

BETWEEN:

HIS MAJESTY THE KING on the }
 Information of the Attorney-General } PLAINTIFF;
 of Canada, }

1949
Apr. 28
May 4

AND

REUBEN SHORE DEFENDANT.

*Revenue—Excise Tax Act, R.S.C. 1927, c. 179, ss. 2(c) (u), 86 (1) (a) (i)—
 Action for payment of sales tax—Goods manufactured for a person
 by another and sold by the former—Person who holds a sales or other
 right to goods being manufactured on his behalf is the manufacturer
 or producer of the goods—“Manufacturer or producer”.*

- (1) (1926) R.J.Q. 43 K.B. 79. (4) (1933) 36 Q.P.R. 353.
- (2) (1940) R.J.Q. 78 S.C. 429. (5) R.J.Q. (1944) B.R. 83.
- (3) (1903) R.J.Q. 23 S.C. 399

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The action is to recover sales tax from defendant on goods manufactured for defendant by E. and M. pursuant to a contract and sold afterwards by the defendant himself who denies liability on the grounds he is not the manufacturer or producer of the goods and that he paid the sales tax to E. and M.

Held: That the defendant held a sales or other right to the goods being manufactured on his behalf and therefore was the manufacturer or producer of the goods.

2. That the defendant being the manufacturer or producer of the goods is liable for the sales tax thereon.

INFORMATION exhibited by the Attorney-General of Canada for the payment of sales tax under the provisions of section 86(1) of the Excise Tax Act, R.S.C. 1927, c. 179, as amended.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

J. W. Pickup, K.C. for plaintiff.

Louis Herman, K.C. for defendant.

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

CAMERON J. now (May 4, 1949) delivered the following judgment:

The claim herein is for the payment of sales tax under the provisions of section 86(1) of the Excise Tax Act, R.S.C. 1927, ch. 179, as amended. The defendant for many years has been a retail jeweler carrying on business at Toronto under the name of R. Shore, Merchandise Distributors. Sometime prior to June 7, 1946, he had seen a toy electric iron in the United States and conceived the idea of having it made up in Canada and distributing it there. On that date he entered into a contract (Exhibit 2) with English and Metcalf of Toronto (also known as Leyden Machine and Tool Company, but referred to hereinafter as English and Metcalf), the essential parts of which are as follows:

1. The Party of the First Part agrees to purchase from the Party of the Second Part, 25,000 Toy Electric Irons, at the price of forty-seven cents (.47c) per unit, complete boxed and constructed as per sample and according to Ontario Hydro Specifications, payable as follows:

\$2,000 deposit on order herewith, and the balance on completion of delivery of the order. The Party of the First Part agrees to pay in addition thereto, the sum of TWO THOUSAND (\$2,000) Dollars, on August 15, 1946, on completion of the dies which are then to be the property of the Party of the First Part.

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2. The Party of the Second Part agrees to supply the Party of the First Part with the said dies, and to commence delivery of the said merchandise on September 15, 1946, and deliver 1,000 units per day, thereafter until the said order is filled.

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3. Time is to be the essence of the contract.

4. Understood that these irons will be manufactured solely for use of the party of the first part.

By a supplementary agreement dated August 9, 1946 (Exhibit 2), the following provision was added to the first contract:

1. It is understood and agreed between the Parties hereto that the said Parties of the Second Part shall not in any manner whatsoever either directly or indirectly through themselves or through any agent manufacture a similar article of merchandise as mentioned in the said Indenture of Agreement for a period of two years after the completion of the contract set forth in the said Indenture of Agreement.

Pursuant to the said contract a very large number of the toys were completely manufactured by English and Metcalf and delivered to the defendant who sold them to departmental stores and jobbers. The plaintiff alleges that the defendant as producer or manufacturer of the goods so sold by him is liable to a sales tax of eight per cent on the sale price of such goods as provided by section 86(1) (a) (i) of the Act, which is 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) hereof, 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.

It is admitted that if the defendant is liable for such sales tax, the amount claimed in respect thereof is correct. The defendant, however, denies all liability, alleging that he is not the manufacturer or producer of the toys. He submits that English and Metcalf were the manufacturers or producers of the goods and as such were solely liable for payment of the sales tax. He alleges further that he paid sales tax to English and Metcalf and should not now be required to pay again.

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There can be no doubt, I think, that the defendant was the "manufacturer or producer" of the goods within the meaning of section 2(c) (ii) of the Act which is as follows:

2. In this Act and in any regulation made thereunder, unless the context otherwise requires,

(c) 'manufacturer or producer' includes

(ii) any person, firm or corporation which owns, holds, claims or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not.

It is clear from the contract and the evidence that English and Metcalf were manufacturing the toys for the defendant only. The dies to be used in their manufacture were made by English and Metcalf upon the instructions and at the expense of the defendant and they are still the defendant's property. English and Metcalf could not sell the toys to anyone but the defendant, and for a period of two years from the completion of the contract could not manufacture a similar article. At first the toys were painted but later, on the instructions of the defendant, were plated. On several occasions the prices to be paid therefor by the defendant to English and Metcalf were substantially increased beyond the price agreed upon in the contract due to the fact that the agreed price turned out to be insufficient to meet the costs of English and Metcalf. The defendant held a sales or other right to the goods being manufactured on his behalf by English and Metcalf and therefore, in my opinion, was the manufacturer or producer of such goods.

Reference may be made to *Palmolive Manufacturing Co. (Ontario) Limited v. The King*; *The King v. Colgate-Palmolive-Peet Co. Limited* (1). In that case a question arose as to whether the Ontario company which made the goods for the Canadian company, or the Canadian company which actually sold the goods, should be liable for the sales tax. Cannon, J., in delivering the judgment of the Court, said at p. 140:

The above authorities satisfy me that we must, as matters of fact, identify the producer of the goods and determine the real price received by such producer when selling them to the public for consumption.

In the instant case the producer of the goods was undoubtedly the defendant and as such he was liable for

the payment of the sales tax on the sale price of the goods when sold by him and computed in accordance with section 85(a).

As I have said, the defendant contends that he has already paid sales tax on these goods. It is significant, I think, that the contract between the defendant and English and Metcalf is silent as to which party should pay the sales tax. Exhibit A consists of a number of invoices rendered to the defendant by English and Metcalf and on which the words "sales tax included" appear. On some of these the words "Sales Tax Licence Number 5914" are typed and the defendant says that when negotiating the contract he saw the sales tax licence in the office of English and Metcalf. All the invoices as rendered were paid by the defendant. None of the invoices indicates the basis on which sales tax was computed by English and Metcalf or shows the sales tax as a separate item. In each case the defendant was billed only for the number of toys at the price agreed upon for their manufacture. In the absence of any clause in the contract requiring English and Metcalf to pay the sales tax, I am quite unable to find that the defendant, merely by paying bills marked "Sales tax included," did, in fact, pay any sales tax whatever. In any event, being the producer of the goods he was not liable to pay sales tax to English and Metcalf and payment to them does not exonerate him from liability to pay the tax to the plaintiff.

English and Metcalf did pay the plaintiff a total of \$100 in respect of sales tax on the goods so made for the defendant and credit is given the defendant for such payment, as well as for an audit credit of \$27.13.

My finding, therefore, is that the defendant is liable for the amount of sales tax claimed by the plaintiff, namely, \$3,370.10, plus penalties imposed by section 106(4) amounting to \$516.21 as of November 2, 1948, plus two-thirds of one per cent on \$3,370.10 from November 2, 1948, to this date, an additional amount of \$134.80, and being in all the sum of \$4,021.11.

The plaintiff claims a further sum of \$2.00 under the provisions of section 95(1) of the Act. Having found that the defendant was a manufacturer or producer during the

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year in question, and it being admitted that in that year he did not take out a licence as required by the subsection (although he did for the following year when requested to do so) he is liable for the payment of the licence fee, which by regulation was fixed at the sum of \$2.00.

The plaintiff, therefore, is entitled to judgment against the defendant for the sum of \$4,023.11, and costs to be taxed.

Judgment accordingly