[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION (QUEENSLAND) . . PLAINTIFF;

AND

STRONACH . . . . . DEFENDANT.

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BRISBANE, *June* 17.

Starke, Dixon and McTiernan JJ.

Sales Tax—Goods manufactured—Primary products—Operations in mining—Alteration of form or condition of goods—Granite and freestone taken from quarries—Process and treatment—Sales Tax Assessment Act (*No.* 1) 1930-1935 (*No.* 25 *of* 1930—*No.* 8 *of* 1935), *secs.* 3, 17, 20 (1) (*g*).

Granite and freestone which, in Australia, are cut out of quarries and moved in large blocks and then sawn into sizes suitable for use in the construction of buildings are goods manufactured in Australia within the meaning of the *Sales Tax Assessment Act* (*No.* 1), and are not exempted by sec. 20 (1) (*g*) of the Act as "being primary products which are derived directly from operations carried on in Australia in . . . mining . . . and which have not been subject to any process or treatment resulting in an alteration of the form, nature or condition of the goods."

Held, accordingly, that for the period before the operation of the amendment made by sec. 6 of the *Financial Relief Act* 1934 (which inserted in the First Schedule to the *Sales Tax Assessment Act* (*No.* 1) an exemption in respect of "stone") granite and freestone so prepared were liable to sales tax.

CASE STATED.

The Deputy Federal Commissioner of Taxation for Queensland claimed by writ of summons from the defendant George Alexander Stronach an amount alleged to be due as sales tax, under the *Sales Tax Assessment Act* (*No.* 1) 1930-1935, on certain freestone and granite. For the purpose of determining the defendant's liability a special case was stated by consent of the parties, pursuant to Order

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XXXII., rule 1, of the *Rules of the High Court*, for the opinion of the High Court. The case was substantially as follows :—

The defendant was a master builder and contractor carrying on business at Brisbane and elsewhere in Queensland and was registered as a manufacturer under the *Sales Tax Assessment Acts*.

The freestone was the produce of natural deposits of freestone situated in quarries at Yangan and Helidon and was won by the defendant from these quarries by the following process :—After the overburden of the natural deposits of freestone was removed, blocks of freestone were cut out of the quarries by means of a drilling machine attached to a quarry bar. The drilling machine was used to cut channels in the stone and the quarry bar was used for the purpose of directing and controlling the action of the drilling machine. By this means large blocks of freestone were cut out of the quarries, and when removed the large blocks were in some cases split into smaller blocks by the use of a smaller drilling machine or rotator which drilled holes approximately five inches deep into the blocks. Steel plugs and feathers were then driven into these holes with a hammer gradually until the stone split. The blocks of freestone so obtained were then transported to the defendant's stoneyard at Brisbane by the defendant and were there classified for colour and size and were sawn into sizes suitable for use in the construction of buildings. The blocks of stone were then placed upon the stone mason's bench and in the majority of cases worked by the stone mason by means of hammers and chisels into the correct sizes and shapes for setting in position in buildings. The blocks were then further treated by planing one side which was then polished with an abrasive stone worked by hand. In some cases certain of the stones were worked into special shapes to conform to the ornamental features of the building into which they were to be built, such as fluted columns and ornamental capitals and cornices. The stones were thereafter conveyed to the site of the particular building into which they were to be built, and were there placed in position in the building. Save as aforesaid the freestone was not at any material time subject to any process or treatment.

The whole of the granite was the produce of a natural deposit of granite situated in a quarry at Cedar Creek, and was won by the

defendant from the quarry by the following process :—After the overburden of the natural deposit of granite was removed, blocks of granite were cut out of the quarry by means of a drilling machine or rotator which drilled holes into the deposit of granite. Steel plugs and feathers were then driven into these holes with a hammer gradually until the granite split. The blocks of granite so obtained were then transported to the defendant's stoneyard at Brisbane by the defendant and were there classified for colour and size and were sawn into smaller sizes suitable for use in the construction of buildings. The blocks of granite were then placed upon the stone mason's bench and in the majority of cases were worked by the stone mason, by means of hammers and chisels, into the correct sizes and shapes for setting in position in the building. In most cases the surface of the granite which was to be set in position exposed to the outer air was polished by abrasives applied either by mechanical power or by hand. The surface of the blocks of granite was smoothed by means of a carborundum wheel. The blocks of granite were then conveyed to the site of the particular building into which they were to be built, and placed in position in the building. Save as aforesaid the granite was not at any material time subject to any process or treatment.

The greater part of the freestone and granite was used by the defendant for building construction in the course of performing a contract, for which he received valuable consideration, made by him for the erection of a certain building in Brisbane, including the provision of all material necessary for the proper execution of the work of the erection.

The balance of the freestone and granite after being treated in the manner described was sold by the defendant in Australia.

The questions of law arising for the opinion of the High Court were as follows :—

1. Is the freestone or part thereof (and if so what part thereof) goods manufactured in Australia within the meaning of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 ?
2. Is the granite or part thereof (and if so what part thereof) goods manufactured in Australia within the meaning of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 ?

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Fahey, for the plaintiff. The point is not whether the defendant is a manufacturer in the ordinary sense, but whether he is a manufacturer as defined by the *Sales Tax Assessment Act* (*No.* 1) 1930-1935. The test is whether the stone is produced and processed commercially and may be bought (*Dominion Press Ltd.* v. *Minister of Customs and Excise* (1); *Federal Commissioner of Taxation* v. *Riley* (2)). These were goods manufactured in Australia. Rough granite was taken out of the quarry, processed and then became building stone. That was the production of a commodity. The stone is a commercial commodity and has a sale value, and as such is different from the rough stone taken from the quarry. The defendant is not entitled to any exemption under sec. 20 (1) (*g*). Removing the stone is an operation of quarrying and not an operation of mining (*Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (3)). That case shows that the operation of obtaining slate may be mining. A quarry from which building stone is extracted is not a mine. The operation of extracting stone from a quarry is not a mining operation. In any event the goods have ceased to be primary products and become secondary goods in that they are worked into shapes and sizes suitable for building purposes. There has been an alteration in the form and nature of the goods.

Macrossan, for the defendant. The granite and freestone are not manufactured goods within the meaning of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935. If they are, the defendant is entitled to exemption under sec. 20 (1) (*g*) of those Acts (*Adams* v. *Rau* (4)). It has been held that the preparation and cooking of fish and chips is not manufacturing goods within the meaning of the *Sales Tax Assessment Acts* (*Federal Commissioner of Taxation* v. *Rochester* (5)). If the only operation is extraction from the site, cutting up or shaping the material, which is called by the same name as before, that operation is not the manufacture or production of goods (*Irving* v. *Munro & Sons Ltd.* (6)). In order that the goods may not be exempt under sec. 20 (1) (*g*) their form or nature must be changed. Merely cutting and smoothing stone does not alter its form, nature

(1) (1928) A.C. 340.
(2) (1935) 53 C.L.R. 69.
(3) (1923) 33 C.L.R. 416, at pp. 418, 419.
(4) (1931) 46 C.L.R. 572.
(5) (1934) 50 C.L.R. 225.
(6) (1931) 46 C.L.R. 279.

or condition. The alteration must be intentional and not accidental. The process or treatment to which the goods are subjected to take them out of the exemption must be such a process as to result in the goods being different from what they originally were. In sec. 20 (1) (*g*) there is no distinction between mining and quarrying. Extracting freestone is an operation in mining (*Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (1)). As to " mining " and " quarrying," see *Oxford English Dictionary*. The materials are primary products derived by an operation of mining and the process or treatment to which they were subjected did not result in any alteration in the form, nature or condition of the goods. A quarry is capable of being included in the term " mine." Winning stone from a quarry is capable of being included in the term " derived from operations in mining." The legislature in enacting sec. 20 (1) (*g*) of the *Sales Tax Assessment Acts* must be taken to have had in mind the decision in *Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (1). [Counsel referred to *Lord Provost and Magistrates of Glasgow* v. *Farie* (2) ; *Midland Railway Co. and Kettering, Thrapston and Huntingdon Railway Co.* v. *Robinson* (3).]

Fahey, in reply. In *Federal Commissioner of Taxation* v. *Rochester* (4), the taxpayer was not the primary producer of the fish and potatoes. Winning freestone and granite is an operation of quarrying and not mining. If the case does not come within sec. 20 (1) (*g*), the defendant is a producer and liable to sales tax. The words of the section are to be taken in their natural signification and do not include quarrying for stone (*Watney Combe & Reid & Co.* v. *Berners* (5)). The stone became a commodity when it was ready for use in the construction of a building. Florists' bouquets are the subject of sales tax (*Re Searls Ltd.* (6) ; *Swinburne* v. *Federal Commissioner of Taxation* (7)).

The following judgments were delivered :—

STARKE J. This is a special case stated by the parties pursuant to Order XXXII., rule 1, of the rules of this court. The defendant

(1) (1923) 33 C.L.R. 416.
(2) (1888) 13 App. Cas. 657.
(3) (1889) 15 App. Cas. 19.
(4) (1934) 50 C.L.R. 225.
(5) (1915) A.C. 885, at p. 893.
(6) (1932) 33 S.R. (N.S.W.) 7 ; 49 W.N. (N.S.W.) 195.
(7) (1920) 27 C.L.R. 377.

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is a master builder and contractor who excavates freestone and granite from quarries. He works up this freestone and granite into building materials, some of which he uses in building and some of which he sells, in Australia. The question is whether the freestone and granite are subject to sales tax under the *Sales Tax Assessment Act* 1930-1935. The tax is imposed upon the sale value of goods manufactured in Australia and sold by the manufacturer or applied to his own use (Act, sec. 17). " Goods " includes commodities, and " manufacture " includes production (Act, sec. 3). There seems to be no doubt that the defendant produced goods or commodities within the meaning of the Act which prima facie fall within the description of its subject matter. In sec. 20, however, there is a provision that sales tax shall not be payable upon the sale value of " goods, being primary products which are derived directly from operations carried on in Australia in—(i) mining." The taxpayer claims exemption under this provision, and relies upon the case of *Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (1). There the facts disclosed that the taxpayer was obtaining slate from workings, in Australia, and using it for various commercial purposes, and the question asked on the facts was whether the court was at liberty to hold that the taxpayer was carrying on mining operations within the meaning of the *Income Tax Assessment Act*. The court answered the question in the affirmative. But all the case means is that there was matter before the learned trial judge which warranted him considering whether in fact mining operations were being carried on; his determination depending upon the character of the material, the methods of work, to some extent the signification of " mining " in the various mining Acts, and many other factors. When the case went back to him he found as a fact that the taxpayer was carrying on mining operations. It is useless, I think, to attempt an explanation of a case decided on the facts. I should have found the other way, and, in my opinion, the *Slate Quarries Case* (1) was wrongly decided on the facts. But a finding of fact is certainly not binding on this court in any other case, and there is no compulsion on me to say that extracting freestone

(1) (1923) 33 C.L.R. 416.

and granite from the earth is a mining operation. I do not think it is or can be called a mining operation.

Moreover, there is a further limitation. The section provides that goods are exempt from sales tax which are primary products derived directly from mining " and which have not been subject to any process or treatment resulting in an alteration of the form, nature or condition of the goods." That provision appears to me to exempt mining products as they come from the ground and not such products after they have been worked up into some other than their natural form and condition. In the present case, the freestone and granite were, in a greater or less degree, worked up into building materials. They do not exist in the form or condition in which they come from the ground.

I am of opinion, therefore, that the freestone and granite excavated and worked by the defendant are not exempt from sales tax, because they were not derived directly from operations in mining, and were subject to a process or treatment resulting in an alteration of the form, nature or condition of the goods.

I should add that the exemption in the First Schedule, " Stone " &c., inserted by the *Financial Relief Act* 1934, came into operation after the material dates in this case.

DIXON J. I agree the defendant is liable for sales tax on the goods mentioned in the special case. The commissioner's claim for sales tax is limited to the period after sec. 3, sub-sec. 4, came into operation and before the amendment made by sec. 6 of the *Financial Relief Act* 1934.

The first question is whether the articles in respect of which sales tax is claimed are " goods " and are the subject of " manufacture " within the definition of that word contained in sec. 3. The articles consisted of freestone and granite in blocks, which, for the most part, were supplied by a contractor to a building owner in fulfilment of a contract for the erection of a building. In my opinion, in the condition in which they were supplied, the blocks of freestone and granite were commodities and, therefore, fell within the definition of " goods." They were obtained by means amounting to production and, therefore, fell within the definition of " manufacture." Under

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sec. 3, sub-sec. 4, a person shall be deemed to have sold goods if, in the performance of any contract under which he has received, or is entitled to receive, valuable consideration, he supplies goods the property in which (whether as goods or in some other form) passes, under the terms of the contract, to some other person. The property in the blocks of stone would pass under a building contract at the time they became fixtures, unless the contract contained special conditions under which the property passed to the building owner at an earlier time. Thus it may be taken that, at the time when they were attached to the freehold and became fixtures, there was a sale.

The taxpayer relies on the exemption contained in sec. 20 (1) (*g*) (i). That exemption is confined to goods being primary products which are derived directly from operations carried on in Australia in mining. It is said that the operation of winning freestone and granite was an operation in mining. The exemption is further restricted by the requirement that the primary products must not have been subject to any process or treatment resulting in an alteration of the form, nature or condition of the goods. Whether the freestone and granite were won by operations in mining or not, I think that, before the property in the stone passed to the building owner and was thus deemed to be sold and after it came into such a condition as to be a commodity, it was subject to a process or treatment resulting in an alteration of its form or condition. The special case shows that freestone was obtained by cutting from open face quarries by means of drilling machines. When blocks were removed from the quarry they were taken to a stonemason's yard and were classified for colour and size and were sawn into sizes suitable for use in the construction of buildings. At that stage, if not before, they became "goods." The blocks of stone were then placed upon the stonemason's bench and, in the majority of cases, worked by the stonemason by means of hammers and chisels into the correct sizes and shapes for setting in positions in the building, that is, the particular building in course of erection. The blocks were then further treated by planing one side, which was then polished by an abrasive stone worked by hand. I think that this subsequent work deprives them of any benefit of the exemption claimed. The granite

blocks were similarly treated and disposed of. It too is disqualified from the exemption claimed. The special case, however, does not use terms in describing the treatment of granite and freestone in the yard which completely cover all stone for which exemption is sought. It says that the freestone and granite " in the majority of cases " were worked as I have described. It is, therefore, possible that what I have said does not cover the whole of the goods in question in the case. It may be that in the case of a portion of the freestone and granite the exemption might apply if the operations by which it was obtained come within the description of " mining." But, in my opinion, it cannot be correctly said that the stone was won by " operations in mining." The expression " mining " is a familiar source of difficulty both in England and here. In its primary meaning the word applies to subterranean working. The minerals sought by subterranean working would, no doubt, be highly prized. But it was natural to extend the application of the word " mining " in two directions. If the operations were subterranean, the word was applied to them although the minerals were of no great value. On the other hand, where precious metals or minerals usually won by subterranean working were obtained by excavation which did not include subterranean working, it was natural to describe those operations as mining. In *Lord Provost and Magistrates of Glasgow* v. *Farie* (1) Lord *Watson* says that, although the original meaning of " mine " might be restricted to subterranean excavation it appeared to him to be beyond question that for a very long period that has ceased to be its exclusive meaning and that the word has been used in ordinary language to signify, either the mineral substances which are excavated or mined, or the excavations whether subterranean or not from which metallic ores and fossil substances are dug out.

In *Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (2) the court's answer to the question submitted was, in effect, that open workings for the purpose of winning slate might according to circumstances amount to " mining." It appears to me that the decision does not preclude us from saying that the open workings for the purpose of winning freestone and granite are not mining. On the present special case we are the judges of law and fact,

(1) (1888) 13 App. Cas., at p. 677. (2) (1923) 33 C.L.R. 416.

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and so far as it is a question of fact, I should feel no hesitation in saying that the winning of the freestone and granite by the workings described is not within the ordinary meaning of mining. The fact is that slate seems to be won at some places by an operation which is one of mining because partly or wholly subterranean. It is easier, therefore, to draw the conclusion that winning slate from an open cut is mining. But winning building stone from ordinary quarries does not, I think, fall within the description "mining." The claim to exemption fails.

McTIERNAN J. I agree that the defendant is liable for sales tax. Manufacture, for the purposes of the Sales Tax Acts, is defined to include production. The materials here are the subject of production and are, according to the Act, manufactured goods. The defendant is not, in my opinion, entitled to the benefit of the exemption contained in sec. 20 (1) (*g*). Uninstructed by the *Slate Quarries Case* (1), I would not have thought that the building stone, now in question, either the granite or the freestone, was directly derived from the operation of mining. I agree that we are not required by that decision to hold that such operation is one of mining. But, if it were mining, upon the facts of the case I think the right conclusion is that both classes of stone were subject to a process or treatment resulting in an alteration of the form or condition of the primary product.

Questions submitted answered in the affirmative. Remit case to Dixon J. to enter judgment in accordance with the answers and to deal with the costs of this hearing and of the case stated.

Solicitor for the plaintiff, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Chambers, McNab & Co.*

Solicitors for the defendant, *Morris Fletcher & Cross.*

B. J. J.

(1) (1923) 33 C.L.R. 416.