GALLOWAY LUMBER CO.

v.

ASSESSOR OF AREA 22 - EAST KOOTENAY

Supreme Court of British Columbia (A872946) Vancouver Registry

Before MR. JUSTICE GOW (in chambers)

Vancouver, May 11, 1988

John E. D. Savage for the Respondent

Peter D. Feldberg for the Appellant

Reasons for Judgment June 3, 1988

This is an appeal by the Assessor from a decision of the Assessment Appeal Board which on September 3, 1987, found that dry kilns on Galloway's land were not improvements within the meaning of s. 1 of the Assessment Act.

A purpose of the Assessment Act is ascertaining which items of property shall be entered in an assessment roll so that municipal taxes may be levied on their value. The basic item is a parcel of land, but also included are improvements on such land as defined by the Act. An improvement is in broad terms any item placed upon and added to land which has the consequence of increasing the value of the land, for example, a building. But not all improvements of and upon a parcel of land are necessarily improvements for the purposes of the Assessment Act. Hence, frequently, there is a dispute between the land owner and the assessor as to whether an item on the owner's land is or is not a statutory improvement. This appeal arises from such a dispute.

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 and storage 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 here is whether the dry kilns are statutory improvements within the meaning 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 Assessment Appeal Board found that the kilns were not buildings, but machines in and of themselves, specially designed machinery built to cure lumber under carefully controlled conditions to make it marketable, and, furthermore, machinery used in the manufacturing of lumber or in the processing of lumber, and, therefore, excluded them pursuant to paragraph (o).

A layman might think that a kiln could be both a building, as that word is commonly understood, and a piece of machinery for manufacturing something, for example bricks, but, in assessment law, matters are not that simple. It may well be that for the layman an edifice on land may be looked upon as both a building and as a species of machinery but in assessment law when the question is -- is this item a taxable improvement? -- a "building" and a certain kind of "machinery" may, depending upon the language of the governing statute, become mutually excluding categories.

In Orchardson Forest Products Ltd. and Assessor of Area 14 - - Surrey-White Rock, Vancouver Registry No. 870142, March 12, 1987, the statutory provisions were:

"improvements" . . . includes

(a) all buildings, fixtures, machinery, structures and similar things erected in, on, under or affixed to land or to a building . . .

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.

The case concerned the classification of dry kilns as a building or as machinery which if erected or affixed by a tenant would, as between landlord and tenant, be removable by the tenant as personal property. The Assessment Appeal Board found that the dry kilns fell within the category of machinery and not within the category of building.

The Assessor appealed on two grounds. The first was that the Assessment Appeal Board had failed to consider whether it could also conclude that the kilns were buildings within the statutory definition. The second was whether the Assessment Appeal Board had applied the wrong, in law, test in reaching its conclusion that the kilns, analogously, constituted tenant's fixtures which were removable by the tenant.

The appeal was dismissed by Meredith, J. and leave to appeal from his decision was refused by Hinkson, J. A. Both learned judges held that the Assessment Appeal Board had found as a fact that the kilns were machinery and had applied the proper legal test in concluding that they were machinery of a kind that would as between landlord and tenant be removable by the tenant as personal property.

Two decisions which are illustrative of the excluding categories approach are Re Weyerhaeuser Canada Ltd. and City of Saulte Ste. Marie (1968) 1 O.R. 460 and Metals & Alloys Co. Ltd. v. Regional Assessment Commissioner, Region No. 11 (1968) 49 O.R. (2d) 289 (Ont. C.A.)

In the former the question was whether the structure used as a dry kiln was a building and taxable or machinery used for manufacturing purposes and, therefore, exempt from taxation. At p. 462 Vannini, D. C. J. said:

I find on the material evidence filed that, while the construction of this unit has certain external characteristics of a building or structure, such does not house or enclose a dry kiln within it. It is in fact a dry kiln. It is one and an entire unit of machinery and equipment. The floor, the walls, the roof and the doors are not the outer shell housing the dry kiln within. They are the shell of the dry kiln. They are the floor, the walls and the roof of it. They are in effect a walk-in oven.

In the latter the taxpayer operated on his land a metal shredder to shred scrap metal into minute pieces. This operation not only polluted the atmosphere but made excessive noise so the taxpayer built a building around the shredder. The trial judge found that the building was an enclosure and, therefore, an appurtenance necessary for the operation of the shredder; that in effect it was the shredder's "muffler", without which the shredder could not be used on or at the premises and he declared that the building was exempt from taxation as being machinery used for manufacturing purposes. The assessor appealed and succeeded.

The successful appellant had argued inter alia that the necessary first question was -- was the "item" a building? -- and if the answer was "yes" that was an end of the matter.

Arnup, J. A. rejected that approach. He said:

Mr. Chernov submitted that the tribunal of fact should first decide if the "item" was a building. If it was, the question of use, integrated or otherwise, was irrelevant. During the argument, I expressed the view which I still hold, that the question: "what is this item used for?" is an appropriate question for the assessor, or the tribunal of fact, to ask. It is, however, only one of the questions to be asked and answered. Other questions are: how is this item constructed? Why was it constructed in this shape, or of this material, or of this size? Does it look like a building? Is it built like a building? Does something happen within or on this item that is an integral part of the manufacturing process, as distinct from happening within or on a piece of machinery that the item encloses?

Arnup, J. A. then went on to find that the item was a "building" and, therefore, real property and not exempt from taxation. At p. 306 he said:

We start with two words in the Act, "building" and "machinery". The task of the tribunal is to decide, in the light of all of the circumstances of the case, whether the item comes within one word or the other.

Admittedly "machinery" in today's scientific and technocratic world can properly be applied to things undreamed of when the word first entered the Assessment Act.

"Building", however, is an ordinary English word, and in this statute should be given the meaning an ordinary person would attribute to it. What we have in this case looks like a building. It is almost identical to its neighbouring structure, which is admittedly a building. It is built like a building. It is used like a building. Nothing takes place in it or on it of a mechanical or chemical nature independently of and distinct from the various machines that it encloses. The only reasonable conclusion in my view, is that it is a building.

But this approach is only possible to the extent that the language of the governing statute permits. In Weyerhaeuser and Metals & Alloys the statute appears to have given each item equal competitive weight. Our statute does not and that is best illustrated by the decision of our Court of Appeal in Assessor of Area 10 -- Burnaby-New Westminster v. Chevron Canada Ltd. (B.C. Assessment Authority Stated Cases -- Case 191) at p. 1076-2.

There the language of the statute was very similar to the language considered in Orchardson Forest Products Ltd., supra, it was:

"Improvements" . . . includes

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

In Chevron the Board found that tanks used to blend crude oil with chemicals were structures and assessable. An appeal by way of stated case was dismissed by MacKinnon, J. who said at p. 1073:

Applying the principles of Trans Mountain Oil Pipe Line, I am of the view that a finding by the Board that the blending tanks were "structures" makes the question of whether or not they were machinery wholly irrelevant.

Here, "structures" are not specifically excluded in the statutory exception as "storage tanks" were in the Trans Mountain case. However, "structures" fall specifically within the definition of improvements and are, therefore, assessable unless otherwise excepted. There was no need for the Board to determine whether or not the blending tanks were also machinery. Once the Board found the blending tanks were structures, they were assessable as improvements.

In the Court of Appeal Lambert, J. A. said at p. 1076-2:

The real questions at the heart of this appeal are whether, if a piece of plant is a structure, it can also be machinery, and, if so, is it excluded from the definition if it comes within the meaning of the phrase ". . machinery . . . as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property;"?

The tanks fitted the description of "structure" contained in the definition of "improvements". They also fitted the description of excluded removable fixtures. Competition between the two categories was permitted by the statute but the statute gave more competitive weight to the removable fixture category, which ousted the "structure" category, and, therefore, the tanks were not statutory improvements.

In Chevron the vital words were "other than". Here they are "except for". The two phrases are synonymous. In Chevron Lambert, J. A. pointed out that the reason for the words "other than buildings" was that as the words "fixtures, machinery and similar things", when used at the exclusion stage of the definition were capable of applying to buildings, and as it was not intended that they should be so capable, the words "other than buildings" had to be inserted.

Thus, the statutory provisions appear to require the tribunal of fact to take a step-by-step procedure for the purposes of making its finding of fact.

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 fact 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.

What the Assessment Appeal Board did in the instant case was to take that step-by-step procedure. It found as a fact that a kiln was not a building but a piece of machinery. It then went on to find, also as a fact, that it was machinery which came within the description of paragraph (o) and concluded, properly in my opinion, that a kiln was not a statutory improvement.

The questions posed and the answers that I give are as follows:

1. Did the Assessment Appeal Board err in law (in answering the question of whether the subject dry kilns were buildings) in finding that (sic) the fact as a matter of law that an item can be both a structure and machinery was an over-riding consideration?

ANSWER: No.

2. Did the Assessment Appeal Board err in law (in answering the question of whether the subject dry kilns were buildings) in finding that section 26 (3) is relevant to the question of whether the subject dry kilns were buildings?

ANSWER: No -- it referred to section 26 (3) to justify its consideration of "use". It did not need that justification.

3. Did the Assessment Appeal Board err in law (in answering the question of whether the subject dry kilns were buildings) in finding there be to (sic) the specified "Over-riding considerations"?

ANSWER: No.

4. Did the Assessment Appeal Board err in law in finding that the use to which an item is put can remove it from the category of "building"?

ANSWER: No.

5. Did the Assessment Appeal Board err in law in finding that the use to which the subject dry kilns was put removed them from the category of "building"?

ANSWER: No.

The appeal is dismissed and Galloway Lumber Co. has its costs.