words used to describe the product. The above quoted words are taken from newspaper advertisements appearing in the press in 1952 and 1953. Before that time, the advertisements carried only the words awnings or canopies as appear on Exhibits one and two. It seems that the words porch roofs, patio roofs and doorway coverings came in later. When the defendant began to manufacture the product, it had before it the experience of the American manufacturer and their advertising material. It is interesting to see what the original manufacturer said of its finished product. The only words used to describe their goods are "Kool Vent Awnings—Kool Vent ventilated awnings are adaptable to all windows, doorways, porches, patios. They admit an abundance of eye-comforting indirect light, keep out direct sun rays, rain, ice, snow and sleet, let in refreshing summer breezes, reduce room temperature in hot summer months, aid greatly in keeping building interiors warmer in winter and cooler in summer, protect household furnishings from sun and rain." This is taken from Exhibit one; all the other exhibits give the same features to the product but add to the word awnings the words roofs and coverings. I looked over carefully every advertisement filed as an exhibit to try to find differences between the designs and illustrations of the first period of advertising and the latter period, but I was unable to find any.

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Now, I should like to say one word with regard to the material used and the process employed to obtain the finished product.

The material is aluminum in strips of different widths, but generally seven inches wide, varying in length up to four hundred feet. The strips are painted mechanically in different standard colours with enamel finish. These strips, after being cut in proper lengths, are converted into what is known as "pans". The pans, when cut to the required lengths, are assembled by hooking or clasping them together. They are given the shape, form and slope as specified on the order or layout sheet. The sides, called "louvers", are processed in the same way, held together by "sawtooth" and riveted to the pans. Thus prepared, they are installed over windows, doorways, patios, balconies. If the work is to be done out of town the component parts may be sent where needed, assembled on the job and installed.

Since the defendant has started operations, it has installed its products over windows, balconies, doors, patios, verandahs, stairs and in one instance, sometime in 1953 I believe, over the roof of a house; the house belongs to the President Manager of the defendant corporation. Photographs filed as defendant's Exhibits L-1, L-2, L-4 and L-5 show the installation of the roof at its different stages. It was a new venture and a first experience. It was built over an existing roof which had become defective. By looking at the above exhibits it seems that the defendant's finished product can be used as roofing material.

In his evidence Mr. Louis Levin, the president and manager of the defendant corporation, stated that he considered as "prepared roofing" all the installations made by the defendant and called "awnings". His own words are: "I do consider them as prepared roofing, but here I say that for five years we have used the terminology 'awning' for that particular type of installation despite the fact that I consider it 'prepared roofing'." He was asked when it occurred to him to bring up this question of "prepared roofing"; he answered that he was interested in another business and, having to look up the Act, he came across the fact that "prepared roofing" was exempt from the sales tax and

realized for the first time that the defendant should not have been paying on prepared roofing in the sense it had been making them.

The defendant's expert witness considered that coverings over balconies, patios, verandahs and buildings were roofs and that Kool Vent products installed on these roofs were "prepared roofing".

Three expert witnesses were heard in support of the plaintiff's contention that the goods known as "Kool Vent Awnings, Canopies, Marquees and Umbrellas" were not "prepared roofing".

Mr. Octave Simard, superintendent of a firm of specialized tinsmiths and roofers, with a personal experience of 43 years in the trade, states that many materials may be used as roofing material, but those generally used were sheet metal, copper, zinc, aluminum, paper, felt, shingles and tiles; that when properly employed they could meet the prerequisites of a roof, that is to say that they would cover the upper part of a building in a way that it would be water, snow, sleet and air proof. He admitted that the Kool Vent product could be used for roofing a building but thought it would not be waterproof or could not resist the action of melting snow, ice or sleet. After looking over the exhibits he could not agree that the installations made by the defendant were roofs and that they are known to the trade and the public as awnings.

Mr. Clodomir Forest, professional engineer with thirty-five years' experience and director of works for a large construction firm, states that installations over doors, windows, balconies and stairs are not roofs and that they are known to the trade and the public as awnings, canopies, marquees and were only accessories to a building, generally added to a completed building for some added comfort. What the trade and public call a roof is the inner structure and the material built over it, covering buildings to protect them against all weather conditions but not to protect the sides of a structure. He does not believe that the aluminum sheets as processed by the defendant could be considered as roofing material meeting the necessary requirement to make a proper roof and were not considered as such in the ordinary sense given to the words "prepared roofings". In his opinion the words "prepared roofings" would apply to what

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was known to the public as ready roofing, which is a composition of paper or felt soaked or seeped and covered with bitumen and a mineral substance. This view of prepared or ready roofings was shared by witness Roland Fortier who represents a firm dealing in ready roofings. He says that prepared roofings are composed of a felt saturated in a mixture of asphalt and tar and covered with asphalt and very fine crushed stone on one side.

Before arriving at a conclusion as to the meaning of the words to be interpreted it may be useful to refer to the definitions of "roof" and "roofings" found in some of the recognized dictionaries. I will mention only those definitions that are pertinent to the solution of our problem.

The Imperial Dictionary of the English Language, vol. 3, p. 726.

Roof—1. The cover of any house or building, irrespective of the materials of which it is composed. Roofs are distinguished, 1st, by the materials of which they are mainly formed, stone, wood, slate, tile, thatch, iron, etc., 2nd by their form and mode of construction of which there is a great variety, as shed, curb, hip, gable, pavilion, ogee and flat roofs. The span of a roof is the width between the supports; the rise is the height in the centre above the level of the supports; the pitch is the slope or angle at which it is inclined . . .

2. That which corresponds with or resembles the covering of a house, as the arch or top of a furnace or oven, the top of a carriage, coach, car, etc.; an arch, or the interior of a vault; hence, a canopy or the like.

Shorter Oxford English Dictionary, p. 175.

Roof—1. The outside upper covering of a house or other building; also, the ceiling of a room or other covered part of a house, building.

Roofing—1. The act of covering with a roof; material used or suitable for roofs; that which forms a roof or roofs.

Webster's New International Dictionary, 2d ed., pp. 2165-2166.

Roof—1. The cover of any building, including the roofing and all the materials and construction necessary to carry and maintain the same upon the walls or other uprights.

Roofing—(*a*) Act of covering with a roof; (*b*) Materials for a roof, or forming a roof.

Encyclopaedia Britannica, 1952, volume 19, p. 527.

Roofs—A roof is the covering of a structure. Its chief purpose is to enclose the upper parts of a building as a protection against wind, rain and snow.

In my view, the meaning which is to be found in these definitions is that a roof is the cover of a house, a building or a structure. Everybody understands what a house or building is. As to a structure: according to the dictionaries above cited, a structure is a building or edifice of any kind

but chiefly a building or edifice of some considerable size and imposing appearance. It will be noted that the expert witnesses heard for the plaintiff assert that in their opinion a roof is the covering of a building or edifice. It seems to me that in ordinary language the word roof is related to a structure, building or house and that it is understood by the public to have that meaning. I do not believe that the words awning, canopy, marquee or even covering can be construed in common language to mean a roof. To say that a doorway, a window, an outside stairway or even a balcony or patio has a roof, in my mind does not give to the word roof the meaning it has in common language or the meaning given to it by the public. The words awning, canopy and marquee are well understood by the trade and public to be coverings over doorways, windows, stairways, etc., and properly so.

Having arrived at these conclusions, it now remains to determine whether the goods sold by the defendant can be considered as "prepared roofings". There is no doubt in my mind that the materials employed in the processing of the above articles may be used as roofing material. But were they prepared for roofing? The evidence is to the effect that the material is processed to make certain specific finished articles. These goods, in the ordinary course of the defendant's operations, are made out according to the specifications laid down in the order received from the customer, completed at the plant and sent to their destination, where they are installed as units or parts of units according to size by its employees. They are not prepared specially as roofing materials but prefabricated into awnings, canopies, marquees and umbrellas. In one instance only was a roof covered with these specially processed aluminum sheets. This was brought in evidence as an example to show that it could be done and that the Kool Vent product could be used in that way. It did establish that the goods could be considered as roofing material, but did not prove that the goods manufactured and sold by the defendant as mentioned in plaintiff's statement of claim were produced as "prepared roofings" within the meaning of the Act or that the articles and materials used were used exclusively in the manufacture or production of the aforementioned building materials.

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In my mind, the words "prepared roofings" were well explained by the witnesses and I believe they mean materials such as paper and felt, specially prepared for roofing. They are processed or treated in a way that makes them capable of resisting the weather. These materials are generally manufactured and sold in rolls or sheets and may be installed on roofs by an uncomplicated procedure requiring very little skill. The felt or paper ir ordinarily saturated in a bituminous preparation and when affixed is covered with asphalt or tar and sprinkled with sand or very fine crushed stone. There may be other prepared roofings with which I am not familiar, but the above will suffice to illustrate what I think is the meaning of "prepared roofings", and the defendant's goods do not fall within that meaning.

When a taxpayer claims the benefit of an exemption, to succeed he has to prove that his claim comes clearly within the provisions of the exempting section—this is a well established rule. The following decisions leave no doubt as to the principle.

The Credit Protectors (Alberta) Limited v. *Minister of National Revenue* (1). At page 279 Cameron J. states:

> The onus is on the appellant to prove that it clearly comes within the provisions of the exempting section 7A. It seeks the benefit of an exceptional provision in the Act and must comply with its context. The principles of construction to be applied are well established. In *Wylie* v. *City of Montreal* (1885) 12 S.C.R. 284 at p. 386, Sir W. J. Ritchie C.J. said:
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> > "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."

Lumbers v. *Minister of National Revenue* (2), where it is stated that the rule to be applied is as follows:

> In respect of what would otherwise be taxable income in his hands, a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act. He must show that every constituent element necessary to the exemption is present in his case, and that every condition required by the exempting section has been complied with.

(1) [1947] Ex. C.R. 44. (2) [1943] Ex. C.R. 202.

W. A. Sheaffer Pen Company of Canada Limited v. *The Minister of National Revenue* (1). At page 255 (in fine) Thorson J. says:

> In *Lumbers* v. *Minister of National Revenue* [1943] Ex. C.R. 202; [1943] C.T.C. 281, which was affirmed by the Supreme Court of Canada [1944] S.C.R. 167; [1944] C.T.C. 67, I held that it is a well established rule that the exemption provisions of a taxing Act must be construed strictly and cited the statement to that effect of Sir W. J. Ritchie, C.J., of the Supreme Court of Canada in *Wylie* v. *City of Montreal* (1885) 12 S.C.R. 384 at 386, where he said:
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> > "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;"

In this case the defendant seeks the benefit of an exemption provision in the Excise Tax Act. It was his duty to prove that his goods came clearly within the provisions of section 89 (1) and Schedule III of the Act. He failed to do so.

For the reasons above, my findings are that the goods mentioned in this case as awnings, canopies, marquees and umbrellas, when installed, could not be considered in ordinary and common language as "roofs" nor that the processed materials to obtain these finished articles or products could fall within the meaning of "prepared roofings" and were subject to the consumption or sales tax provided by section 86 (1) of the Excise Tax Act, R.S.C. 1927, c. 179.

Notwithstanding the defendant's admission in writing that if the sales of the goods were taxable under the provisions of the Act the defendant would be liable for the taxes claimed by the plaintiff, a dispute arose at the trial concerning the percentage of manufacture and sale of the different articles or goods in question. This was important, because each class of items, such as awnings, canopies, marquees, etc., was taxed on a different basis and the percentage of manufacture and sale would have to be determined to establish the exact amount of taxes payable.

It was agreed by the parties and ordered by the Court that the matter of establishing the percentage of manufacture and sale of the different items mentioned in the plaintiff's statement of claim would be referred to the Registrar of the Court. The Registrar will report to the

(1) [1953] Ex. C.R. 251.

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Court the quantities of the different goods or articles, the amounts of sales tax to be paid on awnings, canopies, marquees and umbrellas, together with the amount of penalties in respect thereof up to November 30, 1953, and such additional penalties as may have accrued from November 30, 1953, to this date.

There will, therefore, be judgment that the plaintiff is entitled to be paid by the defendant the amount of the sales tax payable on the sale price of the goods sold by it in the period between May 1, 1950 to May 31, 1953, together with the amount of penalties payable in respect thereof up to November 30, 1953. The plaintiff is also entitled to be paid such additional penalties as may have accrued thereon from November 30, 1953, to this date and computed in accordance with the provisions of section 106(4) of the Excise Tax Act. In the event of the parties not agreeing to the amount of taxes and penalties reported by the Registrar to the Court, these matters may be spoken to.

The plaintiff is also entitled to costs after taxation.

Judgment accordingly.