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JANIN WESTERN CONTRACTORS LIMITED

v.

**THE MUNICIPAL ASSESSOR
FOR THE VILLAGE OF MASSET et al**

Supreme Court of British Columbia (No. 16826/72)

Before: CHIEF JUSTICE J.O. WILSON

Vancouver, June 28, 1973

I.G. Nathanson for the Appellant
K.C. Murphy for the Respondent

Reasons for Judgment

The plaintiff asks for a declaration that certain taxes imposed by the Village of Masset in respect of improvements brought onto Crown property at Masset, and occupied by the plaintiff, were invalidly and illegally claimed and that the assessment and taxation notices in respect thereof should be set aside.

The subject of the taxation was certain buildings bought by the plaintiff on to land the fee of which is in Her Majesty the Queen in the right of Canada, and used by the plaintiff during the construction on the said land of housing at the Canadian Forces base at Masset. The buildings were assessed as improvements occupied by the plaintiff.

The buildings were brought on to the land at the beginning of the construction and removed when construction was complete. Taxes were assessed against the plaintiff for the years 1970, 1971 and 1972, the construction period.

The terms upon which the buildings were allowed upon the land and upon which the plaintiffs occupied them are set out in a contract between Her Majesty and the plaintiff dated July 4th, 1969. Under the heading of "General Conditions" in this contract is clause 13:

> "13. (1) All materials and plant and the interest of the Contractor in all real property, licences, powers and privileges acquired, used or provided by the Contractor for the work shall from the time of being so acquired, used or provided, become and they are the property of Her Majesty for the purposes of the work and they shall continue to be the property of Her Majesty
>
> (a) in the case of materials, until incorporated in the work or until the Engineer indicates that he is satisfied that they will not be required for the work, and

(b) in the case of plant, real property, licences, powers and privileges, until the Engineer indicates that he is satisfied that the interest vested in Her Majesty therein is no longer required for the purposes of the work.

(2) Material or plant that is the property of Her Majesty by virtue of this section shall not be taken away from the site of the work, or used or disposed of, except for the purposes of the work, without the consent in writing of the Engineer."

Clause 1 of General Conditions defines plant as follows:

"(*e*) 'plant' includes all animals, tools, implements, machinery, vehicles, buildings, structures, equipment, articles and things required for the execution of the work;"

The buildings assessed were provided by the contractor. On the completion of the contract they were duly released by the Engineer pursuant to Section 13(b) and were immediately removed from the Crown land by the plaintiff.

The buildings were assessed for both Municipal and School taxes. It is conceded that they are improvements for both Municipal and School tax purposes.

Section 335 of the *Municipal Act* is relied on by the defendants as establishing the right to assess and tax. I cite applicable parts of that section:

"(1) Lands the fee of which is in the Crown, or in some person or organization on behalf of the Crown, but which are held or occupied otherwise than by or on behalf of the Crown are, with the improvements thereon, liable to assessment and taxation in accordance with this section, but this section does not apply to make liable to taxation lands or improvements which would otherwise be exempt from taxation under clauses (b) to (1), inclusive, of sub-section (1) of section 327, or under a by-law adopted under section 328, or a highway occupied by a company mentioned in Part XIV.

(2) The lands referred to in subsection (1) with the improvements there on shall be entered in the assessment roll in the name of the holder or occupier thereof, "whose interest shall be assessed at the actual value of the lands and improvements.

(5) This section applies, mutatis mutandis, to improvements owned by, leased to, held, or occupied by some person other than the Crown, situate on lands the fee of which is in the Crown, or in some person or organization on behalf of the Crown."

The parties agree that the provisions of the *Municipal Act* will determine liability not only for Municipal taxation but for taxation under the *Public Schools Act*.

It is agreed that the definition of "occupier" given in Section 2 of the *Municipal Act* is applicable only to lands and not to improvements and hence is not relevant here.

It is, however, clear that the plaintiff did occupy the improvements during the period for which taxes are claimed.
My first concern is with the decision of the Court of Appeal in *Sammartino* v. *Attorney-General of British Columbia*, (1972) 1 W.W.R. 24. In that case Bull J.A., speaking for the majority of the Court, upheld taxation imposed on an "occupier" of Crown lands pursuant to a provision which said that "every occupier of Crown land shall be assessed and taxed on the lands and improvements thereon held by him as an occupier". Bull, J.A., at page 37, after referring to *Surrey et al* v. *Peace Arch Enterprises Ltd. et al*, (1970) 74 W.W.R. 380, said:

"I cannot see that that case has any application here. The Legislature has not purported to legislate in any way with respect to 'lands reserved for the Indians' or their use. The tax

> legislation is not concerned with Indian lands but merely imposes a tax personally on an occupier thereof with respect to his occupation. In my opinion the appellant's submission is without substance and I reject it."

This makes it clear that in the *Sammartino* case a tax was imposed personally on the occupier of Indian lands and was upheld. The tax imposed in the case before me is on the improvements. I say that because the right to tax can only be sustained by a reference to s.s. 5 of Section 335 and that section refers to "improvements owned by, leased to, held, or occupied by some person other than the Crown, situate on lands the fee of which is in the Crown, or in some person or organization on behalf of the Crown". It is, of course, true that the tax is sought to be imposed on a person, the plaintiff, and indeed, as pointed out by Lord Reid in *Bennett & White* v. *Sugar City* (1951) 3 W.W.R. 111, ". . . no tax literally falls on 'property' only as opposed to 'persons'. All taxes are physically paid by persons." But the subject of the tax is, by s.s. 5 of Section 335, the improvements and not, as in the *Sammartino* case, the personal right of occupation.

The improvements were, by the terms of the contract, the property of the Crown at all times when a tax was imposed in respect of them. They were occupied by the plaintiff. They could only be so occupied by leave or licence of the owner, the Crown. But by clause 13 of the contract it was provided that "the interest of the Contractor in all . . . licences, powers and privileges acquired, used or provided by the Contractor for the work" should be the property of Her Majesty.

It appears to me that if Her Majesty has given any licence to the plaintiff to occupy these improvements Her Majesty has, by the above provision, taken it away and that therefore the occupancy by the plaintiff, based on no licence or privilege, could only have been as an agent of the Crown.

In an admirable study of this subject, "The Allocation of Taxing Power", by G.V. La Forest of the Faculty of Law at the University of New Brunswick, the author states (page 157):

> "But a *property* tax cannot be levied against a person in respect of Crown property if he has no legal interest in it . . .".

The cases cited in support of this proposition are *Fraser* v. *City of Montreal*, (1914) 23 Que.K.B. 242, *Stinson* v. *Middleton Township*, (1949) 2 D.L.R. 328, *Bennett & White* v. *Sugar City*, (1951) A.C. 786. From the *Stinson* case I cite this observation by Laidlaw I.A. at page 338:

> "(1) There is a substantial difference between the class of case where a person is permitted to occupy premises, and the class where a person is required to occupy them for the performance of his services or occupies them in order to their performance or because the occupation is conducive to that purpose.
>
> "In cases of the latter class, apart from special circumstances, the occupation of the premises is considered in law to be the occupation of the master and not that of the servant."

Now here I say the plaintiff is on strong ground because not only does it occupy the improvements in order to the performance of services to the Crown and because the occupation is conducive to that purpose, but further it has re-assigned to the Crown whatever "interest" it held by way of licence to occupy the improvements for those purposes. It had no interest in the improvements and hence cannot be taxed in respect thereof. To sustain the tax would necessarily involve taxing Crown property.

There will be judgment for the plaintiff.