GALLOWAY LUMBER CO.

v.

ASSESSOR OF AREA 22 - EAST KOOTENAY

British Columbia Court of Appeal (CA009486) Vancouver Registry

Before MR. JUSTICE MACDONALD,
MR. JUSTICE LOCKE
MR. JUSTICE TOY

Vancouver, October 31, 1989

Peter D. Feldberg for Galloway Lumber Co.
Peter W. Klassen for the Assessor

Reasons for Judgment October 31, 1989

This appeal is concerned with whether three dry kilns on the property of the respondent Galloway Lumber Co. ("Galloway") ought to be classified as "buildings" and included in the assessment roll and thus be taxable as an "improvement", or whether they ought to be classified as "machinery" used in the manufacturing process and therefore exempt from tax.

The Assessment Act by s. 1 provides:

"improvements" means

(a) buildings, fixtures, structures and similar things erected on or affixed to land . . .

and without limiting the generality of this, "improvements" includes . . .

(b) machinery affixed to or forming part of anything referred to in paragraph (a)

* * *

but notwithstanding the foregoing, "improvements" does not, except for buildings, storage tanks or tanks . . . , include

* * *

(o) machinery that is used to manufacture, process or repair anything or that is used principally to convey anything that is being manufactured, processed or repaired . . ."

The dispute is whether the dry kilns are statutory improvements within the meanings of paragraphs (a) and (b) or are not statutory improvements but machinery used to manufacture or process something within the meaning of paragraph (o).

The kilns are constructed of concrete blocks, sitting on concrete footings. The doors are metal or metal covered wood and the floors concrete slabs and dirt. Lumber is loaded onto railway flatdecks which are rolled into the kiln on tracks. The doors are then closed and the lumber dried by heat provided by gas furnaces, controlled and monitored from concrete block additions to the structures with the help of large fans inside the kilns. Drying takes 38 to 72 hours, after which the lumber is cooled and then removed from the kilns for shipment.

After assessment the respondent Galloway appealed to the Assessment Appeal Board which on September 3, 1987 allowed the appeal. It found the kilns were specially designed machinery built to cure lumber under carefully controlled conditions to make it marketable; it then found the machinery was used in the manufacture and processing of lumber, and as a consequence, was excluded for assessment purposes under the Assessment Act. The Assessor argued before the Board that it had not decided certain matters. The Board considered this and said:

". . . The Board agrees with Mr. Klassen that, despite the number of recent decisions written by the Board and the Courts relating to the issue of assessability, questions raised in this appeal have not been addressed by the Board, viz:

1. Is a dry kiln a "building"? The Board has found in a number of decisions that it is a "machine" but it has not found whether it is a building.

2. If it is a "machine", no decision of the Board has yet been published by the B.C. Assessment Authority (in their Blue Book containing Board decisions) to show that, in the instance of a dry kiln, it is used to "process" or "manufacture" anything.

The Orchardson decision dealing with dry kilns was written before the Act was amended. The Board further agrees that in the instant appeal, the Board should first decide whether the facility under review is a "building". If it is not a "building" is it a "machine"? Even if it is a "machine", is it used to "process" or "manufacture" anything?

The Board will deal with the questions seriatim.

ARE THESE KILNS BUILDINGS?

The Board agrees that the facilities under review have the appearance of buildings. They have walls and a roof and seem to come within the legal definition of buildings or structures. The Board also agrees that if the sawmill closed, with minimum alterations these facilities could be converted to warehouses.

The Board notes, however, that despite this generalization, there are several overriding considerations which must be observed:

(a) Mr. Justice Lambert in writing the decision of the Court of Appeal in Assessor of Area 10 _ Burnaby-New Westminster v. Chevron Canada Limited (B.C. Assessment Authority Stated Cases _ Case 191 at page 1076-2) found that "as a matter of law, it is possible for a piece of plant to be both a structure and machinery."

(b) The Board also notes that section 26 (3) of the Assessment Act provides that the Assessor may give consideration to the use to which an improvement is put.

Mr. Klassen referred the Board to several definitions of a building. He says since the kiln looks like a "building", we should find it to be so.

To put an end to this, once and for all, the Board finds that the dry kilns in issue are not buildings, for assessment purposes. These dry kilns may have the appearance of buildings housing machinery, however the complete facilities are machines in and of themselves.

In the Orchardson decision issued November 12, 1986 and confirmed by Mr. Justice Meredith (B.C. Assessment Authority Stated Cases _ Stated Case 229) the Board made the same finding.

Even if these facilities were found to be structures, since Mr. Justice Lambert has pointed out that a piece of a plant could be a structure and at the same time machinery, the Board would find that, because of "the use" to which this facility is put, it is not a building . . ." (emphasis mine)

The Board then went on to declare the kilns to be machinery and therefore not taxable.

The Assessor appealed to the Supreme Court. The matter was heard before Mr. Justice Gow who in a carefully reasoned decision dismissed the appeal. By leave, the matter falls for decision in this court.

As I understand the nub of the Assessor's argument, he does not quarrel with what the trial judge described as the "two-step" approach. This was described by the trial judge:

". . . The first step is to ascertain whether the item comes within the statutory definition of improvement. The first question is what description, if any, of the species of the statutory improvements applies to the item? In seeking an answer to that question the tribunal of facts is entitled to take the "all of the circumstances" approach advocated and applied by Arnup, J. A. in Metal & Alloys.

If the tribunal concludes that the answer is "building" or "storage tank" that is the end of the matter because they have paramountcy. But if the answer is a "fixture" or "structure" or any description other than that of "building" or "storage tank", then the next question is _ does the item also meet the description of anything referred to in the exclusion part of the definition including machinery as described in paragraph (o)? In seeking an answer to this question again the same "all of the circumstances" approach is taken. If the answer is "no" the item is a statutory improvement. If the answer is "yes", for example "it is machinery within the meaning of paragraph (o)" then, applying the reasoning of Lambert, J. A. in Chevron it is not a statutory improvement . . ."

Agreeing with that method of approach, the Assessor nevertheless says in the instant case the trial judge erred in law by not finding the Board in error in three instances. He should have found, it is said:

1. The Board erred in applying the reasoning of the Chevron case: apart from the fact that it dealt with structures, the concept of simultaneous occupation of classes was irrelevant to the issue before the Board, i.e., was the improvement a building?

2. The Board's reference to s. 26 (3) of the Assessment Act is in complete error: that section is not applicable to this case at all as it deals only with a consideration of use insofar as the calculation of actual value is concerned.

3. In any case, the Board was quite wrong in saying: ". . . there are several overriding considerations which must be observed.:" at best, the concepts of the simultaneous occupation of

categories, and a consideration of use, were only factors to be taken into consideration. All that is known of the Board's thought processes are that they thought those two factors were "overriding" and this is legal error. No one can speculate what the decision of the Board would have been had these points merely been considered as a factor, and not as an overriding one.

Analysis of the Assessor's submissions show there is really only one: that the Board has elevated the first two factors _ one irrelevant, and the other a plain misunderstanding, into being matters of determinative force, and not just factors to consider.

It is true that the two factors are of doubtful value in considering the matter as to whether the structures were buildings. But nevertheless, I think the alleged errors did not affect the Board and it was correct in its conclusion. To appreciate this, it is necessary to set out some legal history.

In Orchardson Forest Products Ltd. v. The Assessor of Area 14, an Assessment Appeal Board decision of 12 November, 1986, the Board had occasion to reconsider the assessment of a dry kiln remitted to them by the court for further consideration. Its decision of 3 July, 1984 had been overturned by an order of McKenzie, J. of the British Columbia Supreme Court. In the November 12 decision the Board considered Re Weyerhaeuser Canada Ltd. and City of Sault Ste. Marie (1968) 1 O.R. 460 where a dry kiln was described as a ". . . walk-in oven . . ." and Metals & Alloys Co. Ltd. v. Regional Assessment Commissioner Region No. 11 (1968), 49 O.R. (2d) (Ont. C.A.). A clear distinction was drawn between a structure which shielded machinery and a place where manufacturing took place within and independent of any enclosed machinery:

". . . The Board finds as a fact that the dry kilns are an integrated unit of specially insulated walls and doors, equipped with specialized internal heating equipment, and equipment of circulation of heat, all of which is designed and used together as an integrated unit for the specialized drying of lumber products known as 'kiln drying'.

" As a result the kilns were found to be "machinery" and so were not inside the definition of "improvement" in the Assessment Act and were excluded. That decision was appealed to Meredith, J. in the Supreme Court on March 12, 1987 and dismissed. Leave to appeal to the Court of Appeal was refused and the matter pursued no further.

The Board was acutely conscious of this history, as shown from its answer to the second question it put itself:

". . . ARE THESE KILNS MACHINERY?

The Board does not intend to review the law in confirmation of its findings in the past that dry kilns are "machinery". As has been previously noted, however, the Orchardson decision was written before the Assessment Act was amended. The instant decision must be considered in light of the change in the Interpretation Section of the Assessment Act.

The Board has, in the interim, had the opportunity of considering the impact of the recent amendment to the Assessment Act relating to kilns in the following unreported decisions:

Westar Timber Ltd. v. Assessor of Area 26 _ Prince George (not reported _ issued June 3, 1987). In this decision the current law is well detailed. The Board found that dry kilns are machinery and not buildings. It found that while the facilities have certain external characteristics of buildings, or structures, they do not house or enclose dry kilns. They are in fact the dry kilns.

Clearwater Timber Products Ltd. v. Assessor of Area 26 _ Prince George (not reported _ issued July 13, 1987). In this decision the Board found that, despite the fact it may look like a building, a

dry kiln is in fact a complete machine. It is not a building housing a machine _ it is the entire machine.

Canadian Forest Products Ltd. v. Assessor of Area 26 _ Prince George (unreported _ issued July 13, 1987). The Board found dry kilns to be machinery.

Ainsworth Lumber Co. Ltd. v. Assessor of Area 23 _ Kamloops (unreported _ issued July 29, 1987). The Board found the dry kilns in that appeal to be machinery and not assessable.

Clearwater Timber Products Ltd. v. Assessor of Area 23 _ Kamloops (unreported _ issued July 13, 1987). The Board found the dry kilns in that appeal to be machinery.

The Assessor still maintains that kilns are not "machinery" but argues they are "buildings". He says,

'The function of the kilns themselves is to contain lumber in an enclosed space so that it can be dried more rapidly than what can be achieved in the open air.'

The Board finds that these dry kilns are in fact complete "machines". They are not buildings to house machinery. They are the machinery used in the business of making lumber merchantable.

The Assessor says,

'It is our opinion that the kilns are constructed for the purpose of containing, not creating, an environment that facilitates the drying of lumber.'

The Board does not agree. In its view the kilns are specially designed machinery built to cure lumber under carefully controlled conditions to make it marketable . . .

" As a result of this finding the Assessor's roll was amended by deleting from it the value of the dry kilns.

The Assessor, in this background, says that the Board, when it used the words "overriding consideration" in its reasons was unduly emphasizing the two concepts of simultaneous occupation of categories, and use, of the building, and this overemphasis was ground for setting aside the decisions, and Gow. J. should have so found.

It is plain to me that the Board has for at least five years consistently found that a structure of the character of these kilns is in fact a piece of machinery within the definition of the Assessment Act.

Were it not for the past consistent decisions of the Board relating to the character of dry kilns and classifying them as machinery (which it recites), I would find much more force in the appellant's point as to the use of the word "overriding" which seems to postulate a legal imperative. If I had concluded that the Board had given effect to the adjective literally, I would send it back for consideration. But plainly, that is not what happened at all. The Board had previously, obviously, firmly, and on correct principles, made up its mind as to dry kilns, and was in this case further justifying its thought processes. It perhaps over-enthusiastically used an adjective it need not have done. It is quite plain from the history it would have reached the same conclusion without the adjective.

Under circumstances such as this, I do not deem reference to two matters which could be classed as irrelevant are sufficient to impeach the decision. I think therefore that the Board's view in this case, being consistent with its own previous decisions and with other authorities in

Canada, was correct. Mr. Justice Gow reached the same conclusion. He was right and I would dismiss the appeal.

THE HONOURABLE MR. JUSTICE MACDONALD: I agree.

THE HONOURABLE MR. JUSTICE TOY: I agree.