S.C.A. No. 02010

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Macdonald and Chipman, JJ.A.

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA Appellant - and - SILVER SPOON DESSERTS ENTERPRISES LIMITED Respondent	John J. Ashley for the appellant Kevin P. Downie for the respondent Appeal Heard: February 9, 1989 Judgment Delivered: March 15, 1989

THE COURT: Appeal allowed without costs per reasons for judgment of Jones, J.A.; Macdonald and Chipman, JJ.A. concurring.

JONES, J.A.:

This is an appeal by the Minister of Finance from a decision of Mr. Justice Davison on an assessment made under the Health Services Tax Act, R.S.N.S. 1967, c. 126.

The respondent operates a restaurant and desserts cafe in the City of Halifax. The cafe was opened in October, 1980 and the restaurant in September, 1983. The desserts are produced in the cafe and sold on a "take-out" or "eat-in" basis in both operations. The cafe is considered a bakery operation by the Commission.

The Provincial Tax Commission (the Commission) conducted an audit on the business operations of the respondent. The auditor was Margaret Goulden and the audit covered the period from January 1, 1982 to December, 1985. A notice of assessment was sent to the respondent claiming the following taxes:

Tax on general sales	$ 8,116.45
Tax on purchases for own use	11,020.87
Interest	5,284.78
Penalty	405.82
	$24,827.92

Section 3(1)(d) of the Act provides:

> "3(1) Every purchaser shall pay to Her Majesty the Queen in the right of the Province of Nova Scotia a tax
>
> (d) at the rate of ten per cent of the purchase price of all other tangible personal property purchased other than that referred to in clauses (a), (b), (c) and (ca)."

The auditor testified before Mr. Justice Davison that the tax on general sales covered taxes

collected on sales which had not been remitted. She calculated these amounts from the records of the respondent.

The tax on purchases included the following items:

1. convection oven
2. mixer
3. graduated measure
4. muffin pans
5. mixer
6. bowl
7. beater
8. whip
9. apple peeler
10. spring-form pan
11. pans
13. cake frames
14. pie spatula
15. spoons
16. cake pans
17. frames
18. heavy duty hand mixer
19. freezer
20. sound system
21. work table - sling top drawer
22. city kitchen garden/flourescent
23. oval mats
24. fabric
25. ice cream machine
26. bleach
27. containers
28. federal sales tax/duty
29. wreathes
30. wreath bases
31. freight
32. pasta machine
33. earthenware mugs
34. one piece knife
35. wire whip
36. cake markers - 11 & 13 slice
37. quiche dishes
38. blade cutters
39. pasta die
40. impulse bag sealer
41. vegetable slicer, shredder blades
42. espresso machine
43. metal markers
44. knives
45. kettle
46. plastic tools
47. cake markers
48. wall rack
49. piping bag
50. towels
51. napkins
52. doilies
53. fabric
54. pressure sensitive labels
55. freight - labels
56. kitchen supplies/equipment
57. signs
58. garbage bags
59. picnic signs
60. cards
61. lists
62. product labels - silver & blue
63. two large photos (16x20)
64. shop fabric
65. freight/hangling
66. lines
67. signs - small desserts/pate and ready
68. lace
69. blue/silver labels

The Commission exempted machinery and equipment which was purchased and used in the bakery operation. On the other hand it was the Commission's position that equipment used in a restaurant was taxable. After reviewing the operation and talking to employees of the respondent the auditor concluded that items one to eighteen inclusive were used in both operations. Based on sales records and conversations with management she apportioned the use of these items at seventy per cent for the bakery and thirty per cent for the

restaurant. These items were accordingly only partially taxable. The remaining items she concluded were used in the restaurant operation and were taxable. In making that assessment she excluded many items of a similar nature as being used in the bakery. In fact she stated that she excluded probably ninety per cent of the invoices for equipment as pertaining to the bakery.

The penalty was only assessed on the tax on general sales which had not been remitted.

Mr. Robert Silver is secretary-treasurer of the respondent Company. Referring to the list of equipment he testified that the majority of the items were used in the bakery. Apart from that he maintained that most of the items were exempt as they were used in the manufacturing or processing of foods including food sold in the restaurant. He exempted the sound system. Mr. Silver stated there were two separate kitchens in the operation. He also maintained that a number of the items were purchased before the restaurant opened.

The respondent appealed the original assessment to the Commission and then to the Minister. Initially all items in the assessment were in dispute, however, this appeal relates to the tax assessed on purchases for one's own use. The respondent claimed exemptions under s. 10(1) of the Health Services Tax Act on the equipment and on supplies used in retail sales. An adjustment in favour of the respondent was made on

the supplies however the appeal on the first ground was denied.

An appeal from the assessment by the respondent was heard before Mr. Justice Davison. He found in favour of the Minister on all issues except for the fourth issue which was the tax assessed on equipment and supplies. The respondent contended that under s. 10(1)(h), (i) and (j) of the Act machinery and materials used in the manufacture or production of goods for sale were exempt from taxation.

Those provisions are as follows:

> "10(1) The following classes of tangible personal property are specifically exempted from the provisions of this Act:
>
> ...
>
> (h) machinery and apparatus and parts thereof which are to be used or which are used in the manufacture or production of goods for sale;
>
> ...
>
> (i) materials consumed or expended in the manufacture or production of goods for sale;
>
> (j) goods purchased for the purpose of being processed, fabricated, or manufactured into, or incorporated into goods for the purpose of sale;"

Section 1(ca) provides:

> "(ca) 'manufacture or production' means the transformation or conversion of raw or prepared material into a different state or form from that in which it originally

existed as raw or prepared material but does not include production or processing;"

After reviewing those provisions the learned judge stated:

"The products being produced for sale in the Applicant's business include desserts and other food products. In my view, any machinery or equipment or supplies used to convert raw materials (e.g. flour, eggs, etc.) into finished products for sale (e.g. cakes) would be exempt. It is immaterial whether the finished product is sold as a whole or a slice, in the cafe or the restaurant.

In my opinion, the distinction made by the assessor between equipment used for the purpose of producing a product in the bakery and that used for producing products in the restaurant is arbitrary and cannot be justified under the terms of the legislation. The tests are whether the equipment or supplies were used in the transformation of material into a 'different state or form' and, secondly, whether the new material was the ultimate product for sale.

The word 'state' is defined in World Book Dictionary, 1977 edition, as a 'physical condition with regard to composition, form, structure, phase or stage of existence'. Water, as a liquid, is in a different state as ice or vapor. A cake is in a state different from a mass of batter which, in turn, is in a state different from an unmixed assembly of eggs, flour, butter and baking soda.

Applying these tests, it is clear that equipment which transforms uncooked food into cooked food which is for sale to the public is exempt. An oven which cooks a roast of beef is exempt for the same reasons as an oven which bakes a cake.

Supplies and equipment involved in the production process but not involved in the 'transformation or conversion' of the ultimate

product for sale are not exempt."

The Minister of Finance has appealed from that decision. While a number of grounds of appeal are raised in the notice of appeal the main issue is summarized in the appellant's factum as follows:

> "It is whether a restaurant can be considered to be engaged in 'manufacture or production' and therefore exempt from the payment of health services tax on the purchase of tangible personal property falling within the exemption provided by s. 10(1)(h) of the Health Services Tax Act, R.S.N.S. 1967, c. 126, as amended."

The words "manufacture or production" or variations of those words, have been used in excise and sales tax legislation for many years in Canada. With the introduction of provincial sales tax legislation following the second world war the same or similar language has been adopted in provincial legislation. See for example, Revenue Tax Act, R.S.P.E.I. 1974, cap. R.-14, s. 10(1)(h), Social Services and Education Tax Act, R.S.N.B. 1973, c. S-10, s. 11(o), Retail Sales Tax Act, R.S.O. 1980, c. 454, s. 5(1). In Re Michelin Tires Manufacturing (Canada) Ltd. 15 N.S.R. (2d) 150 Cooper, J.A. stated at p. 156:

> "I shall first refer to the origin of s. 10(h), its application by the Province, and to definitions made of machinery and apparatus under it and thereafter to what transpired following the 'definition' on which the respondent relied in making the assessment.
>
> Section 10(h) first appeared in the Hospital

Tax Act, c. 4, Stats. N.S., 1958, which came into force on January 1, 1959. The title of the **Act** was changed to **Health Services Tax Act** by amendment made by s. 1 of c. 49 of the Statutes of 1969. It is apparent that s. 10(h) was adopted from Schedule III of the **Excise Tax Act**, R.S.C., 1952, c. 100, as amended by **An Act to Amend the Excise Tax Act**, R.S.C., 1952, vol. 5, supplement, c. 320. That Schedule sets out goods exempt from payment of excise tax. The relevant exemption appeared under the heading 'Machinery and apparatus to be used in Manufacture or Production' as follows:

> 'Machinery and apparatus, as defined by the Minister of National Revenue, and complete parts thereof which,, in the opinion of the Minister, are to be used directly in the process of manufacture or production of goods;'

There is in evidence a copy of an extract from 'General Instructions Hospital Tax Act Department of Finance and Economics Provincial Tax Commission Halifax, N.S. 1959 As Amended 1961' and there appears therein:

> Machinery and Apparatus
>
> (a) 'Machinery and apparatus', for the purpose of clause (h) of Section 10 of the Hospital Tax Act, is defined as machinery and apparatus used directly in the process or manufacture or production of goods which are specifically exempt under the **Excise Tax Act** or which are ruled as exempt under the said **Act** by the Department of National Revenue."

Clause (h) of s. 10 was amended by c. 31 S.N.S. 1977 to provide:

> "(h) machinery and apparatus and parts thereof which are used directly and exclusively in the process of manufacture or production of goods for sale;"

In The King v. Pedrick and Palen (1921), 21 Ex. C.R. 14 the issue was whether a tailor who sold made to measure suits and garments was a "manufacturer" within the meaning of s. 19 b.b.b. of the Special War Revenue Act, 1915, as amended. That section imposed a tax "on sales by manufacturers and wholesalers". Audette, J. stated at p. 17:

> "Now that is not the meaning that is to be attached to this word 'manufacturer' in the present issue. The object of the Act cannot be to weld into the class of manufacturer all classes of men who manufacture, who make or do any work, or part thereof, with their hands. In legislating in respect of, as well as in construing a clause of, the tariff, reference must be had to the language, understanding and usage of trade. **Dominion Bay Co. v. the Queen**, 4 Ex. C.R. 311.
>
> Not only by the usage of trade, but in common parlance, the word manufacturer would seem to come within the ambit of the definitions given by the best dictionaries of the day, such as Littré and the Oxford's, under which a manufacturer in our days, is one who produces by labour on a large scale."

And at p. 18:

> "Apart from any legal rule of construction would it not seem to submit the word to an undue straining, to do violence to the English language to hold for instance a humble seamstress, dress-maker, making a few dresses for consumers to be a manufacturer - or, as in the present controversy, a humble merchant tailor making suits for consumers to be a manufacturer? When speaking of a manufacturing centre, one would not mean a centre where dressmakers or retail merchant tailors carry on business. If a meeting of manufacturers were called to discuss matters relating to their business, neither dressmakers nor retail merchant tailors would be expected

> or even allowed to attend such gathering. There is but one sane conclusion to be arrived at, if one is to be guided by common sense and that is the retailer is not a manufacturer in the general acceptance of the word."

And at p. 23:

> "Why, indeed, should we depart from the general and plain meaning of this specific word 'manufacturer,' which is of common and dominant feature, to endeavour, for the convenience of a special case, to extend to it, by doing violence to the English language, a meaning which to every one would so strain it as to nearly amount to an absurdity on its very face. Common sense alone rebels at accepting and applying to this word 'manufacturer' the narrowest meaning of which it is susceptible and which is contrary to the understanding of the public, the language and usage of trade and of what is commonly and commercially known."

In The King v. Karson 21 Ex. C.R. 257 Audette, J. held that the production of candy for sale constituted manufacturing under the Special War Revenue Act, 1915.

In Rea v. Dominion Bakery (1923), 54 O.L.R. 656 the Ontario Court of Appeal held under the same statute that a person who made and sold pies and cakes was a "manufacturer" under the Federal Statute.

In The Queen v. York Marble, Tile & Terrazzo Ltd. (1968), 65 D.L.R. (2d) 449 the Supreme Court of Canada interpreted s. 30(1)(a) of the Excise Tax Act R.S.C. 1952, c. 200 as rep. & sub. 1959, c. 14, s. 1(1) which provided:

> "30(1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
>
> (a) produced or manufactured in Canada
>
> (i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and ..."

The respondent in that case imported rough marble blocks which it cut, finished and polished into slabs. The issue was whether the finished slabs were produced or manufactured in Canada. Spence, J. in delivering the judgment of the Supreme Court of Canada stated at p. 452:

> "Many authorities were cited but in my view few are enlightening. It must always be remembered that decisions in reference to other statutory provisions, and particularly decisions in other jurisdictions, are of only limited assistance in construing the exact provisions of a statute of Canada. In reference to the words 'all goods (a) produced or manufactured in Canada', Duff, C.J.C. noted in **The King v. Vandeweghe Ltd.**, [1934] 3 D.L.R. 57 at p. 60, [1934] S.C.R. 244:
>
> 'The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe.'
>
> Further reference shall be made to that judgment hereunder. It was delivered on March 6, 1934, and on December 2, 1933, Archambault, J., in **Minister of National Revenue v. Dominion Shuttle Co. Ltd.**, reported

in 72 Que. S.C. 15, gave a very interesting judgment in the Superior Court of the Province of Quebec.

Both of these judgments considered the said ss. 85 et seq. of the **Special War Revenue Act** in which the same words, 'produced or manufactured in Canada' were used. Archambault, J., outlined the facts as follows [p. 17]:

> 'The evidence shows that these lengths of lumber were sold and delivered by the saw-mill in British Columbia to defendants at Lachute, in lengths of 20', 16' and 25' and at so much per thousand feet.
>
> The work done on these lengths by defendant was: first, to cut them in lengths of 10', or 8'; second, to creosote them, or dip them in creosoting oils to preserve them against the elements of the weather (for which defendants have a special plant); third, to round them or mill or dress the lumber to the rounded shape; fourth, to bore holes in them in order to insert the pin on which the insulator is placed; and after this work was done, they were sold to the Canadian Pacific Railway at the price, not based on so much a thousand feet, but based on so much per hundred "cross arms".

and he then continued [pp. 17-8]:

> 'The questions to be decided are: first, are the defendants the producers or manufacturers of these "cross arms"? second, should the cost of transportation from British Columbia to Lachute be included in the sale price?
>
> First, what is a manufacturer? There is no definition of the word "manufacturer" in the Act and it is practically impossible to find a definition which will be absolutely accurate, but from all the definitions contained in leading dictionaries, Corpus Juris, Encyclopedias, etc., the Court gathers that to manufacture is to fabricate; it is the act or process of making articles

> for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.
>
> This is exactly what the defendant company did. They received the raw material or prepared raw material, or lengths of lumber, and put them through the processes already mentioned to make "cross arms" and sold them to the consumer.'

For the present purposes, I wish to note and to adopt one of the definitions cited by the learned Judge, i.e. that "manufacture... is the production of articles for use from raw or prepared material by giving to these materials **new forms, qualities and properties or combinations** whether by hand or machinery". (The italicizing is my own.) If one were to apply the latter test to the question at issue in this appeal, in my view, the finished marble slabs which left the respondent's plant had by work, both by hand and machinery, received new form, new quality and new properties."

He continued at p. 453:

In my view, the application of this test alone would be sufficient justification to find that the marble pieces which left the respondent's plant had been 'produced' or 'manufactured' there from the raw material of the rough slabs of marble which had arrived.

In **Gruen Watch Co. of Canada Ltd. et al. v. A.G. Can.**, [1950] 4 D.L.R. 156, [1950] O.R. 429, [1950] C.T.C. 440 [revd in the result **sub nom. Bulova Watch Co. v. A.G. Can.**, [1951] 3 D.L.R. 18, [1951] O.R. 360, [1951] C.T.C. 94], McRuer, C.J.H.C., considered the same question in reference to the same statute. The facts may be briefly stated from the first paragraph of his judgment at p. 158 D.L.R.:

> 'The plaintiffs in this action have been

engaged for many years in the importation of watch movements from abroad. They import or purchase in Canada watch cases adapted to the particular movements imported, and by a very simple operation performed by unskilled labour, taking only a very few minutes at an expense of from 1.25 to 3.6 cents each, the watch movement is placed in the case and a watch ready for sale is produced. In some cases wrist-bands, bracelets or brooches are attached to the watch case for the personal convenience of the purchasers. The plaintiffs do not manufacture either watch movements or watch cases.'

At p. 169 the learned Chief Justice said:

> 'I cannot find that the simple operation of putting a watch movement into a watch case is "manufacturing" a watch in the "ordinary, popular and natural sense" of the word, but I feel clear that the plaintiffs "produced" watches "adapted to household or personal use." It may well be that, as counsel for the plaintiffs argued, the movement as imported in the tin or aluminum case will keep time and could be used as a watch....It is not a watch "adapted to household or personal use" as the term is used in its ordinary and popular sense, and the movement in the aluminum case would be quite unsalable as such.'

It is to be noted that the learned Chief Justice used the firmly established principle that the taxing statute must be interpreted by the consideration of the words thereof in the ordinary, proper, and natural sense, and that doing so he found himself able to distinguish between the two words 'produced' and 'manufactured'. It was the submission of counsel for the respondent before this Court that the two words must be considered as being practically synonymous and **Charles Marchand Co. v. Higgins** (1940), 36 F. Supp. 792, was quoted as an authority therefor. That was a decision of Mandelbaum, District Judge in the District Court of the Southern District of New York, and the decision on this point may be taken from one sentence

in the reasons of the learned District Court Judge [p.795], 'I am of the opinion that the terms as used in the present taxing statute are synonymous.' The learned District Court Judge reached that conclusion because art. 4 of Treasury Regulation 46 (1932 edition) provided [p. 794]:

> 'As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of the article, **or produces a taxable article by combining or assembling two or more articles.' (Government supplies emphasis.)**

and then various authorities relied on by the learned District Court Judge held that 'manufacturer' implied a change into a new and different article.

For these reasons, I am not able to accept the decision in **Charles Marchand Co. v. Higgins** as being an authority which should pursuade this Court to hold that 'produce' and 'manufacture' as used in the statute presently considered in which neither is defined are synonymous, and I adopt the course of McRuer, C.J.H.C., in **Gruen Watch Co. v. A.G. Can.** in holding that an article may be 'produced' although it is not 'manufactured'. In that case, although he was unable to come to the conclusion that the mere insertion of the movement into the watch case was the manufacture of the watch, he found no difficulty in determining that such a process was the production of a watch.

Similarly, in the present case, if I had any doubt that the various procedures taken by the respondent in reference to the marble slabs resulted in the manufacture of a piece of marble, I would have no doubt that those procedures did result in the production of a piece of marble."

That decision was applied in Mobile Concrete Services Ltd. and Minister of Finance and Economics, (1974),

38 D.L.R. (3d) 465.

By c. 27 S.N.S. 1982 the Health Services Tax Act was amended by inserting the present definition section of "manufacture or production" and by changing clauses (h), (i) and (j). It is important to note that the language in the definition section is substantially similar to the language of Archambault, J. as referred to by Spence, J. in the **York Marble** case. The words "manufacture or production" now have a single meaning and are no longer distinct as defined by Spence, J. The emphasis is on the word "manufacture" as defined by the cases. It should also be noted that the words "directly and exclusively" were deleted from s. 10(1)(h). As to the effect on that change see Stora Kopparbergs v. N.S. (Min. of Fin.) (1987), 78 N.S.R. (2d) 354.

In Controlled Foods Corp. v. The Queen, [1979] 2 F.C. 825 the plaintiff, a restaurant operator, claimed that in using equipment in the operation of its restaurant for producing meals and drinks served to customers, it was a "manufacturer" or "producer" within the meaning of s. 27 of the **Excise Tax Act** and was entitled to a tax exemption.

Gibson, J. in the Federal Court stated at p. 828:

"As has been said so often in respect of

the question as to who are 'manufacturers' or 'producers' or what constitutes 'the manufacture or production of goods' within the meaning of the **Excise Tax Act**, Parliament in the Act and Regulations has given no guide. Without such guide it is still always necessary in deciding the issues in cases such as this to determine whether the subject purchaser or importer of machinery, apparatus or equipment is or is not a 'manufacturer' or 'producer' of goods and whether or not what is done with such purchase and importation constitutes the 'manufacture or production of goods' as a question of fact, and to determine the construction of the statutory provisions as a question of law. In doing so, judicial notice of the ordinary meaning of these words may be taken; and the meaning most appropriate in the context and circumstance may be chosen; and commercial usage can be used as an aid for such statutory interpretation. (See Cross: **Statutory Interpretation, Butterworths 1976;** and **cf. United Dominions Trust Ltd. v. Kirkwood.**)

For example, in applying a specific meaning (i.e. whether or not what is done constitute the 'manufacture or production of goods' within the meaning of the statute) to particular goods or articles as a question of fact, not of law (cf. **Parker v. The Great Western Railway**), the Supreme Court of Canada in **The Queen v. York Marble, Tile and Terrazzo Limited** employed these words:

> For the present purposes, I wish to note and to adopt one of the definitions cited by the learned judge, i.e., that 'manufacture is the production of articles for use from raw or prepared material by giving to these materials **new forms, qualities and properties or combinations** whether by hand or machinery'. [Underlining added.]

and further:

> 'If one were to apply the latter test to the question at issue in this appeal, in my view, the finished marble slabs which left the respondent's plant had by work, both by hand and machinery, received new

form, new quality and new properties.'

> Literally using these latter words, and applying them to the subject raw materials, with a view to proving that such had 'received new form, new quality and new properties', **Controlled Foods** adduced evidence on this appeal proving what it did and does to its raw materials in using the said machinery, apparatus and equipment in operating its Corkscrew Restaurant."

He continued at p. 830:

> "In my view in deciding the issue in this appeal it is of substantial assistance to consider as an aid commercial usage and what is generally accepted as such.
>
> For example, in commercial usage one would not normally consider that a restaurant was in the manufacturing industry and it would not be generally accepted as being in the manufacturing industry. One would consider a restaurant a commercial establishment. In land use laws, by-laws and regulations, restaurant use would be categorized as commercial use.
>
> Another example employing commercial usage and what is generally accepted as such, as a guide, is found in the decision of Angers J. in **The King v. Shelly.** In that case Angers J. found that a person who built a yacht for his own personal use with no intention of disposing of it was not a 'manufacturer' or 'producer' within the meaning of **The Special War Revenue Act**, 1915, S.C. 1915, c.8, so as to be liable for consumption or sales tax even though the subject person had taken raw material at hand and by machinery and tools had fashioned such into a new shape and form for use and thereby had given such material new forms, qualities and properties or combinations. Angers J. found in effect employing commercial usage and practice and what is generally accepted as such that such person was not a 'manufacturer' or 'producer' holding that the statute had in mind and was applicable only to manufacturing or

producing in the way of a business, even though there are no words in the statute enjoining Angers J. to so find.

Another example is to be found in the judgment of **The King v. Karson.** In that case the defendants carried on the business of confectioners and made candy. Audette J. for the Court in that case, again applying commercial usage and practice as an aid found that the defendants when they made candy were 'manufacturers' within the meaning of **The Special War Revenue Act**, 1915, and would be generaly accepted as such in the commercial world. Audette J. at page 261 said:

> '...but this fact goes to show what is the custom of the trade and how traders understand the word "manufacturer" as used in our statute. It is the meaning attached to the word 'manufacturer' in its plain and literal sense that should govern us in construing the statute, and when it is proved, as it was here at the trial, that the sense in which the people in the trade accept it corresponds with that literal sense, the construction of the statute is freed from difficulty.'

Other examples are found in certain American decisions based on various statutes of their respective States. The Supreme Court of Oklahoma in **McDonald's Corp. v. Oklahoma Tax Commission** denied a claim for a refund filed by McDonald'd finding that this fast food restaurant (making among other things hamburgers, fish fillets sandwiches, french fried potatoes, shakes and carbonated soft drinks) was not manufacturing or processing as defined in the relevant statute of the State of Oklahoma in that the preparation or cooking of food is not 'generally recognized' as manufacturing or processing. The relevant Oklahoma statute provided that: **'The term "manufacturing plants" shall mean those establishments primarily engaged in manufacturing or processing operations, and generally recognized as such.'** [Emphasis added].

It may be that these words 'generally

recognized as such' in the Oklahoma statute do not add anything legislatively other than to direct the Court to employ commercial usage and practice as an aid in deciding cases.

The Ohio cases of **Jer-Zee, Inc. v. Bowers, Tax Com'r, Canteen Co. v. Bowers, Tax Com'r,** and the Pennsylvania case of **Commonwealth v. Snyder's Bakery** held that the plaintiff parties were manufacturers within the meaning of their relevant State statutes when such parties were engaged in the preparation of goods for immediate sale to customers as for example, by the making and selling of frozen desserts by coin operated machinery which automatically delivered in a cup carbonated soft drinks or hot coffee made from a combination of ingredients, or by preparing potato chips for selling to serve the customer for immediate consumption after processing them.

There is however, nothing in the reasons of any of these United States decisions and there is also nothing in the reports recording the ratios of the decisions which give any assistance in determining the issue in this appeal.

In view of and having considered these and other authorities and after cónsidering the whole of the evidence and using commercial usage as a guide and confined to the facts of this appeal, in my opinion what has been done and is done by Controlled Foods to the raw materials it uses in the treatments and processes employing the subject machinery, apparatus and equipment would not in fact and generally would not be recognized as constituting the 'manufacture or production of goods', and further Controlled Foods would not be considered and would not be generally recognized as a 'manufacturer' or 'producer' within the meaning of the **Excise Tax Act** especially Schedule III thereto."

That decision was affirmed by the Court of Appeal in Controlled Foods Corp. Ltd. v. The Queen,

[1981] 2 F.C. 238.

In Leslie v. Attorney General of N.S. (1978), 26 N.S.R. (2d) Coffin, J.A. stated at p. 190:

> "At the outset one must acknowledge the principle enunciated in **Eastern Management Ltd. v. City of Halifax** (1970), 2. N.S.R. (2d) 361; 17 D.L.R. (3d) 183, at p. 370 N.S.R., p. 189 D.L.R., where Cooper, J.A., pointed out that although the authorities agreed that enactments imposing and regulating the enforcement of taxes for general and municipal purposes must be strictly construed, a different approach is required where there is a claim for exemption from a taxing statute. In that case the burden is on the person asserting an exemption in his favour to establish it. The question then is whether the appellant has met that burden."

Having regard to the history of these provisions and the restricted definition in our Act, I agree with the appellant's contention that the preparation of meals in the respondent's restaurant did not fall within the exemptions in clauses (h), (i) or (j) of s. 10(1) of the Health Services Tax Act. Clauses (i) and (j) have to be interpreted in the same light as clause (h). I agree with the authorities that the preparation of meals does not constitute manufacturing as that word is used in common usage or as defined under the Act. I am not aware of any Canadian cases which have held otherwise. It follows with respect that the distinction made by the auditor between goods produced in the bakery and the preparation of meals in the restaurant was not arbitrary but based

on the proper interpretation of the Act.

The second issue is whether the Commission was justified in claiming a portion of the tax on machinery and equipment used in the bakery and in the restaurant. I have noted the Commission conceded that machinery and materials used in the bakery are tax exempt. The only authority cited for making the partial assessment was s. 32(2) of the Act which provides as follows:

> "(2) Where it appears from the inspection, audit, or examination of the books of account, records, or documents that this Act or the regulations have not been complied with, the person making the inspection, audit, or examination shall calculate the tax collected or due in such manner and form and by such procedure as the Commissioner may deem adequate and expedient, and the Commissioner shall assess the person for the amount of the tax so calculated, but the person so assessed may appeal the amount of the assessment under Sections 18 and 19."

The origin of the Commission practice is referred to by Cooper, J.A. in the Michelin Tires case, supra, at p. 166:

> "The assessment of tax, however, was made pursuant to the letter of The Honourable Mr. Jones dated July 9, 1969. I first direct my attention to the question whether or not it was a valid exercise of the power given under s. 10(h) of the Act. Mr. Jones does not say that he is repealing the former definition of The Honourable Mr. Smith and substituting therefor an entirely new definition. What he did, as I understand it, was to say that no longer would the machinery and apparatus as previously defined be wholly exempt but only that portion of

it that was used exclusively and directly in the manufacturing or production process. The reference to the recommendation in the letter in my opinion has the effect of enabling us to look at what was recommended to determine the meaning of 'portion'.

I have quoted the letter of May 22, 1969 to The Honourable Mr. Jones. The first paragraph of that letter refers to the fact that the Federal sales tax authorities 'in their rulings do not give consideration to the fact that some equipment may be used for a very small proportion of time for production and the remainder of the time for non-production purposes' and the recommendation follows that the definition of July 3, 1963 be no longer used.

Again in the letter from the Commissioner to The Honourable Mr. Jones dated June 17, 1969, which I have quoted in part, reference is made to the fact that 'in some cases a particular piece of machinery may only be used for a very short period of time in production but the Federal Authorities give full exemption for the equipment' and:

> 'We do not feel that this is proper and that tax should be paid on that portion of the equipment that is not used directly in the process of manufacture or production of goods for sale.'

The recommendation is then set out:

'We therefore recommend that in our definition under Section 10(h) of the **Health Services Tax Act**, that we exempt from tax only that portion of the machinery and apparatus that is used exclusively and directly in the process of manufacture or production of goods for sale. This would then enable us to assess tax on the portion of the equipment that is not used in production.'

It follows therefore in my opinion that the definition of The Honourable Mr. Jones was intended to be a 'clarification' of the former definition by enabling the Provincial tax

authorities in effect to split up a piece of machinery which was used directly in the process of manufacture or production of goods for sale and also for other purposes. No doubt this explains the use of the word 'exclusively' in the definition.

Mr. Offinga in his evidence contrasted the assessment method of the Federal tax authorities with that used by the Province under what I may call the Jones definition by reference principally to fork lifts. If the fork lifts were used, say, seventy per cent of the time for production purposes and thirty per cent for other purposes the item would be exempt. The decision was made on the basis of major use. The Provincial authorities, on the other hand, would in such a situation tax the thirty per cent portion. In fact, fork lifts in the Provincial assessment were taken as a group and pro-rated as so many used for production purposes and so many for non-production. The pro-rating was not done on an individual fork lift basis.

The difficulty I have with the Jones definition is that it imports into it not only direct use but also exclusive use. Section 10(h), the enabling provision under which the Minister is to act, refers only to 'machinery and apparatus...to be used directly in the process of manufacture or production of goods for sale;' In a situation where electricity is used as the source of power the exemption is set out in the Smith definition of July 3, 1963 as being that applied by the Federal tax authorities as of June 12, 1963. I do not think that the Smith definition has been repealed. It purports in the Jones letter of July 9, 1969 only to be 'clarified'. The clarification takes the form of requiring not only **direct** but also **exclusive** use. I do not find authority in the enabling provision authorizing the Minister to add this requirement for exemption and on this ground alone it is my opinion that the Jones definition exceeds the power given under s. 10(h) of the **Act** and is therefore invalid as a matter of law."

No doubt that decision prompted the amendment

to s. 10(1)(h) in 1977 which I have already noted. The effect of s. 10(1)(h)(i) and (j) of the Act is to exempt materials and goods used in the manufacture or production of goods. The exemption does not depend on the degree to which those goods are used in the manufacturing process. Section 32(2) is not a taxing provision and does not empower the Commission to impose a tax where none is due under the Act.

As stated by Jones, J. in McNeil v. Shaw (L.E.) Limited, 58 N.B.R. (2d) 371 at p. 380:

> "Once it has been established that the machinery or apparatus is 'used directly in the process of manufacture or production, this is sufficient. The use of the machinery or apparatus need not be **exclusively in the manufacturing or production process nor does it matter the percentage of use** that is attributed to such process as opposed to other processes.' **Irving Oil Limited v. Provincial Secretary of the Province of New Brunswick,** [1980] 1 S.C.R. 787; 29 N.B.R. (2d) 529; 66 A.P.R. 529; 31 N.R. 291; Pigeon, J., pp. 537 and 538 N.B.R.; **Re Michelin Tires Manufacturing (Canada) Ltd.** (1976), 15 N.S.R. (2d) 150; 14 A.P.R. 150; Cooper, J.A., p. 168."

It is of some significance to note that s. 10 of the Revenue Tax Act, R.S.P.E.I. 1974, cap. R-14 was amended by Chap. 26, S.P.E.I. 1982 to provide:

> "(1.1) For the purposes of clause (1)(h) where the machinery and apparatus is to be used in part directly in the process of manufacture or production of goods for sale, a proportion of the tax is payable based on the proportion of time in which the machinery or apparatus is to be used for other activities."

It follows from the foregoing reasons that equipment and supplies used in the bakery are exempt. Those used exclusively in the restaurant operation are not exempt from tax. The trial judge did not make a final determination as to the items which were taxable or exempt. There was a conflict in the evidence as to the use of the equipment and supplies. In the result I would allow the appeal and set aside the trial judge's decision on the fourth issue relating to the tax assessed on equipment and supplies and remit the matter to the trial judge for a determination of the remaining issues based on the decision in this Court. As success on the appeal is divided I would not allow costs on the appeal or in the court below.

J.A.

Concurred in:

Macdonald, J.A.

Chipman, J.A.

1987 S.H. No. 62460

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

IN THE MATTER OF: An appeal under the Health Services Tax Act, R.S.N.S. 1967, c.126, as amended,

- and -

IN THE MATTER OF: the Appeal of Silver Spoons Desserts Enterprises Ltd., against a Decision of the Minister of Finance from Notice of Assessment No. 27073, dated April 1, 1986.

BETWEEN:

SILVER SPOON DESSERTS ENTERPRISES LTD.

APPELLANT

- and -

MINISTER OF FINANCE

RESPONDENT

HEARD BEFORE: The Honourable Mr. Justice J. M. Davison In Chambers

PLACE HEARD: Halifax, Nova Scotia

DATES HEARD: 29th June, 1988

COUNSEL: Kevin P. Downie, Esq., Solicitor for the Appellant

John J. Ashley, Esq., Solicitor for the Respondent

CHAMBERS APPLICATION

ON APPEAL