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ASSESSMENT COMMISSIONER

v.

WOODWARD STORES LIMITED
and
CHEVRON CANADA LIMITED
and
BRITISH COLUMBIA FOREST PRODUCTS LTD.

Supreme Court of British Columbia (A81002, A81003, A810099) Vancouver Registry

Before: MR. JUSTICE D.E. ANDREWS

Vancouver, February 10, 1981

John E.D. Savage for the Appellant
Brian J. Wallace for the Respondent

Reasons for Judgment March 25, 1981

The appellant, the Assessment Commissioner of British Columbia, has caused the Assessment Appeal Board (the Board) to state a case for the opinion of this Court pursuant to s. 74 of the *Assessment Act*, R. S. B. C. 1979, c. 2 1.

With respect to the respondents, Woodward Stores Limited and Chevron Canada Limited, the decisions appealed from were handed down by the Board on November 26, 1980. With respect to the respondent, British Columbia Forest Products Ltd., the decision appealed from was rendered by the Board on December 3, 1980. The above decisions in effect allowed the appeals by the respondents herein against the assessment of their respective properties. Because the legal issue between all three respondents and the appellant is essentially the same, the three cases stated are being dealt with together.

The issue concerns whether various pieces of property are " 'improvements' for purposes other than for general municipal and Provincial taxation purposes" within s. 1 of the *Assessment Act*. During the course of argument counsel agreed the only items in issue in the present proceedings are as follows (the following descriptions are taken from the cases as stated by the Board):

> "(1) WOODWARD STORES LTD.:
>
> *Class 2*
>
> Item 2 -NCR Cash Registers.
> Item 3 -Mohawk 2400-Mini computer, Key Stations and Key to Disc System.
> Item 3A -Mohawk 2400 Key Stations.
> Item 3B -Mohawk Key Entry (connected to Item 3).
> Item 5 -Norand NT95 Receiver and Mohawk 6405 and 6415 Data Recorder.
> Item 5A -Norand NT 95 Receiver.
> Item 5B -Norand NT 95 Receiver.
> Item 12 -Memorex 1377.
> Item 16 -Memorex 1377.

Item 16A-Memorex 1377.
Item 28 -Telex Police.

Note: Common Characteristics

(a) With the exception of Item 2 (NCR Cash Registers) which are held in place by own weight on counters, *all* held by own weight on, or fixed to, wheeled tables or desks.

(b) All are easily moved about by one person lifting or on wheeled tables.

(c) All derive power by plug-in to 110 volt or 220 volt systems.

(d) Some of these items are also connected to telephone lines and by coaxial or heavy cable to the computer.

Class 4 - This item is the Sweda 80 computer which is located in a separate room from the other equipment. It must operate in an air-conditioned environment of office building standards but does not otherwise require a special environment. It is connected to the cash registers throughout the store by means of wiring and operates on a 220 volt electrical power. In view of the number of electrical lines connecting it to the various cash registers, and other equipment, it is difficult and time-consuming to move. The room in which it is stationed has a raised floor with wiring under it and a special electrical supply to prevent interference. The room has special locks for security purposes. Once the computer is set up and in operation it is only moved to provide increased efficiency or for replacement.

Class 5

Item 7 -Telex 6420-Tape Drive Model 5.
Item 8 -IBM 360/30.
Item 9 -IBM 3350.
Item 10 -Telex 5312-Disk Drive.
Item 11 -IBM 4341.
Item 13 -Telex 6410.
Item 14 -Memorex 1270 Controller.
Item 15 -Telex 5403 Line Printer.

Note: Common Characteristics

(a) These items have the common characteristics of connection to many lines or cables rendering them more difficult to move for that reason alone.

(b) Apart from above, all are resting by own weight not fastened either to table or floor and some are on wheels for ease of movement.

Class 6 - Xerox 9200

Note: Characteristics

This heavy item is assembled in the room in which it operates by joining three component parts. It rests on floor by its own weight and is plugged into both 110 volt and 220 volt power. It requires no special environment.

Rotating Counter

Note: Characteristics

This item not pictured in Exhibit No. 1 is a motor-driven revolving check-out counter. The motor is built into the counter and operated by plug-in to a 110 volt or 220 volt system. The counter rests by its own weight on the floor.

"(2) CHEVRON CANADA LTD.:

Class 3 -Bench Grinders and Similar Small Machines

Put on benches which are sometimes fastened to the garage building. Newer models are not fastened to the benches in any way, whereas some older models are bolted to the benches. Plugged into the benches to 110 volt power source. Almost all valve refacing machines are not bolted down but sit on wheeled carts which move to the vehicle being worked on.

Class 9- Overhead Lubrication Equipment

These are either bolted to overhead beams or on overhead track which is bolted to overhead beams. They are connected to air pressure outlets and to lubricants source. Once attached they would remain for the duration of the station's life."

"(3) BRITISH COLUMBIA FOREST PRODUCTS LTD.

It is difficult, if not impossible, to determine which property is disputed under this heading. Because of the conclusion reached herein, it is sufficient to note that this equipment is similar to the modular units set out above in the Woodwards' case.

By its decisions, the Assessment Appeal Board held the above described equipment and machinery are not "improvements" within s. 1 of the *Assessment Act* and directed the Assessor to remove same from the assessment roll.

Counsel for the appellant sought, at the outset of these proceedings, to have the stated case remitted to the Board so that certain additional questions might be included.

The appellant asked the Board to submit the following questions for the determination of this Court:

"(1) Did the Assessment Appeal Board err in law in holding that for an item to be 'placed' within the meaning of the definition of 'improvements' contained in the *Assessment Act*, R.S.B.C. 1979, c. 21, that the same must be placed with the intent or purpose that;

(a) it should remain in that position, and;

(b) that it should improve the properties of the freehold?

(2) Did the Assessment Appeal Board err in law in holding that a thing is placed only when it is an improvement in the sense of affecting the quality of something which is assessable?

(3) Did the Assessment Appeal Board err in law in concluding that machinery is placed only if the evidence discloses that the machinery improves or changes the quality of the land or improvements?

(4) Did the Assessment Appeal Board err in law in conflating the meaning of 'fixture' and 'placed' as they appear in the definition of 'improvements' in the *Assessment Act*?

> (5) Did the Assessment Appeal Board err in law in directing itself as to the meaning of 'improvements' in its reasons for decision?"

The Board however, chose not to include these and instead submitted only the following question for the opinion of the Court:

> "Did the Assessment Appeal Board err in law in holding that the subject machinery were not improvements as defined in section 1 of the *Assessment Act*, R.S.B.C. 1979, c. 21?"

Numerous authorities were cited by the appellant, all of which indicate that it is for the appellant in stated case appeals to frame the questions on which the Court's opinion is sought (see *R.* v. *Tarr* [1972] 5 W.W.R. 126 (B.C.S.C.) per Kirke Smith, J.; *R.* v. *Cross* (1978) 42 C.C.C. (2d) 277 (P.E.I.S.C.); *Re Celebrity Enterprises Ltd.*, [1976] 4 W.W.R. 502 (B.C.S.C.) per Bouck J.; and *The Arbutus Club* v. *Assessor of Area 09- Vancouver*, Van. Reg. No. A800302, September 9, 1980 per Bouck J.). On the basis of the above authorities and the principles contained therein, it is my view the appellant's contention is well founded.

The respondent argues the questions posed by the appellant are improper in that they are directed to the Board's reasoning and not the result reached. Both *The Arbutus Club*, *supra*, and *R.* v. *Beattie* [1968] 2 C.C.C. 55 (Ont.H.C.) were cited for the proposition that it is the conclusion only and not the reasoning of the Board that is relevant on an appeal by way of stated case. Here, in the words of Seaton, J., as he then was, "what the appellant has done is take statements from the reasons, isolate them, and put them in the form of questions to determine whether or not they are wrong". (*British Pacific Properties Ltd.* v. *Corp. of District of West Vancouver*, Stated Case 63, X977/68). In any event, for whatever reason, the Board took it upon itself to frame the questions to be submitted for opinion.

It is my view that although the appellant's position has merit, no useful purpose will be served by remitting this matter to the Board for amendment. To answer the question posed by the Board, the Court must interpret and apply the word "improvement" as defined in the Act. In the course of doing so, as will become apparent below, it will be necessary, at least by implication, to address the questions the appellant sought to pose. In view of the above, I turn now to a consideration of the merits of the stated case.

The primary legal question decided by the Board was that the property in dispute, the physical characteristics of which are set out above, did not constitute "'improvements' for purposes other than for general municipal and Provincial taxation purposes" as defined in the *Assessment Act*. The relevant portion of the definition provides as follows:

"'improvements' for purposes other than for general municipal and Provincial taxation purposes under the *Municipal Act*, *Vancouver Charter* and *Taxation (Rural Area) Act* includes

> (a) all buildings, fixtures, machinery, structures and similar things erected or placed in, on, under or affixed to land or to a building, fixture, or structure in, on, under or affixed to land and, without limiting the generality of the foregoing, includes aqueducts, tunnels other than mine workings, bridges, dams, reservoirs, roads, transformers and storage tanks of whatever kind or nature, and 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 regulation".

The issue before this Court is whether the Board erred in law in reaching the conclusion it did.

The parties did not seriously dispute that the property constitutes "machinery" within the definition. The specific issue argued was whether the property was either “placed” or "affixed" as those terms are used in the Act.

The meaning of the word "placed" has been considered by the Supreme Court of Canada in the context of the *Assessment Act*, R.S.O. 1937, c. 279 which contained a definition similar in all material respects to that employed in the present British Columbia assessment legislation. In the case of *Northern Broadcasting Co. Ltd.* v. *The Improvement District of Mountjoy* [1950] S.C.R. 502 and 510, Kellock, J. delivering the majority opinion of the Court commented as follows:

> "Prima facie, therefore, the words 'erected', 'placed' and 'affixed' do not connote the same things, and the word 'placed' at least must connote something less than is involved in the word 'affixed'.
>
> With respect to 'placed', I do not think it is used in the Statute as equivalent merely to 'brought upon' so as to take in mere personal property which is intended to be shifted about at will. It involves the idea of setting a thing in a particular position with some idea of permanency. Thus, merely to bring a gas engine and portable saw upon premises would not be to 'place' them upon the land within the meaning of the Statute, any more than would be the case with a table, or a chair, or a typewriter, or similar articles.
>
> 'Placed' is defined in the Shorter Oxford Dictionary as ‘to put or set in a particular place, position or situation'.
>
> In the context of the Statute, I think the Legislature must be taken to have had in mind the including of things which, although not acquiring the character of fixtures at common law, nevertheless acquire 'locality' which things which are intended to be moved about, do not."

At issue in *Mountjoy* was the assessability of a transformer and a transmitter which rested by their own weight in a building. They were large items connected to power and to other parts of the broadcasting system. In holding them to be assessable, Kellock, J. (at p. 511) noted "they are heavy articles placed each in one particular spot with the idea of remaining there so long as they are used for the purpose for which they were placed upon the premises".

The principles expressed in the above extracts from the *Mountjoy* decision have been cited and applied in numerous British Columbia decisions. In Re *Assessment Equalization Act*, 1953; *Re Orr's Assessment* (1955) 16 W.W.R. 25 (B.C.S.C.) Wilson, J. considered the *Mountjoy* decision and the meaning of "place" at common law. He concluded that those things belonging "to the class of things intended to be moved about at will and which [have] not been set in a permanent position" (at p. 43) do not come within the meaning of the word "placed".

The British Columbia Court of Appeal considered the issue in *Re Assessment Equalization Act*, *Re Trans Mountain Oil Pipe Line Company Appeal* (1966), 56 W.W.R. 705. Davey, Lord and Branca, JJ.A., all delivered separate reasons but all agreed that the oil tanks there in issue had been "placed" on the property (see pp. 710, 711-12, and 717-18 respectively). Branca, J.A. noted at p. 717-18 that "it would be seen that 'placed' was not intended to embrace personal property which was brought upon the land and which was intended to be shifted at will, but it did involve the idea of setting a thing in place for use with some idea of permanency". Finally, the decision of Hinkson J. as he then was, in *Re Bank of British Columbia et al* [1976] 6 W.W.R. 356 (B.C.S.C.) & 360 is to the same effect.

I mention the above decisions because, although they do not in my opinion alter or further the analysis set out in *Mountjoy*, they illustrate the principle consistently employed by the Courts in determining whether or not a given thing has been placed" on property within the meaning of the *Assessment Act*. To reiterate, the principle is that "placed" involves some idea of permanency; it does not encompass items that are intended to be shifted about at will. From the above it follows that whether or not a particular item affects the quality of the freehold or improvements thereon is irrelevant to the issue of whether an item is "placed" within the meaning of the statute.

In applying this principle to the facts, it is necessary, *inter alia*, to ascertain whether, as a matter of fact, the items in issue were brought upon the property with some idea or intention of permanency.

A perusal of the material filed indicates the Board found the "linking of various parts of the subject property to the premises by telephone and electric lines does not . . . evidence an intent to make the subject property part of the freehold". The Board did not however, decide the factual issue set out in the preceding paragraph. Therefore, the question posed in the stated case must be answered in the affirmative. The legal conclusion that the property was not "placed" could not have been reached without error in the absence of the above mentioned factual determination.

Before disposing of this matter, reference must also be made to the alternative submission of the respondents.

Section 80 (1) (a) of the Act enables the Lieutenant Governor in Council to define words, not otherwise defined in the Act, by Regulation. Regulation 3-1 of B.C. Reg. 799/74 provides as follows:

> "Fixtures, machinery and similar things refer to those items which as if so erected or affixed by a tenant, would as between landlord and tenant, be removable by the tenant as personal property."

Regulation 3-2 provides for the exemption from assessment of certain residential improvements. Regulation 3-3 provides in part the

> "commercial and industrial improvements referred to in Regulation 3-1 but generally described as follows shall also be exempt from assessment . . ."

The respondents argue Regulation 3-1 defines *inter alia*, "machinery" as items which are "erected or fixed" but not placed, and therefore even if machinery is found to be placed within the meaning of the definition of "improvements" it is not assessable.

At best, the respondents' contention is applicable only to the machinery of British Columbia Forest Products because the other two respondents are not tenants but owners and the regulation applies to tenant's improvements only.

At the time *Re Orr's Assessment, supra*, was decided the statutory definition of improvements was worded somewhat differently than it is now. In that case it was decided, *inter alia*, that the definition did not encompass tenant's "improvements". Subsequently, and perhaps in response thereto, the definition was amended in precisely the manner suggested by Wilson, J. to include tenant's improvements.

Given that the definition of improvements extends to tenant's improvements, it remains to be considered to what the exempting provisions extend. It is my view they extend only to those items covered by the clause "*fixtures, machinery and similar things of a commercial or industrial* undertaking, business or going concern operation so erected, affixed or placed by a tenant". I base my conclusion in this regard primarily on the fact that the emphasized phrases in the statutory definition are repeated in Regulations 3-1 and 3-3 respectively. Indeed, if required to do so, I would go further and conclude that the phrase "except those exempted by regulation" applies only to the immediately preceding clause in the definition.

In any event, it is my opinion the items referred to in the regulations are items owned by tenants. Therefore, at best, the respondents' submissions extends only to the property of British Columbia Forest Products. This conclusion is not, in my view, inconsistent with anything said by Mr. Justice Wilson in *Re Orr's Assessment, supra*.

The next issue to be addressed concerns the purpose of the definition in Regulation 3- 1. The respondents contend, in effect, that the definition in Regulation 3-1 defines "fixtures, machinery and similar things" for the purposes of assessment. If this is so, and one were to insert the definition, in place of the words defined in the statute, the result would be nonsense. Because of this and because of the scheme - such as it is - of the regulations, it is my view Regulation 3-1 defines "fixtures, machinery and similar things" for the purpose of exemption from assessment and not simply assessment.

From the above, it follows the omission of the word "placed" in the regulation results in items that are "placed" within the statutory definition and therefore assessable are not exempt pursuant to the Regulation. In light of the specific inclusions in the exemption provision (Regulation 3-3) it is clear - at least as clear as anything else in this matter - the Lieutenant Governor in Council did not intend this anomalous result. It is my view therefore, that the words "erected or affixed" should be read as including "placed" in a manner similar to that adopted by Kellock, J. in the *Mountjoy* case, *supra*, and 512.

In conclusion, for the reasons given above, I conclude the question posed for the opinion of this Court should be answered in the affirmative and the matter be remitted to the Board for disposition according to the principles set out above.