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EUROCAN PULP & PAPER CO. LTD.

v.

ASSESSOR OF AREA 25 - NORTHWEST

Supreme Court of British Columbia (A810730) Vancouver Registry

Before: MR. JUSTICE D.B. HINDS (In Chambers)

Vancouver, March 30, 1981

B.J. Wallace for the Appellant
J.K. Greenwood for the Respondent

Reasons for Judgment April 23, 1981

This is an appeal by way of stated case, pursuant to s. 74 of the *Assessment Act*, R.S.B.C. 1979, c. 21, from a written decision of the Assessment Appeal Board, dated January 8, 1981.

The application to the Assessment Appeal Board to state a case set forth the following questions for determination:

> "1. Did the Assessment Appeal Board err in law in determining that the improvements under appeal are not 'works' as defined in the agreement made the 29th day of December, 1950 (the 'Agreement') between His Majesty the King in the Right of the Province of British Columbia and the Aluminium Company of Canada, pursuant to the authority of Order-in-Council 2883 dated the 29th day of December. 1950?
>
> "2. Did the Assessment Appeal Board err in law in determining that the improvements under appeal were not exempt from tax by virtue of the *Industrial Development Act* and the Agreement?"

The stated case filed by the Assessment Appeal Board (hereinafter called "the Board") set forth the facts as follows:

> "1. The three folios under appeal are used and occupied by the appellant and comprise a log dump and logging camp facility.
>
> "2. The lands upon which the improvements in question are located are leased by the Appellant from the Aluminium Company of Canada Ltd. (hereinafter called 'Alcan') which lands are assessed in the name of Alcan.
>
> "3. On the 29th day of December, 1950 an Agreement (the 'Agreement') pursuant to section 1 of the *Industrial Development Act*, R.S.B.C. 1979. c. 193 was entered into between His Majesty the King in the Right of the Province of British Columbia and Alcan pursuant to the authority of Order-in-Council 2883 dated the 29th day of December, 1950.

"4. Pursuant to Order-in-Council 2484, approved and ordered on the 3rd day of November, 1954 the Kemano Industrial Township was incorporated pursuant to the Agreement.

"5. Section 3 of the *Industrial Development Act* provides as follows:

> '3. Where. in an agreement made under section 1, provision is made for the incorporation of an industrial township, the Lieutenant Governor in Council may incorporate the area of the Province covered by the agreement into an industrial township, and on so doing the taxes payable after that in respect of the land and improvements in the area incorporated shall. notwithstanding any other Act, be as provided for in the agreement.'

"6. Paragraph 10 of the Agreement provides as follows:

> '10. *Taxes*
>
> The rentals payable by ALCAN pursuant to Sections 4, 5 and 6 hereof shall be in lieu of all taxes and other charges of any nature whatsoever imposed by or under the authority of the GOVERNMENT on or in respect of the Works or the lands appurtenant thereto including flooded land. or the operation of the Works or the electric energy generated thereat except (a) Provincial Land and Provincial School Taxes on the value of lands and improvements owned by ALCAN which are not then within the boundaries of an organized municipality or a said 'Industrial Township'. (b) Taxes imposed by a municipality on property owned by ALCAN, (c) Provincial Land and Provincial School Taxes on the unimproved value of lands owned by ALCAN in an 'Industrial Township' within which ALCAN will provide required public services to Provincial standards, and (d) Franchise and Income Taxes, use and consumption taxes (except on electric energy generated and used by ALCAN or its subsidiaries engaged in processes contributory to the production of aluminium) and taxes of a similar nature generally applicable to corporations doing business in the Province.
>
> The GOVERNMENT will not impose or authorize discriminatory taxes or charges of any nature whatsoever on or in respect of the Works, the operation or the products of the Works, or the conduct of the business incident thereto.'

"7. Paragraph 3 of the Agreement defines 'Works' as follows:

> '3. *Sale of Crown Lands*
>
> Notwithstanding Sections 46 and 57 of the 'Land Act'. the GOVERNMENT will, from time to time. when required by ALCAN, sell and convey, in fee simple, to ALCAN such Crown Lands as may be needed for the Works which are hereby defined as 'all dams, canals, tunnels, aqueducts, penstocks, raceways, protection works, powerhouses, spillways, wharfs, docks, townsites, hydraulic structures, roadways, railways, cableways, pipe lines, flumes, transmission lines and all other structures, waste dumps and other facilities capable of or useful in connection with diverting, storing, measuring, conserving, conveying or using the water of the Eutsuk and Tahtsa water power and producing, measuring, transmitting or using the power to be generated thereby and plant sites, wharfs, docks, townsites, roadways, railways, conveyors and all other structures, waste dumps and other facilities capable of or useful in connection with producing aluminium and other materials by using power generated by the said water power.'

"8. By two leases dated the 1st day of January, 1971 the Appellant leased the land upon which the subject improvements are erected or placed from Alcan. Pursuant to the lease the Appellant as owner of the subject improvements has the right to sever and remove them during the term of the lease or within 30 days thereafter, whether the same are affixed to the lands or form a part thereof or not.

"9. ,The subject improvements are all used in connection with the production of pulp and paper by the Appellant.

"10. Prior to October, 1978 the Appellant used electric power produced by Alcan from the Tahtsa Lake water power source for its production of pulp and paper. Since that date the power produced by Alcan has been fed into the B.C. Hydro distribution grid and both the Appellant and the Alcan smelter have been supplied with their electric power from that grid."

The Board concluded that the improvements owned by the appellant, being a log dump and logging camp facilities located within the Kemano Industrial Township, did not come within the definition of "Works" as defined in an agreement made between His Majesty the King in the Right of the Province of British Columbia and the Aluminium Company of Canada, dated December 29, 1950 (hereinafter called the "Agreement"). It reached that conclusion on two grounds; the first, by the application of the *ejusdem generis* rule, and second, by looking at the object of the Agreement.

The wording of the definition of "Works" in paragraph 3 of the Agreement has been set forth in paragraph 7 of the Statement of Facts. For the purposes of this appeal the material portion of the definition is:

". . . and plant sites, wharfs, docks, townsites, roadways, railways, conveyors and all other structures, waste dumps, and other facilities capable of or useful in connection with producing aluminium and *other materials* by using power generated by the said water power." (my emphasis)

By the application of the *ejusdem generis* rule the Board concluded that the words "other materials" should be interpreted as meaning "like aluminium" and consequently the improvements owned by the appellant did not fall within the definition of Works because the appellant's improvements were not "like aluminium".

In its extensive and carefully written decision, the Board stated with reference to the *ejusdem generis* rule:

". . . The *ejusdem generis* rule has been stated as meaning that where a statute or other document enumerates several classes of persons or things and immediately following and classed with such enumeration the clause embraces other persons or things. the word 'other' will generally be read as 'other such like' so that the persons or things therein comprised may be read as *ejusdem generis* with and not of a quality superior to or different from those specifically enumerated."

That statement appears to have been based upon the portion of the judgment of Riddell, J. in *Re Oilman et al*., [1925] 3 D.L.R. 1196 at 1198.

In *Chitty on Contracts*, 24th ed., at para. 729 under the heading of "Ejusdem Generis rule" , the learned author states:

"The rule which is laid down with reference to the construction of statutes, namely, that where several words preceding a general word point to a confined meaning the general

> word shall not extend in its effect beyond subjects *ejusdem generis* (of the same class). applies to the construction of contracts. . ."

At para. 730 it is stated:

> ". . . The *ejusdem generis* rule cannot, however, be applied unless there is a genus to which the general words can be restricted. . ."

In *United Towns Electric Co., Ltd.* v. *Attorney-General for Newfoundland*, [1939]1 A.E.R., Lord Thankerton, who gave the judgment of the Privy Council. in referring to the *ejusdem generis* rule said, at p. 428:

> ". . . In their opinion, there is no room for the application of the principle of *ejusdem generis* in the absence of any mention of a genus, since the mention of a single species-for example. water rates-does not constitute a *genus*, . . "

Keeping in mind the foregoing observations with respect to the rule and applying them to the above quoted portion of the definition of "Works", it appears that it would be a proper application of the *ejusdem generis* rule to employ it with reference to the words "other facilities" because those general words follow a lengthy list which has some common characteristic which constitutes a genus; however, in my view to employ the *ejusdem generis* rule in interpreting the meaning of the words "other materials" is inappropriate, because those words follow a single word "aluminium", which is a species of metal and is not a genus. With deference to the Board, I have reached the conclusion that it erred in law in applying the *ejusdem generis* rule in interpreting the words "other materials".

With regard to the second basis upon which the board founded its decision that the improvements of the appellant did not come within the definition of "Works" in paragraph 3 of the Agreement, it is a well-recognized principle of construction of a contract that in interpreting a word or phrase reference may be had to the whole of the terms and the object of the contract. In my view the Board correctly considered the terms and the object of the Agreement and concluded that the words" other materials" should be construed to mean-like aluminium. I find the reasons expressed by the Board for reaching its aforesaid conclusion to be compelling and I approve of them.

Consequently as I agree with one basis for the Board's decision with respect to the appellant's improvements not coming within the definition of "Works", I conclude that the Board did not err in law with respect to that matter and question No. 1 is answered in the negative.

With respect to question No. 2, it must first be noted that s. 5 of the *Industrial Development Act* (hereinafter called "the Act"), S.B.C. 1949, c. 31 (now s. 3 of the *Industrial Development Act*, R.S.B.C. 1979, c. 193) provides as follows:

> "5. Where, in any agreement made under section 3, provision is made for the incorporation of an industrial township. the Lieutenant-Governor in Council may incorporate the area of the Province covered by the agreement into an industrial township, and thereupon the taxes payable thereafter in respect of the land and improvements in the area so incorporated shall, notwithstanding the provisions of any other Act, be as provided for in the agreement."

It is common ground that the Agreement provided for the incorporation of an industrial township, and that Kemano Industrial Township was incorporated pursuant to the Act and the Agreement, and that the appellant's improvements are located within Kemano Industrial Township.

It is to be further observed that the effect of s. 5 of the Act was that upon the incorporation of Kemano Industrial Township taxes payable in respect of land and improvements located therein were to be paid as provided in the Agreement, notwithstanding the provisions of any other Act. Therefore the authority to impose taxes on land and improvements in Kemano Industrial Township was to be found in the Agreement.

Paragraph 10 of the Agreement, previously quoted in paragraph 6 of the Statement of Facts, specified that there would be no taxes imposed under the authority of the Government upon the "Works", the lands appurtenant to the Works including flooded land, or the operation of the Works or the electric energy generated there at and then followed a series of four exceptions. It is noted that the effect of exception (c) was that Alcan was required to pay Provincial Land and Provincial School taxes on the unimproved value of the lands owned by Alcan in Kemano Industrial Township, but not on the value of the Works located therein.

The Agreement therefore provided for the exemption from taxation of the Works, and the imposition of taxes on the land, but it failed to deal with the taxation, or the exemption from taxation, of the improvements which did not fall within the definition of Works. It may well be that all Works as defined in the Agreement were improvements (as that word is ordinarily understood in taxation matters), but all improvements did not necessarily come within the definition of Works.

The Board correctly concluded that the Agreement did not expressly tax or expressly exempt improvements such as the appellant's improvements. However, it then went on to characterize the submission of counsel for the appellant as being tantamount to a claim for exemption from taxation of the appellant's improvements. It then proceeded to analyse the phraseology of s. 5 of the Act and concluded that it provided no exemption from taxation under other Provincial taxation legislation for the improvements not falling within the definition of Works. It therefore dismissed the appeal from the assessment made under the *Taxation (Rural Area) Act,* R.S.B.C. 1979, c. 400.

In my respectful view the Board fell into error in analysing s. 5 of the Act and paragraph 10 of the Agreement to determine whether it created an exemption from taxation on improvements which did not come within the definition of Works. In my view the correct approach is to analyse s. 5 of the Act, and the whole of the Agreement, to determine whether such improvements are subject to taxation. If one concludes they are subject to taxation, then and only then would it be appropriate to ascertain whether they fall within any specified exemption.

Returning to the wording of s. 5 of the Act, it is important to note that it said:

> ". . . and thereupon the taxes payable thereafter in respect of the land and improvements in the area so incorporated shall, notwithstanding the provisions of any other Act, be as provided for in the Agreement."

It is significant that it referred to taxes on land and *improvements*, and that the taxes should be payable as provided in the Agreement notwithstanding the provisions of any other Act. From that I deduce that the Legislature intended to deal with taxes not only on land but also on improvements and, furthermore, the Legislature intended that notwithstanding the provisions of any other Act, the taxes payable on land and improvements were to be as provided for in the Agreement.

I have searched in vain for a judicial interpretation of the words "provided for", or the word "provided". The Board in its decision referred to two cases, *In Re Jorgenson,* [1923] 2 W.W.R. 600 and *Countess of Berkeley* v. *Berkeley,* [1946] 2 All E.R. 154. But both of those cases dealt with the word "provision". Accordingly I turn to the *Shorter Oxford English Dictionary* where the word "provide" is defined, inter alia, as:

> "To lay it down as a provision; to stipulate *that*."

It defines "provided", inter alia, as:

> "it being provided or stipulated (that)"

Neither paragraph 10 nor any other paragraph of the Agreement "provides" or "stipulates" anything with respect to taxation on improvements which do not fall within the definition of Works. It is silent with respect to such improvements.

I know of no basis upon which silence with regard to taxation can be equated to authorization to impose taxation. Furthermore, by the inclusion in paragraph 10 of the Agreement of the phrase ". . . notwithstanding the provisions of any other Act. . .", it is clear that authorization for taxation cannot be founded on any other Act.

I therefore conclude that the appellant's improvements are not subject to taxation under the *Taxation (Rural Area) Act* because the Agreement failed to provide for their taxation. I have reached the foregoing conclusion with respect to question No. 2 with some regret. I am by no means satisfied that it was the intention of the Government, when it executed the Agreement, to exclude from taxation those improvements which did not fall within the definition of Works. I suspect that through inadvertence, or perhaps through a failure to foresee with clarity the events of the future, no thought was given to the status of such improvements. However, I cannot allow regret to impinge upon a decision based upon my apprehension of the legal principles involved. It therefore follows that the answer to question No. 2 is "yes" , and the matter is hereby remitted to the Board. The appellant is entitled to its costs.