IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.470/81

IN THE MATTER of the Sales Tax Act 1974 as amended by the Customs Acts Amendment Act No. 2 (1976)

AND

IN THE MATTER of Assessment Notice 5475

BETWEEN CANTEX DISTRIBUTORS LIMITED a duly incorporated company having its registered office at Auckland, Management Company

Appellant

AND THE COMPTROLLER OF CUSTOMS c/- Customs Department, Wellington

Respondent

Hearing: 16 December 1983

Counsel: Carter for Appellant
McGuire for Respondent

Judgment: 29 February 1984.

JUDGMENT OF SINCLAIR, J.

This is an appeal in relation to an assessment for short paid sales tax in respect of the sale of certain copying machines sold by the Appellant company.

The evidence disclosed that the Appellant was engaged in a very competitive field in the sale and delivery of copying machines. In respect of the sales of those machines the Appellant had calculated sales tax on what it considered to be the sale price of the goods and it duly accounted for that to the Respondent. However, during the course of an inspection by the Respondent of the

Appellant's records, it was found that in respect of the supply of each machine a charge had been made for what was called "pre delivery service, inspection warranty, freight and handling". In respect of all machines except one the standard charge was $200. In respect of the other machine, which was of a similar and like character, the standard charge was $100.

It was considered by the Department that sales tax was payable in respect of those charges as they formed part of the sale price when a particular machine was sold, but the Appellant contended that the price had to be ascertained by having a look at all the circumstances and that, in fact, the agreement between the retailers who were concerned with the purchases of the machines was that there was to be a price for the machines and an additional price to cover the services above referred to.

Mr Cantlon gave evidence on behalf of the Appellant and he stated that in relation to the pre delivery service a standard charge of $50 was made, whilst on the warranty a standard charge of a similar amount was made, with freight being assessed at $100. He acknowledged that the cost of delivering a particular type of machine to Whangarei would be less than delivering a similar type of machine to Invercargill, but an attempt was made to average out the cost so that each retailer who was supplied by the Appellant would be treated in a even handed manner.

The warranty was a guarantee for three months against component failure, while the pre delivery service entailed the Appellant in removing each machine from the container

in which it arrived in New Zealand and examining it for any damage, faults or defects prior to it being delivered to the retailer who had ordered it.

So far as the particular sales with which this Court is concerned, they were sales made by the Appellant as a wholesaler to various retailers, although there were occasions when the Appellant did sell on retail and a different method of costing was involved in relation to those types of sales.

The best way to illustrate the way the Appellant invoiced its retailers is to take one particular invoice which is No. 39506, which is for the supply of a copier to a firm in Whangarei. The invoice discloses that there was sold one Nashua 1230 Copier. Alongside that description, and in relation to the Appellant's records, there was provision for the product code to be inserted and alongside that there was a space in which could be entered the serial number of the machine. The price was shown in the right hand column and was made up as follows:

1 Nashua 1230 Copier	$3,540
Pre delivery service, inspection warranty, freight and handling	200
Sales Tax	$1,416
	$5,156

The last figure was the total amount required to be paid by the purchaser. That included the sales tax which had been calculated at 40% on the price of $3,540 and the charge of $200 was totally disregarded by the Appellant

when the sales tax was computed.

Mr Cantlon stated in his evidence that the manner in which the charge for the pre-delivery service etc. was made had been accepted by all the retailers with whom his firm dealt as constituting part of a universal pricing programme. A dealer policy manual was produced and in it it referred to such matters as payment of accounts, price lists, freight, warranty, etc. In paragraph (4) it was stated that the prices of all the dealer products were available in printed form and the one which I will later refer to was produced in evidence.

With the exception of plain paper machines, and in this matter it was that type of machine the Court was concerned with, freight costs were to be borne by the dealers. In relation to plain paper machines the manual suggests that orders in respect of those machines would be accepted in accordance with the Appellant's freight free policy. That may well be a mis-statement of the situation in that in fact a charge is made for freight, but it is a standard charge. In relation to warranties it is stated that all machines carry a 90 day warranty from the date of installation by the dealer.

The price list which was effective from 1980 showed that in relation to Nashua 1230 machines the total price, including tax, was $5156. The evidence indicated precisely that which I have referred to in the invoice I have quoted above, namely that the price of $5156 was made up of the sales tax of $1416, the $200 standard charge and the basic price for the machine of $3540. If one has a look at the

price list and has no other information there is nothing to indicate that a charge of $200 is being made for the pre-delivery service, etc. In relation to the pre-delivery service it can be observed that this is as much for the Appellant's protection as for the Retailers. Obviously the Appellant would not want to despatch a machine which had been improperly assembled overseas or had been damaged in transit or for some reason or another was not in a working condition because that could well involve the machine being returned to the Appellant for servicing after it had been delivered to the Retailer. Equally, some costs are obviously involved in delivering a machine from the Appelant's premises to the Retailer's and if a machine requires servicing during the warranty period in respect of matters which are covered by the warranty, cost will be involved.

There is no argument but that these machines are liable to sales tax by reason of the provisions of S.12 of the Sales Tax Act 1974 and I accept Mr Carter's submission that such tax is in relation to goods and not services. Under S.22 of the statute where goods are sold by a wholesaler, which is the situation with which this appeal is concerned, the following formula is to be applied:

> "For the purposes of this Act, the sale value of goods sold by a wholesaler, not being a contractor, shall be the price for which the goods are actually sold."

Thus it is necessary to enquire precisely what, in fact,

is the price at which these particular copiers are sold by the Appellant.

It was submitted on behalf of the Appellant that the parties to a sale are quite at liberty to agree on a particular price for the article which is the subject of a sale and to agree on incidental services at a separate price for each of those services. That may well be so, but one needs to have a look at the nature of the services; how they affect the contract of sale; how closely they are related to it; and any other circumstances which may have a bearing on deciding what ought or ought not to be included in the actual sale price.

The Respondent pointed to the fact that the buyer was not billed separately for what was somewhat euphemistically termed the "set-up" charge and that it was a standard figure. On behalf of the Respondent Mr McGuire relied very strongly on a decision in Australia, Commonwealth Quarries (Footscray) Pty Ltd. v. The Federal Commissioner of Taxation (1938)59 C.L.R. 111. In that particular case the Court was concerned with interpreting certain provisions in the Sales Tax Assessment Act (No. 1) 1930-1935. The taxpayer was engaged in the manufacture of metal, screenings, toppings and dust, all of which came within the ambit of the statute. In 1933 the Melbourne Quarry Masters Association in relation to the supply of goods of the above nature fixed and set forth in a price list the prices and conditions to be observed by the members of the Association when selling goods of the description above re-erred to. In fixing the prices which were in the price list the distance the goods had to be

carried were taken into account and that accounted for differences in prices set opposite the various places mentioned in the list. Thus a given quantity of material delivered to one destination may cost more than the same quantity of the same material delivered to another destination by reason of the distance which was involved in making the respective deliveries.

The Court was concerned with sales by wholesale and for the purposes of the statute the sale value of goods sold in that manner was defined as "the amount for which those goods are sold". Thus there is very little difference in the wording of the Australian statute which was before the Court and the provisions of S.22 of the New Zealand statute which I have set out above; for all practical purposes they are the same.

At page 116, Latham C.J. had this to say:

> "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.' "

Starke, J. at page 118 said as follows:

"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 in the sale value."

Dixon and McTiernan J.J. delivered a joint judgment and at page 120 said:

"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."

And further at page 121 said:

> "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 the 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 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."

While in the Australian case there had been no attempt to show what was the actual cost of the material involved and what the delivery charge was, it does not seem to me that in principle there is any great difference between the two sets of circumstances. The total charge made in Australia included the cost of delivery because it was a factor which was involved necessarily in the sale and delivery of the goods. To my mind that is precisely what

is involved in the instant case. The set-up charges formed an integral part of the cost of the retailer acquiring the various machines. If he required a particular machine he had to pay either $200 or $100 in respect of those set-up costs if he wished to obtain the machine from the Appellant. The charges made were an integral part of the contract of sale and delivery of each of the machines. I refer again to the fact that the price list produced, if perused by a casual observer, has nothing in it to show how, in fact, the total price is made up. One can only say on perusing the list that a particular machine, including tax, will cost the amount of dollars stated in the list in respect of that machine.

I am of the view that the set-up price did in fact form part of the price for which the goods were actually sold and that therefore the assessment of sales tax under consideration is one which must be confirmed.

Accordingly the appeal is dismissed and the Respondent is allowed costs in the sum of $400.

In coming to the conclusion which I have I would not in any way like to detract from the thoroughness of Mr Carter's submissions. He presented his client's case extremely well and did not overlook anything which ought to have been presented on behalf of the Appellant.

P.D.[illegible]J.

SOLICITORS:

Wright & Co., Auckland for Appellant
Crown Law Office, Wellington for Respondent