[HIGH COURT OF AUSTRALIA.]

M. R. HORNIBROOK (PTY.) LTD. . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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BRISBANE, *June* 16.

SYDNEY, *July* 28.

Latham C.J., Rich, Starke, and McTiernan JJ.

Sales Tax—Concrete piles used in erection of bridge—Bridge built under contract with franchise holder—Piles constructed by contractor—Goods passing under terms of contract to some other person—Goods applied by manufacturer to his own use—Jurisdiction of board of review—Sales Tax Assessment Act (*No.* 1) 1930-1936 (*No.* 25 *of* 1930—*No.* 78 *of* 1936), *secs.* 3, 17, 41.

Sec. 17 (1) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1936 provides that "sales tax . . . shall be levied and paid upon the sale value of goods manufactured in Australia . . . by a taxpayer and . . . sold by him or . . . applied to his own use."

A contractor constructed a bridge under contract with a highway company which held a franchise for the erection of the bridge under the *Tolls on Privately Constructed Road Traffic Facilities Act of* 1931 (Q.). The bridge was built on reinforced concrete piles, driven into the bed of the sea. The piles were constructed by the contractor on the shores of the bay adjacent to the site of the bridge. Concrete piles are not bought and sold in Australia but are specially constructed by contractors for a particular job on which they are engaged. The Commissioner of Taxation assessed the contractor to sales tax in respect of the piles.

Held, (1) by *Latham* C.J., *Rich* and *Starke* JJ. (*McTiernan* J. dissenting), that the concrete piles were "goods" within the meaning of the *Sales Tax Assessment Act* (*No.* 1) 1930-1936; (2) by *Latham* C.J. and *Rich* J. (*Starke* J. doubting), that the contractor was deemed to have sold the piles by virtue of sec. 3 (4) of the Act; (3) by *Rich* and *Starke* JJ., that the piles were applied by the manufacturer to its own use, within the meaning of sec. 17 of the Act.

Held, accordingly, by *Latham* C.J., *Rich* and *Starke* JJ. (*McTiernan* J. dissenting), that the contractor was chargeable with sales tax in respect of the piles.

Per Latham C.J. and *Rich* J.: It is within the jurisdiction of the board of review to hear an objection to an assessment to sales tax that no tax is payable at all.

REFERENCE under sec. 18 of the *Judiciary Act* 1903-1937.

The Federal Commissioner of Taxation assessed M. R. Hornibrook (Pty.) Ltd. to sales tax due under the *Sales Tax Assessment Act* (*No.* 1) 1930-1936 on certain reinforced concrete piles built adjacent to the site of the Hornibrook Highway in Moreton Bay, Queensland. The company was dissatisfied with the assessment and requested that the matter be referred to the board of review, which confirmed the assessment. The company gave notice of appeal to the High Court and upon the appeal coming on to be heard before *Rich* J., his Honour, under sec. 18 of the *Judiciary Act* 1903-1937, directed that the matter be argued before the Full Court upon agreed facts, from which the court was to be at liberty to draw inferences.

The relevant facts were set out in par. 5, sub-pars. *a-e* of the admitted facts, and may be summarized as follows :—(*a*) M. R. Hornibrook (Pty.) Ltd. was a builder and contractor which, in addition to manufacturing ironwork and goods for use in contracts undertaken, manufactured items of plant for its own use. (*b*) In the years 1934 and 1935, M. R. Hornibrook (Pty.) Ltd. constructed under contract for Hornibrook Highway Ltd. at a price set out in the contract, the Hornibrook Highway connecting Sandgate and Redcliffe, Queensland. Part of the highway consisted of a bridge of about $1\frac{3}{4}$ miles in length over an arm of Moreton Bay. The bridge was built on reinforced concrete piles, which were driven into the bed of the sea in series of three in line, each set of three being connected by a headstock of reinforced concrete. (*c*) The piles varied in length depending upon the depth to which they had to be driven into the bed of the sea. They were made of a mixture of cement, crushed metal, sand and water, and reinforced with steel bars. (*d*) The piles were constructed on the bank of Moreton Bay adjacent to the site of the bridge. The headstock was built in the same manner as the piles. (*e*) So far as was known, concrete piles of the class used in the construction of the bridge were not manufactured for sale anywhere in Australia, nor where they an article of commerce in Australia or anywhere else in the world. Such piles had not been standardized because the construction of each pile depended upon the particular load which it was to carry and the nature of the ground into which it was to be driven, and therefore each pile in a job might

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be different from every other pile in it in length. It was not practicable to make the piles at a distance from the site and transport them by road because of the risk of fracture of the piles and also of their unwieldiness.

The questions of law submitted for the determination of the High Court were :—

1. Upon the facts hereinbefore set out was the Commonwealth Taxation Board of Review entitled in law to confirm the said assessments and to decide that the grounds of objection taken by the company to the said assessments, namely :—
   (*a*) That the said piles had no sale value within the meaning of the *Sales Tax Assessment Acts* (Nos. 1 to 9) 1930 to 1936.
   (*b*) That the said piles were not a " manufacture " or " goods manufactured " within the meaning of the *Sales Tax Assessment Acts* (Nos. 1 to 9) 1930 to 1936.
   (*c*) That the said piles formed part of a bridge and were built on the job and were not articles of commerce and were not procurable from any third person and were not of a class of goods manufactured for sale by any person,

   were not sustainable ?
2. Upon the facts hereinbefore set out was the said board bound in law to allow the said grounds of objection or some and which of them and to set aside the said assessments ?

Fahey (with him *Macrossan*), for the appellant. This is an appeal from the board of review against an assessment for sales tax on certain concrete piles made for a bridge in Moreton Bay. The whole decision of the board of review and not merely the question of law is involved (*Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). The concrete piles are not goods manufactured within the meaning of the *Sales Tax Assessment Act* (*No.* 1). If they are manufactured goods within the meaning of the Act they have no sales value. In order to establish sales value it must

(1) (1928) 41 C.L.R. 148.

be shown that the goods are articles of commerce and are made for sale. These piles were not made for sale and they are not bought and sold in the ordinary course of business. Under sec. 3 of the Act the goods must be articles of commercial value. The application of the Act is not extended by sec. 3 (*f*), so that before sales tax is payable there must be a sale of goods. In the case of *Deputy Federal Commissioner of Taxation* (*Q.*) v. *Stronach* (1) the goods were articles of commerce. The piles have no commercial value and it is impossible under the *Sales Tax Assessment Act* to compute their sales value. The court will look to the scope of the Act (*Deputy Federal Commissioner of Taxation* (*S.A.*) v. *Ellis & Clark Ltd.* (2)). There was no sale to anyone in this case. There has to be a supply of goods passing to some other person under a sale or contract. The piles were not supplied to any person, but were driven into the sea bed. The piles when so driven in became the property of the Crown, and therefore did not pass by way of sale under the terms of the contract between M. R. Hornibrook Pty. Ltd. and Hornibrook Highway Ltd. The piles were not manufactured by the appellant for the purpose of its own business, and were not applied to its own use within the meaning of sec. 17 (2) of the Act. The Act deals only with saleable goods, and one of the elements of liability to tax is that the goods should have a sale value (*Adams* v. *Rau* (3); *Federal Commissioner of Taxation* v. *Rochester* (4); *Irving* v. *Munro & Sons Ltd.* (5)). The tax cannot be enforced as it is impossible to ascertain the sales value of these piles. They have no market value (*Commissioner of Taxes* v. *Executors of Rubin* (6)).

McGill K.C. (with him *Grove*), for the respondent. The commissioner proceeded on the ground that there was a sale of the concrete piles from M. R. Hornibrook (Pty.) Ltd. to Hornibrook Highway Ltd. The piles were goods or commodities (*Deputy Federal Commissioner of Taxation* (*Q.*) v. *Stronach* (1); *The Frederik VIII.* (7)). The goods were supplied by the appellant to the Hornibrook Highway Co. The property passed not as piles but as part of the bridge.

(1) (1936) 55 C.L.R. 305.
(2) (1934) 52 C.L.R. 85.
(3) (1931) 46 C.L.R. 572.
(4) (1934) 50 C.L.R. 225.
(5) (1931) 46 C.L.R. 279.
(6) (1930) 44 C.L.R. 132, at pp. 143, 148, 149.
(7) (1916) 116 L.T. 21, at p. 22.

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The property in the bridge is not in the Crown but in the Hornibrook Highway Co. by virtue of the *Tolls on Privately Constructed Road Traffic Facilities Act of* 1931 (Q.). Under that Act the bridge does not become the property of the Crown till the franchise expires. The property thus passed under the contract to some other person, and as long as property passes from the appellant company to some other person there is a liability to tax. If the appellant could make these piles some other person could have made and sold them. The test is: If the appellant had purchased them, what would he have had to pay for them ? Under sec. 17 (1) of the Act the goods were manufactured by the appellant and used for the purpose of its business. The goods were thus applied by the appellant to its own use.

Fahey, in reply. There is a distinction between a contract with some other person and making goods for a person's own use (secs. 17 (2) and 3 of the Act). The property must pass under a contract. Here property passed by operation of law when the piles were driven into the sea bed. The word " owner " has a restricted meaning under the *Tolls on Privately Constructed Road Traffic Facilities Act of* 1931 (Q.).

Cur. adv. vult.

July 28.

LATHAM C.J. This is an appeal by M. R. Hornibrook (Pty.) Ltd. against a decision of the Commonwealth Taxation Board of Review that sales tax is payable under the *Sales Tax Assessment Act* (*No.* 1) 1930-1936 in respect of the sale value of reinforced concrete piles used in the construction of the Hornibrook highway.

The piles were used in building a bridge one and three-quarter miles long across Moreton Bay. The appellant was the contractor for the building of a highway which included the bridge. Another company, Hornibrook Highway Ltd., held a franchise for the construction of the bridge under the *Tolls on Privately Constructed Road Traffic Facilities Act of* 1931. The latter company was bound to construct the highway and it was authorized to charge specified tolls. At the end of the franchise period the highway became the unencumbered property of the Crown free from the rights of the franchise holder.

The highway was constructed in the years 1934-1935 under a contract which provided for a principal payment of £220,000. The bridge was built on reinforced concrete piles which were driven into the bed of the sea. The piles varied in length according to the place in which they were driven. They were constructed on the shore of Moreton Bay, and, when they had hardened, were transported by punts to the positions in which they were to be placed. They were driven into the bed of the sea in sets of three. The heads of the piles were then connected by a concrete headstock constructed across the tops of the piles.

Concrete piles are not manufactured for sale anywhere in Australia and are not standardized. They must be constructed to suit the particular job for which they are required, and they are so heavy that it is necessary to make them upon or near the site of the structure in which they are to be used.

The appellant objected that sales tax was not payable and relied upon the following grounds :—(*a*) That the said piles had no sale value within the meaning of the *Sales Tax Assessment Acts* (Nos. 1 to 9) 1930-1936. (*b*) That the said piles were not a " manufacture " or " goods manufactured " within the meaning of the *Sales Tax Assessment Acts* (Nos. 1 to 9) 1930-1936. (*c*) That the said piles formed part of a bridge and were built on the job and were not articles of commerce and were not procurable from any third person and were not a class of goods manufactured for sale by any person. The board of review decided in favour of the Commissioner of Taxation and the company now appeals to this court.

The *Sales Tax Assessment Act* (*No.* 1) 1930-1936, sec. 19, provides that sales tax shall be paid by the manufacturer of the goods the sale value of which is specified in sec. 18. The commissioner contends that the piles were goods which were manufactured by the appellant. The provision in sec. 18 which the commissioner contends is relevant is to the effect that where goods are sold by retail the sale value shall be the amount for which those goods would have been purchased by the taxpayer from another manufacturer if that manufacturer had manufactured those goods in the ordinary course of his business for sale to the taxpayer (sec. 18 (1) (*b*) (ii)). The appellant contends that this provision cannot apply because no

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other manufacturer manufactured reinforced concrete piles in the ordinary course of his business for sale. The reply of the commissioner to this contention is that another manufacturer would have manufactured the piles for the appellant and could have sold them to him, so that it is not impossible to ascertain a sale value under the provision quoted. But there is really no difficulty as to the ascertainment of the sale value, because the parties in fact have agreed upon a sale value and have agreed on the amount of tax payable if the transaction in question is subject to tax.

The piles were not sold as piles by the appellant to Hornibrook Highway Ltd. The latter company certainly did not become the owner of the piles as they lay upon the shore, or as they were being transported, or as they were being driven. When they were finally fixed in position they were attached to the bed of the sea and became the property of the Crown, which throughout remained the owner of the bed of the sea and of the bridge, though subject to the rights of the franchise holder. A franchise holder is described as the "owner" for the purposes of the Act under which the franchise is granted. But this description of the franchise holder as owner refers only to the ownership of the franchise rights and not to the ownership of any highway or bridge made upon Crown land.

Thus there was in fact no sale of the piles by the appellant to any person whereby that person became owner of the piles before they lost their character as chattels and became part of the bridge. Therefore it is necessary for the commissioner to rely upon some special provision in the Act creating a liability in such a case as the present. Such a provision, the commissioner contends, is found in sec. 3 of the Act. In that section it is provided that "sale of goods by wholesale" includes certain transactions but does not include (*inter alia*)—"(*f*) the supply of goods by a person to some other person in the circumstances specified in sub-sec. 4" of the section. Such a supply of goods is deemed to be a sale of goods by retail (sec. 3—provision following upon par. *g*).

Sec. 3 (4) of the Act, referred to in par. *f* above quoted, was at the relevant time in the following form: "For the purposes of this Act, 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."

In my opinion the commissioner is right in his contention that this provision applies to the present case. The appellant company, in the performance of a contract for building a bridge under which contract it was entitled to receive and doubtless has received valuable consideration, has supplied goods, namely, reinforced concrete piles. Such piles are plainly manufactured articles. They are chattels. They were intended to be incorporated in a structure and were so incorporated. They lost their identity as goods in that structure. But this fact does not prevent the piles from being goods any more than it prevents bricks or stones or nuts and bolts from being goods. The fact that the goods were specially manufactured and designed for a particular purpose cannot be held to deprive them of the character of goods.

Sub-sec. 4 applies where goods are supplied for the purpose of a contract and the property in the goods (whether as goods or in some other form) passes under the contract to some other person. In the present case the property in the piles, not as piles but as an integral part of the bridge, passes to the person who becomes the owner of the bridge, namely, in my opinion, the Crown, but subject, as already stated, to the rights of the franchise holder. It was argued that the property did not so pass " under the terms of the contract," but that it passed by operation of law, that is, by reason of the legal principle that the piles when attached to the land passed to the owner of the land—the Crown. But, in my opinion, the property may fairly be said to pass under the terms of the contract because the property passes by reason of the terms of the contract and of what is done under the contract, namely, the driving of the piles into a position in the bed of the sea which position is intended permanently to be occupied by them. No property ever passes under the terms of any contract if the contract is considered in abstraction from applicable legal principles. Thus, in my opinion, sec. 3 (4) of the Act applies to the present case. The same opinion was expressed by *Dixon* J. in *Deputy Federal Commissioner of*

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Taxation (*Q.*) v. *Stronach* (1). Then sec. 18 (1) (*b*) (ii) becomes applicable and the sale value in respect of which sales tax is payable can be ascertained.

Accordingly, in my opinion, the appeal should be dismissed.

It was objected by the commissioner that the board of review had no jurisdiction to determine the objections raised in the present case because those objections were not merely objections to the amount or value upon which the commissioner had assessed sales tax but were objections that sales tax was not payable at all. This objection depended upon the words of sec. 41 (1). That provision enables a taxpayer to object to any assessment or decision made by the commissioner by which the sale value of any goods is ascertained by lodging an objection in writing against the "amount or value" upon which he is required to pay sales tax. The section requires that the taxpayer shall state fully and in detail the grounds upon which he relies. If the commissioner disallows the objection the taxpayer may require the decision of the commissioner to be referred to a board of review and upon review a taxpayer is limited to the grounds stated in his objection (sec. 41 (1), (2)). The contention of the commissioner is that only objections to "amount or value" can be dealt with under these provisions, and that an objection that no tax at all is payable must be dealt with, if at all, in a proceeding for the recovery of the tax. In my opinion this objection is not well founded. A contention that the commissioner is seeking to tax a transaction which does not involve any dealing in "goods" within the meaning of the Act, or that the alleged goods have no sale value within the meaning of the Act, is a ground for an objection to the amount or value upon which the commissioner requires the taxpayer to pay sales tax. The objection of the taxpayer is that there is no amount or value upon which he is bound to pay tax, that is, that the alleged amount or value should, for the reasons relied upon by him, be reduced to nil. In my opinion, therefore, the board of review did have jurisdiction to determine the objections raised by the taxpayer.

For the reasons stated the appeal should be dismissed and the assessment affirmed.

(1) (1936) 55 C.L.R., at p. 311.

RICH J. When this appeal came before me the parties asked for a case to be stated, but I made the same order as in *New Zealand Flax Investments Ltd.* v. *Federal Commissioner of Taxation* (1), costs to be costs in the appeal.

The facts are already in statement and need not be repeated in detail. The question for our determination is whether the articles in respect of which sales tax is claimed are "goods" and are the subject of manufacture in Australia within the meaning of the *Sales Tax Assessment Act* 1930-1936, sec. 3. The articles in question consisted of concrete piles which were supplied by the appellant —a bridge-engineering and contractor company—to the highway company in fulfilment of a contract for the erection of a bridge over an arm of Moreton Bay. "The process of construction" and the condition in which these piles were supplied is described in par. 5 of the admitted facts.

This condition satisfies me that they were commodities and so within the definition of "goods" and the process brings them within the definition of "manufacture" contained in sec. 3. Then were the goods sold or applied by the manufacturer the appellant building company to its own use (sec. 17)? The question of sale involves the construction of sec. 3 (4), which reads as follows: "For the purposes of this Act, a person shall be deemed to have sold goods if, in the performance of any contract (not being a contract for the sale of goods) 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." In the circumstances of this case the property in the concrete piles passed under the terms of the contract to some other person, since under the terms of the contract the manufacturing company is required to fix the piles in the land of another person in such a way that they shall cease to become the manufacturing company's chattel property and shall become that other person's real property. I also consider that in the circumstances the piles were applied by the manufacturing company to its own use (sec. 17), in that it employed them for the purpose of carrying out a contract into which it had entered in the course of its business.

(1) (1938) 61 C.L.R. 179.

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And I see no reason why in a particular case a particular transaction should not come within the provisions of more than one description contained in an Act of Parliament: Cf. *David Jones Ltd.* v. *Willis* (1). On the hearing before the board of review " it was admitted by the taxpayer that if the board found that sales tax was attracted to these piles there would be no dispute as to the quantum of tax " (Reasons of the Chairman, Mr. W. D. Mears). The objection to the assessment that the piles had no sale value within the meaning of the Act is therefore not tenable. I am also of opinion that the objections argued before the board are within the ambit of sec. 41.

The appeal should be dismissed with costs, including the costs of the application to state a case to which I referred at the beginning of my judgment.

STARKE J. Appeal from a decision of the board of review pursuant to the provisions of the *Sales Tax Assessment Act* (*No.* 1) 1930-1936 directed to be argued before this court pursuant to the *Judiciary Act* 1903-1927, sec. 18.

The appellant is a builder and contractor, and in 1934-1935 it constructed, under contract, Hornibrook Highway, connecting Sandgate and Redcliffe in Queensland. Part of the highway consisted of a bridge about one and three-quarter miles in length over an arm of Moreton Bay. The bridge was built on reinforced concrete piles, which were constructed by the appellant on the bank of Moreton Bay adjacent to the site of the bridge. The piles are not bought and sold in the ordinary course of business, but are constructed by contractors for the particular undertaking or work on which they are engaged. The commissioner assessed the appellant to sales tax in respect of the piles so constructed by it and used in the bridge forming part of the Hornibrook Highway.

Objection was taken by the appellant to the assessment on the grounds :—

1. That the highway is really built for the Government of the State of Queensland.

2. That the piles have no sales value within the meaning of the *Sales Tax Assessment Acts* 1930-1936.

(1) (1934) 52 C.L.R. 110, at pp. 117, 123.

3. That the piles are not a manufacture or goods manufactured within the meaning of the Acts.

4. That the piles are not liable to tax under the said Acts.

5. That the piles are exempt from tax under the said Acts.

6. That the piles form part of a bridge and are built on the job and are not articles of commerce and are not procurable from any third person and are not a class of goods manufactured for sale by any person.

The commissioner regarded grounds 1, 4 and 5 as incompetent for the purposes of sec. 41 (1) of the Act and disallowed the other objections.

The appellant notified his dissatisfaction with the decision of the commissioner and requested the commissioner to refer the decision to the board of review, which he did. Before the board of review it was conceded on behalf of the appellant that grounds 1, 4 and 5 were outside the scope of the objections allowed by sec. 41 (1) of the Act upon its proper construction. Further, the appellant did not dispute the amount of the tax if it were assessable to sales tax in respect of the piles. The board of review confirmed the assessments: hence the appeal to this court.

I am not satisfied that the commissioner was right in disregarding grounds 1, 4 and 5 of the objections as he did, but his opinion on this matter cannot well be questioned in this appeal, for these grounds were not relied upon before the board of review. In any case, grounds 2, 3 and 6 raise the matter of substance in the present case.

The liability of the appellant to sales tax depends upon the proper construction of sec. 17 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1936. Sales tax is levied upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or applied to his own use (sec. 17). Goods manufactured in Australia by a taxpayer and applied to his own use mean goods manufactured in Australia in the course of carrying on a business and applied by the taxpayer to his own use whether for the purpose of that business or for any other purpose and whether or not those goods are of a class manufactured by that person for sale (sec. 17 (2)). "Goods" includes commodities. "Manufacture" includes production and also the combination of parts or ingredients whereby an article or substance

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is formed which is commercially distinct from those parts or ingredients (sec. 3 (1)). A person shall be deemed to have sold goods if, in the performance of any contract (not being a contract for the sale of goods) 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 (sec. 3 (4)).

In my opinion the piles constructed by the appellant for use in the bridge were goods manufactured or produced by it within the meaning of the *Sales Tax Assessment Act*. They were tangible articles produced by the application of physical labour or mechanical power and distinct from the ingredients composing them. The piles were in truth articles or goods specially made and supplied for the construction of the bridge as distinguished from services rendered: Cf. *Adams* v. *Rau* (1). The decisions of this court in *Deputy Federal Commissioner of Taxation* (*Q.*) v. *Stronach* (2) and *Federal Commissioner of Taxation* v. *Riley* (3) support the conclusion.

But were the piles sold by the appellant or applied to its own use? It is said that they must be deemed to have been sold by reason of the provisions of sec. 3 (4) of the Act (*Deputy Commissioner of Taxation* v. *Stronach* (4), per *Dixon* J.). The words in the sub-section "passes under the terms of the contract to some other person" are doubtless of a comprehensive nature. It is not "passes by the contract" but "under the contract." The passing of the property in the piles, however, was not brought about by any term of the contract or by force of the contract. It is true that the piles would not have been constructed and used for the purpose of the bridge if the contract had not been made. But the property in the piles or in the material from which they were constructed is not rooted in the contract but passed by operation of a rule of law when the piles were affixed to and became part of the soil. They would so pass upon becoming part of the soil without the existence of any contract whatever. Moreover the sub-section contemplates, I think, that the property passes at the moment of supply. But it cannot be affirmed that the piles so passed in the present instance. They did not necessarily pass at the moment of supply, but only when they were affixed to and became part of the soil.

(1) (1931) 46 C.L.R. 572.
(2) (1936) 55 C.L.R. 305.
(3) (1935) 53 C.L.R. 69.
(4) (1936) 55 C.L.R., at p. 312.

It was claimed that the property passed to the Crown when driven or sunk into the bed of the sea. It may be so, but the provisions of the *Tolls on Privately Constructed Road Traffic Facilities Act of* 1931 require consideration : See secs. 3 and 6.

The commissioner's decision, however, can be supported upon the express terms of sec. 17. The piles were applied by the taxpayer to its own use. The piles were manufactured in Australia by the taxpayer in the course of carrying on its business and used for the purpose of that business, namely, the performance of a contract made in the course of the business. The proviso to the sub-section, in the view I take of sec. 3 (4), is inapplicable to the case. The suggestion that the piles had no sales value is met by the provisions of sec. 18 (3) (*b*). The quantum of tax, as already mentioned, was not disputed before the board of review.

In my opinion the assessment of the taxpayer to sales tax in respect of the piles made by it was rightly confirmed by the board.

McTIERNAN J. In my opinion the appeal should be allowed, for the reason that the concrete piles upon the " sale value " of which it was sought to levy sales tax do not come within the description of " goods " within the meaning of the Act. There is no definition of the word " goods " in the Act ; it is stated in sec. 3 (1) that " goods " includes commodities, but does not include certain classes of " goods " (which are set out). The articles in question in this case are certain concrete piles forming the foundation of a bridge over Moreton Bay. The piles were constructed by the appellant out of concrete, steel reinforcements and other things on the shore of Moreton Bay adjacent to one end of the site of the bridge. The details of the process of construction of the piles, the placing of them into position and the setting of the headstocks on to the piles are described in par. 5 (*d*) of the agreed facts. The facts show that the piles formed the foundation of the bridge. Thus, they formed a basic and essential component of the bridge, and cannot be regarded, in their true nature, as mere accessories or things used in the construction of the bridge. To describe the piles of the bridge as " goods " seems to confuse the piles as a principal part of the structure with the materials out of which this part was made. Some of the ingredients of the piles may have been " goods " within the scope of the Act, as, for example, the cement out of which the concrete was made, or the steel reinforcements. The piles stand outside the conception of " goods " as much as brick foundations or brick walls

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of a house, or, indeed, in this case, the headstocks or any part of the deck of the bridge.

In the case of *Deputy Federal Commissioner of Taxation (Q.)* v. *Stronach* (1) the stones upon the sale value of which it was held that sales tax was payable were things to be used in the making of a structure. As such, each stone was in itself more properly to be regarded as a piece of building material rather than as a component part of a building like its foundation or one of its walls. The fashioned stones in a structure or part of a structure may be compared with the ingredients out of which the piles were built, such as the cement or steel reinforcements.

In my opinion, therefore, these piles are not " goods " within the meaning of the Act because they are not merchantable articles and were not brought into existence for sale or use as a commodity but as essential components of a specific structure : See *Adams* v. *Rau* (2).

There is nothing in the Act which, in my opinion, warrants so wide a departure from realities as to justify the classification of the concrete piles which form the foundation of the bridge as " goods." It seems to me that such things used in building operations as would be " goods " within the scope of the Act are described by words in sub-sec. *d* of the paragraph dealing with " sale of goods by wholesale " in sec. 3 (1) of the Act—although, of course, this paragraph has no direct bearing as a definition or otherwise on this case. The words are these : " goods of a kind used in the construction and repair of and wrought into or attached to so as to form part of buildings." It is not difficult to conceive of many things on or in a structure which, though in a literal sense they form parts of the structure, retain the character of things which are or were " wrought into or attached to " it. In no realistic sense, however, can walls or foundations, for example, be said to be " wrought into or attached to " buildings. Nor can the piles in this case be so described in relation to the bridge. These things are too closely identified with the entire structures to bear in any proper sense such a description.

Appeal dismissed.

Solicitors for the appellant, *Tully & Wilson.*

Solicitors for the respondent, *Chambers, McNab & Co.*

B. J. J.

(1) (1936) 55 C.L.R. 305.

(2) (1931) 46 C.L.R., at p. 578.