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BRITISH COLUMBIA TELEPHONE COMPANY LIMITED

v.

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA & THE BRITISH COLUMBIA ASSESSMENT AUTHORITY

Supreme Court of British Columbia (A903448) Vancouver Registry

Before the HONOURABLE MR. JUSTICE SCARTH (in chambers) Vancouver

January 15, 1991

Barry T. Gibson for the Petitioner
J. G. Pottinger for the Respondent
Peter W. Klassen for the Intervener (British Columbia Assessment Authority)

Reasons for Judgment (Oral) January 15, 1991

The Petitioner, British Columbia Telephone Company Limited, seeks a declaration that the words " . . . or for purposes ancillary to, the business of . . ." in British Columbia Regulation 438/81, "Prescribed Classes of Property Regulation", made pursuant to s. 26 (8) of the Assessment Act, R.S.B.C. 1979, c. 21, are ultra vires and of no force and effect.

For the purpose of administering property taxes, land and improvements in British Columbia are classified as residential property, utilities, unmanaged forest land, major industry, light industry, business and other, managed forest land, recreational property or farm property.

Each municipality sets a tax rate in respect of each class of property.

Certain classes attract a higher tax rate than others. Generally, the rates set for property included within the class designated "utilities" is higher than the rate set for any other classification.

The Lieutenant Governor in Council determines what the classes of property are, and what property is to be included in each class. He does so pursuant to the authority vested in him by s. 26 (8) of the Assessment Act, which reads:

> "26 (8) The Lieutenant Governor in Council shall prescribe classes of property for the purpose of administering property taxes and shall define the types or uses of land or improvements, or both, to be included in each class."

Pursuant to that subsection the Lieutenant Governor in Council, by British Columbia Regulation 438/81, prescribed the nine classes of property mentioned above. Class 2, relating to utilities, reads as follows:

> Class 2 -- utilities.
>
> 2. Class 2 property shall include only land or improvements, or both, used or held for the purposes of, or for purposes ancillary to, the business of

(a) transportation by railway,

(b) transportation, transmission or distribution by pipeline,

(c) communication by telegraph or telephone, including transmission of messages by means of electric currents or signals for compensation,

(d) generation, transmission or distribution of electricity, or

(e) receiving, transmission and distribution of closed circuit television; but does not include that part of land or improvements or both

(f) included in Classes 1, 4 or 8,

(g) used as an office, retail sales outlet, administration building or purpose ancillary thereto, or

(h) used for a purpose other than a purpose defined in paragraphs (a) to (e) of this class."

On behalf of the Petitioner, Mr. Gibson submits s. 26 (8) of the Assessment Act requires the Lieutenant Governor in Council to define the utilities class by reference to the "type or use" of property. Insofar as the definition in the regulation reads:

> "Class 2 property shall include only land or improvements, or both, used or held for the purposes of . . . (c) communication by . . . telephone . . ."

Mr. Gibson says it is authorized by the Act because it defines property in terms of its type or use. On the other hand, it is argued, the words "or for purposes ancillary to, the business of", are ultra vires because they do not define property in terms of its type or use. Rather, it is said, they define property by reference to the business carried on by the person who is using the property.

Mr. Gibson refers to the decision of this Court in Inland Natural Gas Company Limited v. British Columbia Telephone Company (No. A781585, Vancouver Registry, September 25, 1978) (B.C. Stated Case #117, page 699). The statutory provisions there under consideration included s. 24 (8) of the Assessment Act, S.B.C. 1974 c. 6 and British Columbia Regulation 437/77 and 496/77. Subsection 24 (8) of the Act read as follows:

> (8) "The Lieutenant Governor shall define the types or uses of land or improvements, or both, to be included in each class."

In part the regulation defined utilities as follows:

> "Class 2 -- Utilities (30 percent) shall include land or improvements, or both, except land or improvements or both included in classes 1 and 4, of any telegraph corporation, railway corporation, pipeline corporation, or of any electric light, electric power, telephone, water, gas, or closed circuit television company..."

The Court held the definition of utilities contained in that regulation to be ultra vires because it defined utilities by reference to who owned it, rather than by classifying the property by type or use.

At page 701 of B.C. Stated Case #117, Mr. Justice Macdonald (now J.A.) wrote:

> The determining factor in the Board's finding that the properties of these two appellants should be classified as Utilities, Class 2 is the presence of the word 'of' in the definition. Quoting only the essential words, the definition reads:
>
> > 'Class 2 -- Utilities (30 percent) shall include land or improvements or both . . . of any . . . pipeline corporation, or . . . telephone . . . company . . .'

The Board was of the opinion that the inclusion of the word 'of' was a clear indication that the determination of classification as utilities should not be made upon the manner in which the land or improvements were used but rather upon the basis of ownership. Class 2 excludes land or improvements or both included in classes 1 and 4. Class 1 is residential. The Board went on to find that as the residence at Kelowna of Inland Natural Gas Co. Ltd. was used for office overload space and not for residential purposes, it could not fall within the definition of Class 1 -- Residential

I agree with the view of the Board as to the effect of the definition of Class 2 -- Utilities by reason of the inclusion of the word 'of'. But that definition is ultra vires. Under s. 24 (8), the Lieutenant-Governor in Council 'shall define the types or uses of land or improvements, or both, to be included in each class'. Mr. Hutchison argued that the definition is intra vires because it defines types of land or improvement. I do not agree. One does not define a type of land or improvement by naming the owner. The applicable definition of 'type' which I take from the Shorter Oxford English Dictionary is:

> 'The general form, structure, or character distinguishing a particular kind, group or class of beings or objects.'

Ss. 8 requires the Lieutenant-Governor in Council to define the types of land or improvements. That is objects not beings. The unsoundness of the contention for the Respondents is revealed by an illustration. Take the Vancouver Hotel property. If one person asked another what type of land and improvements it was he would consider that he was not getting a responsive answer if he was told that it was owned by Canadian National Railways. He would expect to hear an answer to the effect that it was a prime, downtown, urban land developed as an hotel."

Mr. Gibson submits that by including the words "or for purposes ancillary to, the business of" in the regulation presently in force, the Lieutenant Governor in Council has classified land and improvements by reference to the business carried on by the person who is using them. The effect of that, it is argued, is virtually the same as defining what is included in the utilities class by reference to the owner of the land or improvements. The Court, in the Inland Natural Gas case, held such a provision to be ultra vires.

Mr. Gibson submits that s. 26 (8) of the Assessment Act permits the Lieutenant Governor in Council to classify improvements by reference to their "use". Giving the word "use" its natural and ordinary meaning, Mr. Gibson contends the legislature intended land and improvements to be classified by reference to what they are used for, and not by reference to the business engaged in by the person who uses them.

Under s. 26 (8) of the Assessment Act, the Lieutenant Governor in Council is required:

> (i) to prescribe classes of property for the purpose of administering property taxes, and
>
> (ii) to define the types or uses of land or improvements, or both, to be included in each class. The section is quite clear, in my view, that property (land and improvements) is to be classified in accordance with its type or use. In defining Class 2 property (that is, utilities) as including "only land or improvements, or both, used or held for the purposes of . . . (c)

> communication by . . . telephone" I think the regulation made by the Lieutenant Governor in Council falls squarely within s. 26 (8) of the Act because it relates the property to a specific use, that is "for the purposes of . . . communication by telephone".

With respect to the impugned words in the regulation -- "or for purposes ancillary to, the business of" -- I am of the view they likewise are authorized by s. 26 (8) of the Act. The construction of the regulation, employing those words, is as follows:

> "Class 2 property shall include only land or improvements, or both, used or held . . . for purposes ancillary to, the business of . . .
>
> (c) communication by . . . telephone."

The definition, in that form, continues to bespeak of a classification of property in accordance with its use. It is not, in my opinion, a definition by reference to who owns the property. In effect, the regulation classifies property under the heading "utilities" on the basis of "use" and "ancillary use". That classification, in my judgment, is authorized by s. 26 (8) of the Act.

In the result the application is dismissed.