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**ASSESSOR OF THE MUNICIPALITY OF BURNABY**

**v.**

**SIMPSONS-SEARS LTD.,**
**TRITON CENTRES LTD.**

SUPREME COURT OF BRITISH COLUMBIA (NO. X4865)

BEFORE MR. JUSTICE J.S. AIKINS

Vancouver, August 13, 1973

Mr. R. R. Dodd, for the appellant
Mr. H. P. Legg, for the respondent

**Reasons for Judgment**

The Assessment Appeal Board, using the power given it by Sec. 51(1) of the *Assessment Equalization Act* (R.S.B.C. 1960 C. 18), has submitted questions of law for the opinion of the Court in the form of a Stated Case. Although not stated very explicitly in the Case, it appears, and was certainly common ground in argument, that the respondent Simpson-Sears Ltd. owns and operates a department store in the Municipality of Burnaby. The respondent Triton Centres Ltd. (now known as Trizec Equities Ltd.) owns a department store there as well which it leases to the T. Eaton Company. In 1971 Simpson-Sears acquired some National Cash Optical Font cash registers ("Font registers") and these were installed at the end of that year. They were assessed for the first time for school and hospital purposes only at the end of 1972. Machines of the same kind and make were installed in Triton's premises in 1972 and they, too, were assessed for the first time at the end of that year. The respondents appealed the assessments to the Court of Revision for the Municipality of Burnaby. The Court of Revision directed that the assessments of the respondents' Font registers be deleted from the assessment roll. The decision of the Court of Revision is dated the 13th of March, 1973. The assessor for the Municipality appealed to the Assessment Appeal Board. The Board embarked on the appeal on the 23rd of May, 1973, reserved its decision and stated the present case.

The facts I have given thus far are taken from paragraphs 1, 2 and 3 of the case. For the remaining facts given I now cite paragraphs 4 to 9 inclusive and 11 and 12 of the case. I have left out paragraph 10 which simply refers to the appropriate regulations and I have left out other references to copies of circular letters, etc., sent up with the case:

> "(4) In making his assessment the Assessor followed an assessability schedule supplied by the Assessment Commissioner of the Province of British Columbia. That assessability schedule showed that 'cash registers' were not assessable. This was the position that had prevailed since August 1967 and prevailed at the time of the hearing of this appeal. The Assessor did not assess 'cash registers' as improvements for the purpose of levying school and hospital rates.

(5) In November 1972 the Assessment Commissioner of the Province of British Columbia issued an amendment to the assessability schedule indicating that 'automated registers (cash)' were assessable for the purpose of levying school and hospital rates. The Assessor thereafter assessed the Respondents in respect of these National Cash Optical Font cash registers (under the description 'automated registers (cash)') but did not assess any 'cash registers' in the Municipality.

(6) A large number of 'cash registers' in the Municipality and School District of Burnaby were owned and operated by department stores, shops and grocery chains. Many of these stores were competitors of the Respondents and sold goods and merchandise also sold by the Respondents.

(7) The 'cash registers' and the National Cash Optical Font cash register are improvements for the purposes of levying school taxes. The 'cash register' is very similar to the National Cash Optical Font cash register both in function and use. Both are electrically operated, are generally operated in one location, are used to receive cash and give change and both enable the sales personnel to give customers receipts for purchases.

(8) The basic difference between the 'cash register' and the National Cash Optical Font register is that the latter uses a tape which produces a stylised script. This tape is manually removed from the register and must be processed by a scanner prior to its adoption to a computer. The scanner and computer used by the Respondents are situated outside the Municipality of Burnaby.

(9) In making his assessment the Assessor relied upon the assessability schedule issued by the Assessment Commissioner hereinbefore referred to, as well as certain directives contained in circular letters dated December 2, 1965; May 17, 1966; August 1967 issued by the Assessment Commissioner.

(11) On the hearing of the appeal the Respondents submitted that the Court of Revision decision should be upheld on the grounds that the Assessor was not entitled to assess the Respondents' National Cash Optical Font cash registers in view of the fact that the Assessor had not assessed 'cash registers' in the Municipality or School District of Burnaby.

(12) The Board reserved judgment on its decision and respectfully submits this Case under the provisions of Section 50 (1) of the *Assessment Equalization Act* for the opinion of the Supreme Court of British Columbia."

The following questions are submitted:

"(1) Was the Assessor required by law to follow the directives of the Assessment Commissioner contained in the attached letters and assessability schedules and

(a) assess the Respondent's National Cash Optical Font cash registers ('automated registers (cash)') as improvements for the purpose of levying school and hospital rates?

(b) not assess 'cash registers' as improvements for the purpose of levying school and hospital rates?

(2) Did the Assessor discriminate in law against the Respondents in assessing National Cash Optical Font cash registers of the Respondents as improvements for the purpose of levying school and hospital rates when he did not assess all other cash registers in the Municipality and School District of Burnaby?

(3) Was the assessment contrary to the provisions of Section 46 of the *Assessment Equalization Act*?

(4) If the answer to question (2) or (3) is in the affirmative ought the Board to hold as a matter of law that the 'Court of Revision was correct in directing the Assessor to delete from his roll the said assessments against the National Cash Optical Font cash registers of the Respondents?"

Improvements are defined in Section 2 of the *Assessment Equalization Act*. I cite the portion of the definition relevant to the present case:

"2. In this Act, unless the context otherwise requires,. . .

'Improvements' includes

(a) all buildings, fixtures, machinery, structures, and similar things erected or placed in, or upon, or under or affixed to land or to any building, fixture, or structure therein, thereon, or thereunder, and, without restricting the generality of the foregoing, . . . includes fixtures, machinery, and similar things of a commercial or industrial undertaking, business, or going concern operation so erected, affixed, or placed by a tenant, except those exempted by regulations of the Lieutenant Governor in Council."

Regulation 4 of the regulations made under the Act deals with "Exemptions of Landlord and Tenant Improvements". Regulation 4-2 exempts certain "industrial landlord and tenant improvements" generally from assessment; these are described in eleven lettered clauses, (a) to (k). I now cite Regulation 4-2 stripped of those clauses and provisions of clauses which are not relevant to the present matter:

"4-2. Commercial and industrial landlord and tenant improvements generally described as follows shall also be exempt from assessment under the Act:

(a) machinery and equipment which are portable in use and are not restricted in their places of work to fixed sites or parcels of land (e.g. *typewriters and adding machines*, bench hand tools. . . but this exemption shall not extend to such items of machinery and equipment which remain stationary or immobile in a particular position in the performance of their specific commercial or industrial purposes, whether the machinery and equipment are mounted on wheels, held in place or held stationary by their own weight, or affixed:

(b) office furniture: . . .

Where there is any doubt that improvements are assessable or exempt, the ruling of the Commissioner, subject to the right of appeal therefrom of a person to the Lieutenant-Governor in Council, shall be final."

I have added emphasis to the words in Regulation 4-2 (a), "typewriters and adding machines". These words were added to the section by Order in Council No. 3035 approved on the 4th day of November 1965. Clause (b) of Regulation 4-2 was altered by the same Order in Council. Clause (b) originally read "office furniture and machines:"; the words "and machines" were deleted by the just-mentioned Order in Council.

It is convenient to explain at this point that Counsel for the respondents does not contend that cash registers, including Font registers, are not assessable as improvements for levying school and hospital rates. Counsel agrees they are assessable. This is the argument given me for the respondents. Cash registers are not exempt from assessment by any regulation. They may therefore be assessed. A Font register is a cash register. The assessor assessed the

respondents' Font registers but did not assess any other cash registers. Counsel says that the assessor by assessing the respondents' cash registers and by not assessing any other cash registers owned by taxpayers in the Municipality discriminated against the respondents and that such discrimination renders the assessment invalid by Section 46 (1) ( a) of the *Assessment Equalization Act*, or, that failing, on the application of common law principles.

I defer considering Counsel for the respondents' arguments further at this point because it is convenient to first consider an argument, anticipated by Mr. Legg for the respondents, and strongly relied on by Counsel for the Assessor which, if sound, would be determinative of the matter without it being necessary for me to consider the issue of discrimination. It appears plainly from the case stated that the Assessor in assessing the Font registers and not assessing other registers was following an assessability schedule prepared by the Assessment Commissioner and, no doubt, given to all assessors. Since August 1967 the assessability schedule showed that cash registers were not assessable for either general tax purposes or for school and hospital rates. This was the position at the time that appeal came before the Assessment Appeal Board (see paragraph 4 of Case). The page of the assessability schedule dealing with cash registers is attached to the Case as Appendix 1. In November 1972 (see paragraph 5 of the Case) the Assessment Commissioner issued an amendment under the heading "ASSESSABILITY SCHEDULE - ADDENDUM". This is Appendix II to the Case. The amendment creates a new category, "AUTOMATED REGISTERS (cash)" as not assessable for general tax purposes but as assessable for school and hospital rates.

Automated registers (cash) are clearly, in plain English, automated cash registers so, by the addendum, the Commissioner was attempting to create two categories of cash register, one which would be wholly exempt from assessment and one which would be assessable for school and hospital rates only.

There are three documents forming part of the material which can best be described as memoranda giving instruction and advice to assessors. These make up Appendix III to the Case. The first memorandum is dated December 2, 1965; the second May 7, 1966; and the third, August 1967. The first two memoranda say nothing at all about assessability schedules. The third memorandum contains the first reference to the assessability schedule. The last paragraph of this memorandum contains instructions about how to read the schedule which is in columnar form. The opening paragraph of the third memorandum is of considerable importance in relation to Mr. Dodd's argument for the Assessor. It is as follows:

> "As a guide to Assessors in the classification of various items as to their assessability, the following schedule has been prepared. The schedule has been divided into two main classifications with column headings as follows: . . ."

Mr. Dodd first points to the last sentence of Regulation 4-2 of the regulations, cited supra, but which I reproduce again for convenience:

> "4-2. Where there is any doubt that improvements are assessable or exempt, the ruling of the Commissioner, subject to the right of appeal therefrom of a person to the Lieutenant-Governor in Council, shall be final."

Mr. Dodd then says that the memorandum of instruction dated in August 1967 with the accompanying assessability schedule (Appendix I) and the subsequent amendment to the assessability schedule (Appendix II) is a ruling or are rulings made by the Commissioner pursuant to the power given him by Regulation 4-2, that assessors are bound thereby and the only right of appeal is to the Lieutenant-Governor in Council.

The argument is that under Regulation 4-2 the Commissioner may make what Mr. Dodd calls "advance rulings", without any specific question being put to him for a ruling. The first question to be resolved on this argument is whether the memorandum of August 1967 with the assessability

schedule (Appendix I) and the later amendment (Appendix II) is "a ruling" on the assessability of the various things listed in the assessability schedule including cash registers and automated registers (cash). I am of the opinion that by issuing the documents just referred to the Assessor did not make any ruling or rulings.

I have reached the conclusion just stated for a number of reasons and I now set them out. I first refer to Regulation 4-4. This reads:

> "4-4. Where, in the opinion of the Assessor, landlord and tenant improvements do not fall in the classes of exemption described in Section 4-2, he shall submit in writing a list thereof to the Commissioner for his ruling."

The Assessor in the particular situation described in Regulation 4-4 must submit a list of improvements to the Commissioner for the Commissioner's ruling. I am inclined to think that Regulation 4-4 and Regulation 4-2 read together show that a ruling by the Commissioner must be made in response to a request for a ruling and in respect to specific improvements given in the request for a ruling. I need not, however, explore further whether the Commissioner is confined to ruling only in response to a request under Regulation 4-4, because other aspects of the matter lead me to conclude that the papers I am considering do not constitute a ruling or a series of rulings.

I have been unable to find a definition of "ruling" in either Black's Law Dictionary or in Lord Jowett's Dictionary. However, the shorter Oxford dictionary gives, inter alia, this definition:

> "2. a judicial decision; also gen. an affirmative pronouncement."

The primary reason why I do not think that the memorandum of instruction of August 1967 can be considered a ruling is that ex facie that memorandum is not a ruling. It is plain that it does not purport to be a ruling; there is no mention of rule or ruling. Quite to the contrary, it is not a ruling because the opening words are:

> "As a guide to assessors. . .".

Two further points are worth noting. Firstly, the fact that Regulation 4-2 gives an appeal to the Lieutenant-Governor in Council indicates that the intent was that the Assessor was to exercise his power to make rulings in either a judicial or a quasi-judicial way. This conforms to the definition I have given of a ruling as being "a judicial decision" and militates against the interpretation advanced by Mr. Dodd, that the Commissioner is free to make advance rulings on any matters in respect to which he thinks rules should be made. Secondly, if Mr. Dodd's contention is correct, it would give rise to this unsupportable situation. The Act, by Section 56, gives the Lieutenant-Governor in Council power to make regulations. Regulation 4-2, made pursuant to Section 56, then gives the Commissioner the power to make rulings. If Mr. Dodd's contention is correct and Regulation 4-2 gives the Commissioner power to make advance rulings, that is to say, to make a ruling or rulings whenever he thinks some matter or matters should be regulated by rule, then in substance, although perhaps not in terms, the Lieutenant-Governor in Council has delegated a power to make regulations to the Commissioner. A delegation by the Lieutenant-Governor in Council of the power to make regulations given by the Legislature to the Lieutenant-Governor in Council is invalid because a delegated power cannot be delegated: delegato non potest delegare. Unless driven to do so by the plain meaning of the language of the statute or regulation, the Court should not construe a statutory provision or a regulatory provision in such a way as to render the provision invalid. There is no sensible reason that I can see on the language employed in Regulation 4-2 to construe the last sentence of the regulation as the delegation of a power which the Lieutenant-Governor in Council lacked power to delegate. It is unnecessary for the purposes of the present case to consider the exact scope of the Commissioner's power to make rulings except to say that it does not include a power to make general rulings in advance in respect to

any matter or matters the Commissioner thinks should be regulated by rule because such a power is in substance a power to make regulations.

By Section 7, clause (b), the Commissioner is directed, in mandatory terms, and empowered to: "give advice and assistance to assessors for the purpose of securing uniformity in land and improvement assessments within the Province;". In my opinion the memorandum of August 1967 and the assessability schedules cannot be put on a higher footing than advice and assistance given by the Commissioner to assessors. The memorandum and assessability schedules were given to guide assessors not to bind them. They are not rulings. This being so, the respondents were not confined by Regulation 4-2 to an appeal to the Lieutenant Governor in Council and they properly appealed to the Court of Revision. Because the assessments were not made pursuant to a ruling made by the Commissioner which the Assessor was bound to follow, the Assessment Appeal Board is free to consider the propriety of the assessments on their merits.

I now turn to the submission for the respondents that the assessments cannot stand because the assessments are discriminatory under Section 46 (1)(a) of the *Assessment Equalization Act*. Section 46 (1)(a) is as follows:

> "46. (1) The amount of the assessment of real property appealed against may be varied by the Board where, in the opinion of the Board, either
>
> (a) the value at which an individual parcel under consideration is assessed does not bear a fair and just relation to the value at which similar land and improvements are assessed in the municipal corporation or rural area in which it is situate;".

The word "similar" in Section 46 (1) (a) was substituted for the word "other" by Chapter 5 of the Statutes of B.C. 1973 {Bill 71) retroactive to 31st December 1972.

The Legislature has used the words "real property" in the first line of Section 46 (1). At first blush it might appear that the section applies to real property in a strict sense only and does not apply to improvements. This is not the case, however, because Section 2 of the Act defines real property in this way: '"real property' includes land and improvements as defined in this Act;".

The essential premise on which the respondents' case rests is that Font registers are cash registers. Put simply: if a Font register, although similar to a cash register, is not the same thing as a cash register, then there can be no discrimination in assessing the respondents Font registers and not assessing other taxpayers' cash registers. It appears from the Case that there are a large number of cash registers in the Municipality: see paragraph 6 of the Case. The Board in paragraphs 7 and 8 of the. Case states the difference between Font registers and what, for lack of a better term, I shall call "ordinary cash registers". Font and ordinary cash registers are "electrically operated, are generally operated in one location, are used to receive cash and give change and. . . enable sales personnel to give customers receipts for purchases".

The only difference, on the Case as given me, is that the Font register uses a tape which produces a stylized script. The tape can be removed manually. The tape, if processed by a scanner, may be used with a computer. It is said in the Case that the scanner and computer used by the respondents are located outside the Municipality. The locality of the scanner and computer is important only because it shows that such devices are not an integral part of a Font register.

The Font register performs the same function and is put to the same use as an ordinary cash register. The fact that the tape can be read and recorded by a scanner and computer working in combination does not alter the essential character of the machine any more than would be the case if the tape recorded the figures in Chinese characters so that the tape, when removed, could be scanned and recorded by an accountant who worked with Chinese numerals. No doubt many sophisticated modifications could be made to an ordinary cash register. For example, a cash register could doubtless be rigged so that the amount of a purchase was translated to words on

tape and broadcast audibly to a purchaser. The machine, in my view, would still be a cash register. I find that Font registers are cash registers because, in my view, there is no sensible basis on which they may be classified as not being cash registers.

What then is the position under Section 46 (1 )( a)? It is simply this. The amounts of the assessments of the lands and improvements of the respondents include the value of their cash registers. The amounts of the assessments of the lands and improvements of other taxpayers in the Municipality who have cash registers do not include the value of cash registers owned by those other taxpayers. The assessability of cash registers, aside from the so-called "rulings" of the Commissioner in the assessability schedules, was not argued. Mr. Legg conceded that cash registers were assessable. Mr. Dodd did not argue to the contrary and the point is not raised in this case. Assuming that cash registers are assessable, then it is plain in my view that the amounts of the assessments of the respondents' lands and improvements do not bear a fair and just relation to the values at which the lands and improvements of other taxpayers, having cash registers, have been assessed. This is so because the value of assessable cash registers has been included in the amounts of the assessments of the respondents' lands and improvements but the value of assessable cash registers has not been included in the amounts of the assessments of the lands and improvements of other taxpayers who have cash registers. I hold that this is discrimination and that it falls within Section 46 (1)(a).

For these reasons I give the following answers to the first, second and third questions propounded for the opinion of the Court. The first question is answered in the negative. The second question is answered in the affirmative. The third question is answered in the affirmative.

I have had some concern about the fourth question because at first blush it looks as if the Board is asking the Court to decide the disposition of the whole appeal to the Board. However, the question is confined to issues of law raised in the Case itself, without reference to extraneous factual matters which are for the consideration of the Board. I think I may properly answer the fourth question. That question is answered in the affirmative.

The respondents will have costs.

The Court must, under Section 51 (6) of the Act, cause the opinion of the Court to be remitted to the Assessment Appeal Board. I direct the District Registrar to immediately send this opinion to the Board.