[HIGH COURT OF AUSTRALIA.]

COMMONWEALTH QUARRIES (FOOTSCRAY) PROPRIETARY LIMITED . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1938.

MELBOURNE, *Feb.* 21, 22; *Mar.* 25.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Sales Tax—"*Sale value of goods*"—*Contract price*—*Inclusion of cost of delivery*—*Sales Tax Assessment Act* (*No.* 1) 1930-1935 (*No.* 25 *of* 1930—*No.* 45 *of* 1935), *sec.* 18.

Where the sale price of goods includes the cost of delivery, the sale value of the goods for the purposes of sec. 18 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 is the price actually charged, including the cost of delivery.

REFERENCE by board of review.

Upon the hearing of an objection by Commonwealth Quarries (Footscray) Pty. Ltd. to an assessment to sales tax, the board of review referred the following admitted facts for the opinion of the High Court pursuant to the provisions of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935:—

1. The taxpayer company is a company incorporated under the *Companies Acts* in the State of Victoria and at all relevant times carried on business as a quarrymaster in that State.

2. In the carrying on of its business the company was at all times material a manufacturer within the meaning of the *Sales Tax Assessment Acts* of the following goods:—Metal, screenings, toppings and dust, all of which are goods within the meaning of those Acts upon the sale value whereof the company became liable to pay sales tax as the manufacturer thereof.

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3. During the period commencing 1st January 1934 and ending 31st July 1934 the company sold partly by wholesale and partly by retail certain quantities of goods of the above description.

4. During that period the company was a member of the Melbourne Quarrymasters' Association, which association included a large majority of the owners of privately-owned quarries within the metropolitan area. One of the objects of the association was the fixing of prices and rules to be observed by all members when selling their products. On 6th November 1933 the association fixed and set forth in a price list the prices and conditions to be observed by the members of the association when selling, whether by wholesale or retail, goods of the description therein appearing in the circumstances therein set forth. Such price list was circulated privately among the members of the association.

5. In the price list were set forth the prices to be charged for goods of the kinds specified delivered by and at the cost of the vendor to the buyer at any of the places set forth in the list. In fixing such prices the distance the goods had to be carried was taken into account, and this accounted for differences in the prices set opposite the various places mentioned in the list.

6. The contract pursuant to which such of the goods as were sold for delivery at places other than the company's quarry were sold was on each occasion constituted by a request by the buyer to be supplied with a specified quantity of goods of the description required delivered to the buyer at the buyer's place of business or some other specified place other than the quarry of the company and the delivery to and acceptance by the buyer of such goods at such place of delivery. Whenever a price was quoted it was the appropriate one set forth in the price list. Invoices were invariably rendered which showed only the date of delivery, the place of delivery, the nature and quantity of the goods, the price per yard thereof and the amount charged therefor. The price per yard so shown was the appropriate one set forth in the price list, and the amount so charged represented the number of yards calculated at this price. No division or allocation of the amount charged nor any reference to cartage appeared on the invoices.

7. In order to effect delivery of the goods to such customers the company employed and paid independent carters.

8. In making returns of sales and sales tax for the months of January, February, March, April, May, June and July 1934 for the purposes of the Act, the company deducted from the amounts which it charged to and received from its customers an amount representing the amount paid by it for cartage.

9. The commissioner claims that the amount charged to the customers for the goods of the description so sold and delivered during the period was the sale value of the goods for the purposes of the above-mentioned Act. The company contends that the sale value of the goods for the purposes of the Act was the amount so charged, less in each case the amount actually paid by it to effect delivery of the goods to its customer, or, alternatively, some lesser amount than the amount so charged.

The following question was stated for the determination of the High Court:

Whether upon the proper construction of the *Sales Tax Assessment Act* the sale value of the goods for the purposes of the Act is:

(*a*) the amount charged to its customers by the company for such goods as aforesaid, or

(*b*) the amount so charged less the amount paid by the company for cartage, or

(*c*) some other amount to be ascertained by some other and what means.

Herring K.C. (with him *Adam*), for the company. It is necessary to ascertain the sale value to the wholesaler for the purpose of assessing sales tax (*Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1)). The commissioner can go behind the documents, and the problem is to find out what the goods were sold for. Once it is ascertained that the scheme of the Act is to take the goods in the warehouse of the wholesaler, the system works uniformly for all purposes. The question is: What would the appellant sell its goods for at its factory? The particular terms of the particular contract are not the determining factor. The Act is seeking

(1) (1934) 52 C.L.R. 85.

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to arrive at a value at the time of appropriation to the contract. The tax should be assessed, not on the contract price, but only on the wholesale value as defined in sec. 18 of the Act.

[DIXON J. referred to *Carling Export Brewing and Malting Co.* v. *The King* (1).]

The legislature was concerned with the amounts for which the goods were sold and not the cost of transporting them from one place to another. Assuming that there is a basic price for the metal, the vendor may make a profit on the carting. If the price of cartage is added, the cost of insurance or of exchange might logically be added as well.

Wilbur Ham K.C. (with him *Hudson*), for the commissioner. Sec. 18 (1) of the *Sales Tax Assessment Act* makes it clear that on the plain meaning of the language the transaction is the complete transaction, and, if it includes transport, the contract price is the proper price. On the other hand, the purchaser may buy goods and himself carry the goods to their destination. Here there was no contract made until the contract was actually performed. The contract was accepted by performance (*Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler* (2)). Sec. 18 bears the construction put upon it by the department. The whole matter depends on the contract of sale.

Herring K.C., in reply. The contract price is not the sale value of the goods, if it is shown that it includes something for sales tax. The tax is imposed on the sale immediately preceding the retail sale. The cost of delivery should not be included.

Cur. adv. vult.

Mar. 25.

The following written judgments were delivered :—

LATHAM C.J. The reference by the board of review sets out the facts upon which the question asked arises, and it is unnecessary to re-state those facts at length. The reference shows that the taxpayer sold metal screenings and other products of its quarry to

(1) (1931) A.C. 435, at p. 445.

(2) (1898) A.C. 200, at p. 207.

customers, making a single charge for the goods sold and delivered at a particular place. The contract of sale therefore was simply a contract for goods sold and delivered at a specific place. It is contended for the commissioner that this price is the sale value of the goods within the meaning of sec. 18 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935. The taxpayer, on the other hand, contends that an amount representing an amount paid by the taxpayer for cartage of the goods to the customer should be deducted from that price in order to arrive at the sale value for the purposes of the Act.

The reference shows that a number of quarry proprietors, who constitute the Melbourne Quarrymasters' Association, have agreed among themselves as to the prices to be charged for their products when delivered at places mentioned in a price list circulated privately among the members of the association. The prices in that list vary according to the places at which the goods are to be delivered. In fixing the prices, the distance the goods have to be carried was taken into account, and this fact explains the difference in the prices mentioned. The price list, however, as already stated, was circulated privately among members of the association, and there is nothing to show that any of the customers of the taxpayer were aware of the existence of the list or of the agreement between the quarrymasters, or that, if they were so aware, they knew of the allowance made in each, or in any, case for cartage.

Some of the sales in respect of which tax is sought to be levied were by wholesale and others were by retail.

Sec. 18 (1) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935, so far as relevant, provides as follows: "For the purposes of this Act, the sale value of goods, not being goods to which the next succeeding sub-section applies which are sold by the manufacturer to an unregistered person or to a registered person who has not quoted his certificate in respect of that sale shall be—

(*a*) where the goods are sold by wholesale—the amount for which those goods are sold; and

(*b*) where the goods are sold by retail—

(i) if the goods are of a class which the manufacturer himself sells by wholesale—the amount for which the goods would be sold by the manufacturer if sold by wholesale."

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Latham C.J.

The retail sales in question were such as to make sec. 18 (1) (*b*) applicable, because the goods were of the class mentioned in the sub-section.

Sec. 18 (1) (*a*) applies to all the sales by wholesale. In the case of sales by wholesale the sale value of the goods is stated by the section to be " the amount for which those goods are sold." In the present case, it is, in my opinion, clear that the amount for which the goods were sold was the amount which was agreed to be paid for the goods delivered at the point at which the taxpayer-vendor agreed to deliver them. Each contract was an ordinary contract for the sale and delivery of goods, and if the price had not been paid it would have been sued for as the price of goods sold and delivered. The fact that the delivery was made at the charge of the vendor does not enable him to split the price into two parts—one part representing the price of the goods, and the other the cost of delivery of the goods. There is nothing in the terms of such a contract which warrants any such division of the single amount. The true position is that the contracts were for the sale of goods to be delivered at a particular place. Any goods which did not possess the quality or attribute or character of being delivered at that place would not be goods which the purchaser was bound to receive under the contract. The prices to be paid were therefore prices for the goods which alone could be supplied in satisfaction of the contract. Thus the price was " the amount for which the goods were sold."

In the case of sales by retail the position is exactly the same. Here the sale value is " the amount for which the goods would be sold by the manufacturer if sold by wholesale." The prices in the case of all sales which within the meaning of the Act were sales by retail were exactly the same prices as in the case of sales by wholesale, and what I have said as to the sale value in that case applies also to the retail sales.

It is possible to speculate upon the meaning of the words " the amount for which the goods would be sold if sold by wholesale," and to raise questions as to the conditions upon which it is to be assumed that the goods which in fact were sold by retail would be sold if they were sold by wholesale. In this case it is unnecessary to explore any of these questions, because the facts are that the

conditions in all respects were exactly the same in the case of sales by retail as in the case of sales by wholesale. There is no room for a contention in this case that the conditions of the actual retail sales were different in any particular from what they would have been if the sales in question had fallen within the category of sales by wholesale within the meaning of the Act.

I am therefore of opinion that the statute contains no authority for the deduction claimed by the taxpayer, and that the court should accordingly answer the question of law submitted to it by declaring that upon the proper construction of the *Sales Tax Assessment Act* the sale value of the said goods for the purposes of the said Act is the amount charged to the customers for such goods without any deduction for costs of cartage.

STARKE J. Reference by the board of review pursuant to the provisions of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935. The facts are fully stated in the reference.

The Commonwealth Quarries (Footscray) Pty. Ltd. is a company which carries on the business of a quarrymaster and prepares metal screenings, toppings and dust which it sells wholesale and retail. It sells at prices fixed and set forth in a price list issued by the Quarrymasters' Association, of which the company was a member. The prices per cubic yard varied according to the localities or places at which the material was delivered and included sales tax. But no division or allocation of the amount charged nor any reference to cartage charges appeared on the invoices delivered to the purchasers. The price charged for the material to purchasers was thus one inclusive sum. No distinction is made in the price lists between wholesale and retail prices.

The *Sales Tax Act* (*No.* 1) 1930-1931 imposed a sales tax upon the sale value of goods manufactured in Australia by a taxpayer which are sold by him or treated by him as stock for sale by retail or applied to his own use.

The *Sales Tax Assessment Act* (*No.* 1) 1930-1935, which is to be incorporated in and read as one with the taxing Act, provides, by sec. 18, that "for the purposes of this Act, the sale value of goods . . . which are sold by the manufacturer . . . shall be—

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(*a*) where the goods are sold by wholesale—the amount for which those goods are sold; and (*b*) where the goods are sold by retail—(i) if the goods are of a class which the manufacturer himself sells by wholesale—the amount for which the goods would be sold by the manufacturer if sold by wholesale."

The question of law referred to this court is: (1) Whether upon the proper construction of the *Sales Tax Assessment Act* the sale value of the goods for the purposes of the Act is (*a*) the amount charged to its customers by the company for such goods as aforesaid; (*b*) the amount so charged less the amount paid by the company for cartage; (*c*) some other amount to be ascertained by some other and what means.

The argument for the taxpayer was that the sale value of goods must be ascertained by some standard which would bring about equality of taxation amongst all taxpayers dealing in the same class of goods. That standard, as I understood the argument, could only be ascertained by reference to the wholesale value of the goods as they left the premises of a wholesale merchant without reference to cartage or other charges incidental to delivery. Some general considerations based upon *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clarke Ltd.* (1) were relied upon in support of this contention, but it was mainly supported by reference to sections in the Act dealing with the cases of goods sold by retail and goods treated by the manufacturer as stock for sale by retail or applied to his own use (See sec. 18, sub-secs. 1, 2 and 3). In all these cases it was suggested that the wholesale value of the goods should be ascertained at the door of the wholesale merchant without reference to cartage or other charges incidental to delivery. But the argument wholly ignores the plain and explicit words of the Act that where goods are sold by wholesale "the amount for which those goods are sold" shall be the sale value of the goods. If sales and purchases are made, as here, for one inclusive price, that is the amount for which the goods are sold. The Act for obvious reasons of convenience and certainty takes that sum as the amount upon which sales tax shall be levied, and is not concerned with the various items of cost, labour and expenditure which are elements

(1) (1934) 52 C.L.R. 85.

in the sale value. The case of the retail sales of the taxpayer is dealt with in sec. 18 (1) (*b*), and the sale value is the amount for which the goods would be sold by the manufacturer if sold by wholesale. Or, in other words, the sub-section takes the particular sale and substitutes for the amount for which the goods were sold by retail the amount for which they would have been sold wholesale upon the same terms and conditions. The amount in the present case is, as already mentioned, the same. It may be, as contended, that the sale value of goods that a manufacturer treats as stock for sale by retail or applies to his own use should be ascertained at his premises. But that arises from the situation of the goods and not by reason of any uniform standard prescribed by the Act.

The price lists incorporated in the reference indicate that sales tax was included in the amount charged to the taxpayer's customers. The commissioner did not, I understand, dispute that a proper allowance should be made to the taxpayer for the amounts of tax so paid if he so claims and properly verifies those claims. At all events, I think such an allowance should be made (Cf. secs. 3 (5) and 18 (5)).

The question referred, *a*, should be answered in the affirmative subject to deduction in respect of any sums paid in respect of sales tax.

DIXON AND MCTIERNAN JJ. In this proceeding we are called upon to decide a question of law referred to the court by a board of review under sub-sec. 6 of sec. 42 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935.

The taxpayer sells goods both by retail and by wholesale. The sales are always at definite list prices fixed by a trade association of which the taxpayer is a member. The prices vary with the locality where the goods are delivered. The list gives the prices to be charged when the buyer takes delivery at the premises of the taxpayer. There is thus little or no difficulty in seeing how far the prices fixed for goods when delivered by the taxpayer as seller in the various localities mentioned in the list reflect the cost of or charges for transportation and delivery.

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The question is whether for the purpose of computing sales tax upon sales for delivery elsewhere than at the premises of the seller the sale value of the goods should be taken to be the actual price at which the goods were sold or that price diminished by a deduction or allowance on account of the costs of or charges for carriage and delivery.

On behalf of the taxpayer it is said that the *Sales Tax Assessment Acts* disclose an intention to measure the sale value of goods according to a standard which will produce a money equivalent for the goods affected by accidental circumstances as little as possible, and based as nearly as possible upon the true wholesale value of the goods to a taxpayer. The fact that in a given contract of sale the seller undertook the duty of delivery at a distant point and charged an inclusive price to cover the cost of delivery would be such an accidental circumstance.

It is the plan of the legislation to tax the goods once during the course of dealing between manufacture or importation and the transaction by which they go into use or consumption. The stage in the course of commercial dealing chosen for the imposition of the tax is the last wholesale disposal of the goods before the retailer performs his function in distributing them to the consumer. The tax is levied upon the immediately preceding sale by wholesale, or, if the goods go into use or consumption without such a purchase from a wholesaler by a retailer, then upon the immediately antecedent wholesale value possessed by the goods.

The taxpayer begins with the fact that the legislation discloses this general intention of seeking a measure of taxable value that shall be uniform, at least in the stage in the process of distribution at which the money equivalent of the goods is determined and in the kind of sale or conversion adopted as the standard. With this beginning, the taxpayer then adduces a number of additional considerations found in different provisions of the enactments and bases upon them the inference that, upon the true interpretation of the statutes, they intend that the sale value should be that price for which the last wholesaler sells or is prepared to sell the goods, as goods, stripped of every accidental element in the sale or supposed

sale which does not affect the value of the goods as they lie in his possession complete and immediately ready for sale.

The argument has great cogency as a piece of *a priori* reasoning as to the standard of value which should be adopted if the purpose of the legislation were to find the true conversion value of the goods at the point where they await sale, and if no practical considerations of convenience could lead to any departure from the measure of value best calculated to fulfil that purpose. But, in our opinion, the matters relied upon amount to no more than general considerations which might control or affect the construction of ambiguous or indefinite expressions. They do not supply any necessary implication or establish any unmistakable intendment before which clear language should give way. And we think there is no ambiguity in the chief or leading provision declaring what shall be the standard of sale value. The material part of that provision simply says that, where the goods are sold by wholesale, the sale value shall be the amount for which those goods are sold. To us these words appear necessarily to mean the contract price. In a contract under which for a single lump sum of money a party undertakes to do various things, including the transfer of property in goods, it is quite true that the entire money consideration or contract price cannot be regarded as the amount for which the goods are sold. In such a case the amount for which the goods were sold could not be ascertained from the transaction except by allocating part of the consideration to the other acts or things to be done by the seller. But delivery is so essential to a sale of goods that it cannot be distinguished in this manner from the sale as a separate and independent act or service to which part of the consideration forming the selling price must be allocated. The place where the goods are or are to be when delivery is made is a matter which affects buyer and seller in fixing the price. But when the price is fixed, it is taken to be the amount for which the goods are sold whether the goods are already at that place or the seller to fulfil the contract must still carry them there. No doubt the parties to a sale of goods may by their contract distinguish between the price payable for the goods the property in which will pass on appropriation to the contract and the charges to be made by the seller for carrying the goods to some other place

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for delivery to or at the direction of the buyer. But this possibility does not justify a departure from the ordinary meaning of the words " amount for which the goods are sold " or from the natural application of that meaning to cases where goods are sold and delivered for one single consideration.

The words which we have described as constituting the chief or leading provision declaring the standard of sale value deal with the general case of a manufacturer selling by wholesale. They are followed in the sub-section where they occur, viz., sec. 18 (1) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935, by a paragraph dealing with the special case of a manufacturer selling by retail. If in such a case the goods are of a class which he usually sells by wholesale, the sale value is to be the amount for which the goods would be sold by the manufacturer if sold by wholesale. This description of sale value is, doubtless, susceptible of a meaning consistent with the taxpayer's contention. But its interpretation must be affected by the leading provision, and we think its language is equally capable of a meaning inconsistent with the taxpayer's contention. In the context we should interpret the paragraph as requiring that a sale by wholesale should be supposed with the same terms and conditions as the actual retail sale made, except in respect of price and any other term or condition which would be absent or modified in a sale by wholesale.

In our opinion the question referred to this court by the board of review should be answered :—The sale value of the goods for the purpose of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 is the amount charged to its customers by the taxpayer for the goods mentioned in the stated case. This answer is subject to the possible application in any given case of sec. 18 (5) (Cp. sec. 70c).

EVATT J. The question of law referred by the board of review is how the phrases " the amount for which those goods are sold " (sec. 18 (1) (*a*), *Sales Tax Assessment Act* (*No.* 1) 1930-1935) and " the amount for which the goods would be sold by the manufacturer if sold by wholesale " (sec. 18 (1) (*b*) (i)) are to be applied to the facts of the case. In the former case we are dealing with an actual sale by wholesale : in the latter, with an actual sale by retail where the goods are of a class which the manufacturer also sells by wholesale.

In my opinion it is not possible to hold that where one price has been paid for goods, the fact that they have been delivered and that such delivery is reflected in the price means that "the amount" should be reduced. Delivery at the point of actual sale may be of the essence of the sale value of the goods. With the assertion that this means that the tax payable on some sales may differ from that payable on similar sales by the same manufacturer, I agree, but answer that the object of the Act is to pass the real burden of the tax not back from the wholesaler but forward to the consumer; and precise uniformity of burden is not possible.

So far as the second class of transaction is concerned, the argument for the taxpayer is that the sale is hypothetical, not actual: therefore, why include cartage in such a case? It seems to me that the answer is that on a sale by retail by a manufacturer, presumably at a higher price than wholesale, the manufacturer will only be charged on the basis that the difference (if any) between retail and wholesale price will not be included in the sale value, but otherwise the actual transaction (e.g., as to the inclusion of cost of delivery in the retail price) will be regarded as controlling. If so, the statutory hypothesis is satisfied, and it is not necessary that any further hypothesis, e.g., sale at the ordinary point or time of wholesale sale, should be made.

The question asked should be answered by stating that the sale value of the goods mentioned in the reference is the amount actually charged to customers for the goods and not such amount less any sum referable to the sums paid for or referable to the delivery of the said goods.

Question referred answered by deciding that upon the proper construction of the Sales Tax Assessment Act (No. 1) 1930-1935 the sale value of the said goods for the purpose of the Act is the amount charged to its customers by the taxpayer company for such goods less the amount, if any, properly allowable under sec. 18 (5) of the Act as an amount payable in respect of sales tax.

Solicitors for the company, *Weigall & Crowther.*

Solicitor for the commissioner, *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

H. D. W.