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B.C. HYDRO AND POWER AUTHORITY

v.

ASSESSOR OF AREA 5 - PORT ALBERNI

Supreme Court of British Columbia (A860101) Vancouver Registry

Before: MR. JUSTICE HINDS (In Chambers)

Vancouver, December 1 and 2, 1986, January 30, 1987

J.R. Lakes for the Appellant
B.T. MacDonell for the Respondent

Reasons for Judgment February 11, 1987

Pursuant to the provisions of s. 74 (2) of the *Assessment Act*, R.S.B.C. 1979, c. 21 (the Act), the appellant has appealed from a decision of the Assessment Appeal Board (the Board) dated October 24, 1985.

The Board's decision related to the assessability of three mobile diesel generating units (hereinafter called the units) located at the Bamfield Generating Station operated by the appellant. Counsel agreed the Board had found, directly or by implication, that the three units came within both the first and the second definition of "improvements" set forth in s. 1, the Interpretation section of the Act.

Section 1 of the Act contains two definitions of improvements. They are known as the first and second definitions. The first definition is for the purpose of general municipal and Provincial taxation. The second definition is for the purposes other than general municipal and Provincial taxation, such as school and hospital taxation. Both definitions have an opening phrase followed by six sub-paragraphs. This appeal is concerned only with the opening phrase and the first sub-paragraph of each definition. They are set forth below.

The first definition:

> "Improvements" 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 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, but does not include those fixtures, machinery and similar things, other than buildings and storage tanks as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property; . . .

Second definition:

> "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 wording of the Stated Case caused uncertainty and confusion when the appeal came on for hearing on December 1st and 2nd, 1986. As the result of a memorandum to counsel dated December 17, 1986 and their reappearance on January 30, 1987, some of the uncertainty and confusion was dispelled.

The Stated Case set forth four questions for determination. At the hearing on January 30, 1987, counsel for the appellant withdrew the fourth question. The remaining questions are as follows:

> 1. Did the Assessment Appeal Board err in law when it held that the said mobile trailers are assessable as buildings under the first definition of improvements contained in the *Assessment Act*?
>
> 2. If the answer to question 1 is affirmative, did the Board thereby commit an error in finding that the machinery and equipment located within the mobile trailers is assessable under the second definition of improvements contained in the *Assessment Act*?
>
> 3. Was there any evidence upon which the Assessment Appeal Board could properly find that the said mobile trailers and items of machinery and equipment were placed with a sufficient degree of permanency to render them assessable under the second definition of improvements contained in the *Assessment Act*?

I understand from counsel who appeared before me that counsel formerly acting for the appellant drafted the questions. The Board had merely included them in the Stated Case. The responsibility for the wording of the questions, therefore, rests upon the appellant. Messrs. Lakes and MacDonell requested that Question 2 be considered on the assumption that the Board had found that the mobile trailers, in addition to the machinery and equipment located therein, were assessable under the second definition of "Improvements" contained in the Act.

In the commencement of the Stated Case it stated ". . . the following are the material facts: . . ." It then set forth a number of issues, facts and conclusions. The facts, as distinct from the issues and conclusions, are hereinafter set forth:

> 2. The three diesel generating units each consist of a double-axle trailer unit which contains a diesel engine, generator and control panel. Each unit is supported on jacks which are installed for this purpose and fuel is supplied either from a day tank which is slung beneath the trailer chassis or from a separate fixed tank. The unit incorporates an elevatable power takeoff by which it can be connected to the transformers and electrical services which it is to supply.
>
> 3. These trailer units are moved about by B.C. Hydro as required to provide generating capacity at different locations, and to permit the individual units to be serviced from time to time. All can be towed on the highway with normal highway licensing.

4. Since 1972, there have been from one to four units on site at any time. Ten distinct units have been used at the location, with the shortest stay being 4 months and the longest stay 57 months.

5. The trailers are removable, purposely mobile and are sometimes temporarily located on highways or elsewhere.

6. When the units are in operation as part of the Bamfield Generating Station, they are located at one of four particular berths on the property, connected to a fuel supply line and via three cables to the system for distributing the power they are there to provide. They are either on the property, at their special location, or not on the property at all.

8. The particular units are 35 feet long by 10 feet wide by 13 feet high and weigh almost 29 tonnes. A wood cribbing foundation supports the fifth wheel end of each unit and wood steps with a landing are provided. Though the trailer unit may be brought on the site intact, some assembly or erection is undertaken to make the units usable on site.

On the basis of the foregoing findings of fact the Board concluded that the three trailers were buildings and were, therefore, assessable under the first definition of "Improvements". The Board did not purport to conclude that the three trailers were "fixtures, machinery, structures and similar things", within the opening lines of sub-paragraph (a) of the first definition. Had it done so, the exemption phrase at the conclusion of that sub-paragraph may have relieved the three trailers from assessability - at least if they had been found to be "fixtures, machinery and similar things". By concluding that the trailers were "buildings", the exemption clause was nullified, because buildings are not exempt whether they are or are not removable as between landlord and tenant.

For an object to be a "building" under the first definition of "Improvements" and to be assessable it must, according to the definition, be ". . . erected in, on, under or fixed to land or to a building, fixture, structure in, on, under or affixed to land. . . ." The Board's findings of fact do not support the proposition that the three trailers were either "erected" in, on, or under the land, or were "fixed" to land.

The facts in the recent case of *Angus Catering (1982) Ltd. and Quadra Ventures Industrial Lodge (Tumbler Ridge) Ltd.* v. *Assessor of Area 27 - Peace River*, 3 B.C. Stated Cases (Case 205) 1145, are quite similar to the facts in this case. There, as here, the assessability of mobile trailers under both the first definition and under the second definition of "Improvements" under the Act was in issue. In dealing with their assess ability under the first definition, Lysyk J. had this to say:

> Are the units here in question 'affixed to land'? In support of his submission that this question ought to be answered in the negative, counsel for the appellants relies in particular on another recent decision of Mr. Justice Taylor, namely, *Britco Structures Ltd.* v. *Minister of Finance for British Columbia* (May 25, 1984), Vancouver Registry No. A833627, unreported. In issue there was the status of portable buildings, resting on their own weight on blocks, for purposes of determining liability to assessment for sales tax under the *Social Service Tax-Act*, R.S.B.C. 1979, c. 388. Following a review of decisions respecting mobile homes and buildings, Taylor J. concluded (at p. 6):
>
> > 'The authorities cited seem now to have established that a portable building which rests on land by its own weight only, and which has no permanent foundation beneath it, will remain a chattel even though it may have utility connections."
> >
> > While Taylor J. was concerned with the status of such units for the purposes of a different enactment, his analysis, in my opinion, is applicable to the issue before me.

> I conclude that the units here in question remain chattels and that they are not 'affixed to land' in the relevant sense.
>
> Are they 'erected on land'? In its primary sense, 'erected' is employed to refer to that which is built or constructed, or at least set up in the sense of assembled. According to paragraphs 2 and 3 of the board's statement of material facts, these units were wheeled or trucked to the site and connected to utilities. They were placed on the site. They were not 'erected' there within the ordinary dictionary meaning of the word. Nor do the authorities to which I was referred command the extended interpretation of 'erected' for which the respondent contends.

In my respectful view his reasoning was correct and is applicable to the circumstances of the case. The three trailers were not erected in, on, or under the land; they were not affixed to the land. Accordingly, they were not "buildings" within the first definition and were not assessable.

The answer to Question No. 1 is "Yes".

I now turn to consider Question No. 2.

There is a significant difference between the first and second definition of "Improvements" in s. 1 of the Act. The latter includes a key-word - "placed". Moreover, it does not include the exemption clause which is contained in the first definition. The second definition is more encompassing than the first. The distinction between the two definitions was emphasized by Branca J.A. in *Re Assessment Equalization Act, Re Trans Mountain Oil Pipeline Company Appeal* (1966), 56 W.W.R. 705 at pp. 715-316.

The meaning to be ascribed to the word "placed" as it appears in the. second definition, was considered by Taylor J. in *Assessment Commissioner* v. *Woodwards Stores Limited et al.* 2 B.C. Stated Cases (Case 167) 931. After a thorough review of the relevant authorities dealing with the interpretation of the word "placed" Taylor J. stated at p.p. 939 and 940, as follows:

> I conclude from these authorities that the key factor in determining whether machines or structures have been so 'placed' as to render them assessable as 'improvements', although not in law 'fixtures', is simply whether they have been given 'some permanency of position'.
>
> In every case the question to be asked is, not whether the item concerned is in fact intended to be moved by the particular owner, but whether by reason of its character, function and placement, as determined from all the evidence, the item concerned falls into the class of things which, once put in position can normally be expected to remain in that position, rather than falling into the class of things which can generally be expected to be moved around from time to time in the normal course of business.

In Supplementary Reasons for Judgment Taylor J. amplified his original Reasons for Judgment by stating, at p. 941:

> I have said that the 'idea, or intention, of permanency' which the authorities have declared to be necessary in order to render a chattel so 'placed' as to constitute it an 'improvement' under the statute is to be imputed from objective evidence, apparent to the observer, of the nature, function and manner of placement of the chattel itself, and not from subjective evidence of actual intention of a particular installer, owner or user.

Upon reading the Board's decision and the Stated Case, it is apparent that the Board did not use the test expressed in the Woodwards Stores Limited case, or the test expressed in the authorities canvassed in that case by Taylor J., in determining whether the trailers and the machinery and equipment contained therein were "placed" upon the land. By failing to use the proper test in

order to determine whether the trailers and their contents were "placed" upon the land the Board erred in law. Accordingly, the answer to Question No. 2 is "Yes".

In view of the affirmative answer to Question No. 2, it is unnecessary to answer Question No. 3.

Pursuant to the provisions of s. 74 (6) of the Act the opinion of the Court is hereby remitted to the Board.