Problems of Litigation under the Excise Tax Act*

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From time to time comments have been made on the absence of a formal procedure for litigating disputes under the Excise Tax Act.[1] The matter was well expressed by McLean J. in *The King* v. *Noxzema Chemical Company* when he stated:[2]

> The Special War Revenue Act [now the Excise Tax Act] makes no provision for an appeal from the imposition of the Sales Tax under section 86 [now section 30] or from any sales price determined by the Minister under section 98 [now section 37]; in fact, there does not appear to be any provision for an appeal by the taxpayer under any of the Parts of the Act, and probably it was a practical consideration that it was deemed undesirable to make any provision for appeals where a tax on sales of goods is imposed by reference to their value, and where the tax has so wide an application . . . Considering the large number of returns to be made and the small number likely to be seriously contested on the ground of the sale price, it was likely deemed prudent to provide that any denial of liability by the taxpayer for the tax, in whole, or in part, would be heard and determined when and if the tax levied were sued upon by the Crown. Section 108(1) [now section 50(1)] provided that all taxes or sums payable under the act shall be recoverable at any time after the same should be accounted for and paid, as a debt due to, or as a right enforceable by the Crown, in the Courts there mentioned. This would preserve the legal rights of the taxpayer and afford him an opportunity of bringing and establishing any defence as to his legal liability for the tax.

In view of the magnitude of the sums collected under the Excise Tax Act,[3] it seems surprising that more attention has not been

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[1] R.S.C., 1952, c. 100.

[2] [1941] Ex. C.R. 155, at p. 169; reversed on appeal, [1942] S.C.R. 178.

[3] For the fiscal year 1952-1953, total collections under the act were estimated at $852,000,000, or 19.5% of total federal government revenues.

given to this problem. As a result of the absence of an ordinary procedure for appeals, remarkably complicated methods, which it is proposed to examine in this article, have arisen for litigating questions of liability for sales or excise tax. The outstanding pioneering work which has been done in the field of our federal sales tax by Professor John Due and by the staff of the Canadian Tax Foundation[4] has not dealt directly with this aspect of the tax, procedure being, of course, primarily of interest to lawyers.

To a large extent sales and excise taxes are collected almost automatically and with a minimum of friction between the taxpayer and the Department of National Revenue. Should a taxpayer be in doubt whether he is liable to pay either tax, or over the rate or method of computation or any other matter, a speedy departmental procedure is available for securing reliable rulings. Numerous published regulations and rulings have been issued and are readily obtained from any collector's office. Nevertheless disputes can and do arise over liability for sales or excise tax, the most common cases being disagreement over one or more of the following matters:

(1) whether an article is subject to sales tax or excise tax;

(2) whether the taxpayer is a manufacturer or producer;[5]

(3) the rate of the wholesale discount, if any, to be allowed on direct sales by a manufacturer to retailers and consumers;

(4) the determination of the "wholesale price" under regulation 6 of circular 1-C;[6]

(5) alleged unreported sales,

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[4] See particularly Due, The General Manufacturers Sales Tax in Canada (Toronto, Canadian Tax Foundation, 1951).

[5] "Manufacturing" and "producing" are not defined by the act, but a considerable case law exists, as well as numerous departmental rulings, most of which are summarized in the Canadian Sales and Excise Tax Guide (Toronto, CCH Canadian Limited, 4th. ed., 1953).

[6] Regulation 6, "Licensed Manufacturers", reads:

"The 'Wholesale Price', for the purposes of this Regulation, shall mean the price for which the manufacturer or producer regularly sells his taxable goods of like quality and value in the ordinary course of business to bona fide independent wholesalers in representative wholesale quantities in the zone or territory in which the sale is made, except in those cases where the Minister has made specific Regulation to the contrary.

"Where a Manufacturer has not established the 'Wholesale Price' for his taxable goods, as hereinbefore defined the Minister may determine the value on which the tax may be calculated on transfer to the unlicensed wholesale branch(es) or retail branch(es) of the manufacturer or produced.

"Where a manufacturer or producer sells his taxable goods to both wholesalers and others, the Sales Tax may be paid on the 'Wholesale Price' as hereinbefore defined, except where otherwise determined by the Minister. Where vendor and purchaser are inter-related, associated or affiliated concerns, or where one is subsidiary to the other, the 'Wholesale Price', as hereinbefore defined, established by either of them by sales to

(6) alleged errors in calculation;

(7) the proper method of calculating the tax on "tax-included" sales of articles subject to a "wholesale discount".

Should investigation by a departmental auditor disclose sums believed to be due for sales or excise tax, a notification of the claim is sent to the taxpayer and ample opportunity is given him to present his objections, both at the local collector's office and at Ottawa. If this informal procedure does not result in settlement, a number of alternatives are available to the Crown and to the taxpayer.

Defences Not Available to Taxpayer

At the outset it should be noted that certain defences are never available to a taxpayer who is assessed for sales or excise tax. Since the act merely levies tax upon the manufacturer or importer, or in some cases upon the wholesaler, it is, generally speaking, the taxpayer's own business whether or not he collects the tax from his customers, and the Crown is not concerned.[7] Inability or failure to collect the tax, or indeed any part of the purchase price, from the customer cannot affect the taxpayer's liability to the Crown. Not even loss of the goods in transit to the customer will excuse the taxpayer if the property in the goods has passed.[8] Nor will it

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independent wholesalers, shall be the value on which the tax is payable, except where otherwise determined by the Minister.

"Where a manufacturer is operating an unlicensed wholesale branch and sells identical goods at identical prices to all retailers, including chain and departmental stores, he may pay Sales and Excise Taxes on the wholesale price as approved by the Minister."

[7] An exception to this rule is section 61 of the act, which reads:

"Everyone liable under this Act to pay to Her Majesty any of the taxes hereby imposed, or to collect the same on Her Majesty's behalf, who collects, under colour of this Act, any sum of money in excess of such sum as he is hereby required to pay to Her Majesty, shall pay to Her Majesty all moneys so collected, and shall in addition be liable to a penalty not exceeding five hundred dollars".

Although this section, except as regards the penalty, was held ultra vires the federal government by the Exchequer Court, *The King* v. *Imperial Tobacco Company*, [1938] Ex C.R. 177, reversed on other grounds, [1939] S.C.R. 322, the department still attempts to collect excess tax under this section. Regulation 10(d) of circular 1-C, dealing with the general administration of the act, states: "Where licensed manufacturers or wholesalers charge their customers a separate amount on their invoices as 'sales tax', 'tax', 'surcharge' or other wording suggesting that the item represents tax, or a percentage equivalent to the rate of tax in effect, and the amount so charged exceeds the tax paid, the difference is required to be paid to the Department". It is at least arguable that the regulation goes beyond the words of section 61. It should also be noted that under the Special War Revenue Act as it existed before January 1st, 1924, liability was imposed upon purchasers to pay the tax to vendors and upon vendors to remit the tax to the Crown. This feature of the act was abandoned when the turnover tax was replaced in 1924 by the present sales tax

[8] Section 30(1)(a) provides.

avail the taxpayer to allege that he has been misinformed or misdirected on the application of the tax by departmental officials, for it is clear that the Crown is not bound by such misrepresentations. Liability is imposed upon the taxpayer as principal debtor and not as a mere collecting agent of the Crown; consequently he is never entitled to rely upon incorrect instructions if they result in his paying less tax than the law requires.[9]

Limitation of Proceedings

Since the Excise Tax Act, unlike the Income Tax Act, contains no provisions restricting the common-law rule that the Crown's claims for tax are not barred by the lapse of time, it is possible for the department to assess a taxpayer for additional sales or excise tax alleged to have been due any number of years before. The recovery of penalties for infraction of the act is, however, limited by section 62, which states:

> Prosecutions or suits for the recovery or enforcement of any of the penalties imposed by this Act may be made or commenced at any time within three years after the offence was committed or the cause of prosecution or suit arose, but not afterwards: Provided, however, that where false or fraudulent acts, whether of omission or commission, are involved in any offence committed or in any cause of prosecution or suit, the prosecution or suit may be commenced at any time within the said period of three years or within six months after the Minister or the Commissioner of Excise has knowledge or notice of such false or fraudulent acts, whichever be the longer period, but not afterwards.

The words "within three years after the offence was committed

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"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 purchaser or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, which ever is the earlier, and

(ii) payable, in a case where the contract for the sale of the goods (including a hire-purchase contract and any other contract under which property in the goods passes upon satisfaction of a condition) provides that the sale price or other consideration shall be paid to the manufacturer or producer by instalments (whether the contract provides that the goods are to be delivered or property in the goods is to pass before or after payment of any or all instalments), by the producer or manufacturer pro tanto at the time each of the instalments becomes payable in accordance with the terms of the contract;"

See *The Queen* v. *Steel Company of Canada Ltd.* (1953), 53 D.T.C. 1154 (Ex. Ct.)

[9] *The King* v *Weir Mfg. Co Ltd.*, [1941] 3 W.W.R. 801 (Vancouver County Court), *The King* v. *Disappearing Propeller Boat Co.* (1924), 55 O.L.R. 545.

or the cause of prosecution or suit arose" are somewhat ambiguous when used in connection with section 53(1), which imposes a quasi-criminal penalty for failure to pay tax.[10] Failure to pay tax is, presumably, a continuing offence so long as the tax remains unpaid. It is, therefore, difficult to see that this section imposes any limitation at all on proceedings under section 53(1), except where the tax was paid after the due date but before the three-year period.[11] Consequently, even if the Crown's right to recover tax civilly under section 50(1) has been barred by the lapse of time, the tax can still in most cases be recovered indirectly, by proceedings under section 53(1), an astonishing result which surely could never have been intended by the draftsman.

Procedures Available to the Minister

If informal attempts at settlement fail, the department appears to have the following procedures available to it:

(1) to register a certificate of the taxes claimed in the Exchequer Court, pursuant to section 50(4);

(2) to take civil proceedings under section 50(1) for recovery of the tax claimed;

(3) to take proceedings for recovery of penalties due under section 53(1) for failure to pay tax, the proceedings being either civil, under section 50(2)(a), or criminal, under section 50(2)(b);

(4) to apply to the Tariff Board under section 57.

[10] Section 53(1) reads:

"Every person who, being required, by or pursuant to this Act, to pay or collect taxes or other sums, or to affix stamps fails to do so as required is guilty of an offence and in addition to any other penalty or liability imposed by law for such failure is liable on summary conviction to a penalty of not less than

(a) the aggregate of twenty-five dollars and an amount equal to the tax or other sum that he should have paid or collected or the amount of stamps that he should have affixed or cancelled, as the case may be,

and not exceeding

(b) the aggregate of one thousand dollars and an amount equal to the aforesaid tax or other sum or aforesaid amount of stamps, as the case may be,

and in default of payment thereof to imprisonment for a term of not less than thirty days and not more than twelve months."

[11] It seems reasonably clear from the decision in *Rex* v. *Smith* (1947), 89 C.C.C. 397 (Alta.), that where the tax owing is paid after the due date but before the bringing of an action, and where section 62 does not apply, the taxpayer may still be required to pay the additional penalty prescribed by section 53(1), equal to the amount of tax which should have been paid For a contrary and, it is submitted, less correct view, see *Rex* v. *Freedman* (1946), 86 C.C.C. 310 (Man.), decided under the now repealed sections on retail purchase tax. If the *Smith* case is correctly decided, then, once default takes place, prosecution under section 53(1) may be instituted at any time before three years from the date of payment of the arrears.

1. *Registration of a certificate of arrears*

Section 50(4), although superficially similar to section 119(2) of the Income Tax Act, is actually radically different, for there is no procedure under the Excise Tax Act for filing a notice of objection or notice of appeal from the assessment, such as is provided by sections 58 and 59 of the Income Tax Act. If the taxpayer believes himself aggrieved by the action of the department, he may bring a motion before the Exchequer Court to have the certificate set aside. This was also pointed out by McLean J. in the *Noxzema* case:

> Section 108(4) [now section 50(4)] provides for the filing of a certificate of default in the payment of the tax and this operates as a judgment obtained upon the filing of such certificate in a Court. This section provides for summary procedure for obtaining judgment where there has been a default in the payment of tax, and this procedure is availed of in hundreds of cases annually in this Court, by the taxing authorities, but, I assume, usually in cases where liability for the tax claimed is not a dispute. It is the equivalent of a judgment entered in default of pleading in the ordinary action in any Court and would be readily opened up by that Court on cause being shown [12]

If a notice of arrears has been sent out but the certificate has not yet been registered in the Exchequer Court, there is apparently no way in which the taxpayer can forestall registration of the certificate of default except by informal representations to the department. A motion before the Exchequer Court seems an unlikely course, for no proceedings have as yet been taken by the minister in that court. It seems highly unusual, to say the least, that a default judgment has to be obtained against a taxpayer before he is allowed to defend the case at all except with the consent of the department, but there does not appear to be any escape under the present wording of section 50(4).

2. *Civil proceedings*

Section 50(1) allows the Crown to take civil proceedings for recovery of tax in the Exchequer Court or in any other court of competent jurisdiction. The litigation is today conducted almost exclusively in the Exchequer Court.[13] but in the early years of the Excise Tax Act (then called the Special War Revenue Act) civil

[12] [1941] Ex C.R at p. 170

[13] The law reports of the past ten years do not appear to contain a single reported decision in a civil suit by the Crown under this act which was brought before a tribunal other than the Exchequer Court The number of unreported cases brought before other tribunals is unknown, but it is thought to be very small

proceedings were frequently brought in provincial courts. Two particularly interesting examples are *Dominion Bakery* v. *The King*,[14] in which the Ontario Court of Appeal decided an appeal from a decision of the fourth division court of the county of Welland on arrears of sales tax, and *The King* v. *Leake*,[15] in which a jury trial was held before the Supreme Court of Ontario. A jury trial before the Supreme Court might find favour with other taxpayers in situations where it is thought that imposition of the tax in the manner demanded by the Crown would shock the conscience of an ordinary man. Apparently, however, the Crown has the choice of forum, and today the Crown chooses to sue in the Exchequer Court.[16]

At least three reported cases have been by way of a case stated for the opinion of the Exchequer Court,[17] a procedure which, if acceptable to both parties, may expedite trial and reduce court costs.

Onus of proof. A wide divergence of judicial opinion exists on the onus of proof in an action by the Crown for recovery of sales or excise tax. Kelly D.J., in his reasons for judgment in the undefended case of *The King* v. *Allison*,[18] held that the minister's assessment is an administrative act not susceptible of judicial review. Under this theory there seems to be no point whatever in the act's allowing proceedings to be taken under section 50(1), since, once the minister has assessed, the result is a foregone conclusion. Kelly D.J.'s dictum purports to be based upon the decision of the Supreme Court of Canada in the *Noxzema* case.[19] This case, however, involved the interpretation of section 37, empowering the minister to set the fair price on which tax should be imposed. The Supreme Court's decision was, it is submitted, simply to the effect that since no legal criteria are provided by section 37 for the exercise of the minister's power, his decision under the section is a purely administrative act and not reviewable by the courts. Kerwin J., in reasons for judgment concurred in by Rinfret and Hudson JJ., stated:

> His [the Minister's] jurisdiction depends only upon his judgment

[14] (1923), 54 O.L.R. 656; *sub nom.*, *Rex* v. *Dominion Bakery*.

[15] (1924), 27 O.W.N. 3.

[16] A more recent exception among the reported cases is *The King* v. *Weir Mfg. Co. Ltd*, [1941] 3 W.W.R. 801, which was brought in the Vancouver County Court.

[17] *The King* v. *The Bank of Nova Scotia*, [1930] S.C.R. 174, affirming [1923] Ex. C.R. 153, *The King* v. *Fraser Companies Ltd.*, [1931] S.C.R. 490, reversing [1931] Ex. C.R. 16; *The King* v. *Henry K. Wampole & Co. Ltd.*, [1931] S.C.R. 494, affirming [1931] Ex. C.R. 7.

[18] [1950] Ex. C.R. 260.

[19] [1942] S.C.R. 178, reversing [1941] Ex. C.R. 155

> that the goods were sold at a price which was less,— not, be it noted, less than would be a fair price commercially or in view of competition or the lack of it,— but less than what he considered was the fair price on which the taxes should be imposed.[20]

It seems a fair inference from the foregoing that, had the minister been called upon to determine, for example, a competitive price, his decision might have been reviewable, for some standard would then exist by which a court could determine a price or review the minister's determination. It is submitted that the reasoning in the *Noxzema* decision is inapplicable to ordinary cases not arising under section 37 or similar cases where liability is disputed for any of the reasons discussed at the beginning of this article. Nevertheless, the *Noxzema* case was applied in an ordinary tax case in *The King* v. *Allison* and in two cases involving criminal proceedings under section 53(1).[21]

An alternative view to that of Kelly D.J. was stated in *The King* v. *Pacific Bedding Company Limited*,[22] in which Cameron J. held that the documents referred to in section 50(11) and (12)[23] were prima facie evidence of the amount that was due. A number of other cases however, such as *Sarnia Brewing Company* v. *The King*,[24] have held that the onus is upon the Crown to show that the tax is due, and that the Crown must affirmatively prove each element necessary for liability. In the *Sarnia Brewing* case the Crown failed to prove manufacture by the defendant of the goods in question and the action was dismissed, without the defendants tendering any evidence at all.

Section 50(11) was enacted in 1949 in order to nullify the effect of the decision in *Rex* v. *Pacific Bedding Company Limited*,[25] in which the British Columbia Court of Appeal held that the mere production of a document signed by the minister, alleging that a

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[20] *Ibid.*, at p. 186.

[21] *Rex* v. *Bierwith*, [1944] 2 W W.R 560; *Rex* v. *Beaudry Bonbons Ltd.* (1951), 99 C.C.C 387.

[22] [1950] Ex. C.R. 456.

[23] Section 50(11): "Where any question arises in a proceeding under this Act as to whether the Minister has formed a judgment or opinion or made an assessment or determination, a document signed by the Minister stating that he has formed the judgment or opinion or made the determination or assessment is evidence that he has formed the judgment or opinion or made the determination or assessment and of the judgment, opinion, determination or assessment".

Section 50(12): "In any proceedings under the Act a certificate purporting to be signed by the Deputy Minister that a document annexed thereto is a document or a true copy of a document signed by the Minister shall be received as evidence of the document and of the contents thereof".

[24] [1929] S.C.R. 46.

[25] [1949] 2 W.W.R. 575.

taxpayer had failed to keep proper books and records, and making an assessment, is insufficient evidence upon which to found a conviction for failure to pay tax. Under section 50(11) such a document is evidence that the minister has made the assessment, but whether it is of any probative value on the quantum of the tax payable is another matter. Although the section goes on to state that the certificate is also "evidence of the . . . assessment", this does not seem to carry the matter any further. It is possible that the enactment of section 50(11) has shifted the onus of proof required under the Excise Tax Act. It has certainly not done so, however, in clear terms. It is submitted that section 50(11) relates only to evidence and cannot put the Crown in any better position than it would be if the minister or his deputy[26] took the witness stand and testified that he had made an assessment. In the absence of direct evidence establishing liability for the tax claimed, it may be doubted that the minister's or deputy minister's evidence would be sufficient to enable the court to give judgment.[27]

Wholesale discounts. In most of the regulations issued under the Excise Tax Act on specific commodities, the minister has fixed rates of "wholesale discount" applicable on sales by manufacturers directly to retailers or consumers. In addition, many manufacturers have been allowed to account for tax on sales to retailers or consumers on the basis of the price at which they sell similar goods to bona fide independent wholesalers in the same territory.[28]

Some difference of opinion appears to exist on the exact purpose of these provisions. The department's view is that they are

[26] Section 50(12).

[27] It has been suggested that it is only in cases where the minister has made an arbitrary assessment under section 55(8), in the absence of proper records, that the onus is on the taxpayer and that in all other cases the onus is on the Crown. It should be noted that section 55(8) is the only provision for making an assessment under the Excise Tax Act and that it does not in express terms provide for any appeal or method of disputing the assessment. Where section 55(8) does not apply, the licensee simply becomes liable to pay sales tax when he makes a taxable sale; the Crown may bill him for tax, or for more tax than he has paid, but this is a mere assertion of a claim by the Crown rather than an assessment. In such a case, the onus of establishing liability is clearly upon the Crown. However, it is possible that, where the minister has assessed under section 55(8), the Crown may simply produce in court the documents referred to in section 50(11) and (12) and claim that it is entitled to judgment and that the taxpayer has no right at all to introduce evidence to contest the assessment. But this conclusion may not be justified by the wording of section 55(8), since it is possible to argue that the minister's power is restricted to assessing the licensee for the taxes he was, by other sections of the act, required to pay. On this reasoning, if the licensee can prove that he has paid tax on all his sales, the minister is not legally entitled to assess him for additional tax.

[28] Regulation 6 of Circular 1-C.

intended to equalize as much as possible the tax position of manufacturers selling directly to retailers or consumers and manufacturers selling through independent wholesalers. Since prices charged to wholesalers are usually less than those charged to retailers or consumers, in the absence of these or similar rules manufacturers selling to wholesalers would have a competitive advantage as regards the amount of sales tax paid. Accordingly, where there are no wholesalers at all in an industry, the department appears to feel in many cases that there is no reason why tax should not be levied upon the actual price charged by manufacturers to retailers without any wholesale discount at all. Some taxpayers accept this view, but others have pointed out that the general intent of the regulations, imperfectly though they may be expressed, is to levy tax upon a price which excludes the mark-up attributable to the functions of the wholesaler and of the retailer. These taxpayers consider that even where no independent wholesalers exist in an industry and all manufacturers perform wholesaling functions, a wholesale discount should be allowed, even though refusal to allow it would not discriminate among firms in the industry.

The wholesale discount provisions of the regulations have had an interesting history. Regulation 6 of circular 1-C was applied in *The King* v. *Capuano and Pasquale Company Limited*,[29] which dealt with the establishment by a manufacturer of a closely related sales organization, to which products were sold at less than the manufacturer's former prices to wholesalers. Today such tax minimization devices are dealt with under section 37, but in this case Duclos J. simply held, on the basis of the regulation, that where the sale was made to the manufacturer's own wholesale house, the value for purposes of the tax could not be less than the price at which the goods were sold to bona fide independent wholesalers. Although the point was not actually decided, doubts were cast on the validity of regulation 6 in *Attorney-General for Canada* v. *Goldberg*,[30] in *Minister of National Revenue* v. *Laboratoires Désautels Ltée*[31] and in *The King* v. *Weir Manufacturing Company Limited*.[32] The point came up squarely for decision in *Attorney-General for Canada* v. *Coleman Products Limited*,[33] where it was held to be ultra vires the minister to make any regulation varying, modifying or changing the positive declaration in section 30 that tax is to be levied on the actual sale price. This decision appears to have effectively destroyed

[29] [1929] 1 D.L.R. 1004 (Que., 1926).
[30] [1929] 1 D.L.R 711 (Ont.).
[31] (1930), 68 S C. 142 (Que.).
[32] [1941] 3 W W R. 801 (B.C.).
[33] [1929] 1 D L.R. 658 (Ont.)

the legal basis of both the percentage-type of wholesale discount and the type contemplated by regulation 6, and no one has as yet risked taking a similar case to the Supreme Court of Canada or even to a provincial court of appeal. The government has shown no inclination to ask Parliament to amend the Excise Tax Act so as to validate these regulations, with the result that a manufacturer aggrieved at the wholesale discount fixed by the minister for his particular product has no recourse at all to the courts. If he has the temerity to bring the matter of a wholesale discount before the courts, he will find that he has to pay tax upon the actual sale price, without any discount at all.

3. *Penalty for failure to pay tax*

Civil. A civil suit by the Crown for recovery of a penalty, such as is contemplated by section 50(2)(a), is a rather unusual type of proceeding in law, although it is probably not entirely without precedent. Only one reported case, and that during the first years of the act, has involved this procedure.[34] In practice, criminal rather than civil proceedings are taken to collect penalties under the Excise Tax Act, except for the interest penalty contained in section 48(4).

Criminal. Criminal proceedings may be brought under section 50(2)(b) for recovery of penalties incurred for any violation of the act, but this article will deal only with the penalties under section 53(1) for failure to pay tax. The wording of this latter section is interesting, since it speaks of failure "to pay or collect tax or other sums, or to affix or cancel stamps". Today, the only relevant word is "pay", for there are no longer any provisions requiring a vendor to collect taxes or to affix or cancel stamps. One might hazard the opinion that the minister could be prosecuted under section 53(1) for allowing wholesale discounts and thereby failing to collect the full tax due!

Section 19BBB of the Special War Revenue Act, enacted in 1920 and amended in 1921, was the predecessor of the present section 30, but it imposed a turnover tax which had to be paid by the purchaser to the vendor at the time of the sale and remitted by the vendor to the Crown. Under these provisions it had been held that where, through inadvertence, no tax had been collected by the vendor, he was under no civil liability to pay to the Crown

[34] *Versailles Sweets Ltd.* v *A G Can* (1923), 25 O.W.N. 15, affirmed 25 O.W.N. 357, affirmed [1924] S.C.R. 466 (a suit to recover penalties for failure to collect sales and excise tax and for failure to take out licences)

the moneys he should have collected, although he might be liable criminally for a penalty.[35] At the beginning of 1924 the incidence of the tax was changed and the present manufacturers sales tax inaugurated, in which the vendor is liable to the Crown for sales and excise tax whether or not he collects it from the purchaser.[36] Although some justification may have existed for imposing such a criminal penalty on a vendor who was not civilly liable for the tax, once the vendor became civilly liable there could be little justification for a criminal liability in addition to the civil one. Nevertheless, by section 22 of chapter 50 of the Statutes of 1932-1933, the predecessor of section 53(1) was amended to provide for an additional penalty for failure to pay tax equal to double the amount of the tax due. By section 5 of chapter 52 of the Statutes of 1938 this additional penalty was reduced to the amount of the tax itself. To some taxpayers this has all the earmarks of a criminal prosecution for recovery of a civil debt, a proceeding generally deplored in civilized societies.

We may leave aside any general discussion of imprisonment for debt, but there are a number of situations in which these prosecutions produce exceedingly harsh results.[37] When bankruptcy intervenes, the problem becomes acute for, obviously, the bankrupt no longer has any assets with which to pay the tax. Nevertheless, if he has failed to pay tax which was due before the bankruptcy, he has committed an offence and is liable to all the penalties prescribed by section 53(1).[38]

In practice, the government applies the additional penalty which is paid under section 53(1) on account of the civil tax liability and does not attempt to get paid more than once, although under section 51(2)[39] there is no legal obligation upon the minister to apply

[35] *A. G. Can.* v. *Reed*, [1926] 1 D.L.R. 821 (B.C.C.A.).

[36] Despite dicta to the contrary in *Rex* v. *Clarke* (1949), 94 C.C.C. 332, and *Regina* v. *Fagan*, [1954] O.W.N. 1, it is quite clear that sales and excise taxes are in no sense trust funds collected by the vendor on behalf of the Crown but are rather a mere civil obligation.

[37] See comment on *The King* v. *Pacific Bedding Co. Ltd.*, [1950] Ex. C.R. 456, in (1951), 29 Can. Bar Rev. 87; and Some Legal Aspects of the Sales Tax, 2 Tax Bulletin, No 1, p. 23.

[38] *Rex* v. *Gold and Smith* (1938), 71 C.C.C. 395 (Ont.); varying 70 C.C.C. 382. Since sales and excise taxes are payable only at the end of the month following that in which the sales were made (section 48), if taxes are owing only for the current month at the time of bankruptcy, no offence under section 53(1) has been committed: *Rex* v. *Gold and Smith*, *supra*.

[39] Section 51(2): "Where a penalty calculated by reference to the amount of the tax that should have been paid or collected or the amount of stamps that should have been affixed or cancelled is imposed and recovered under or pursuant to this Act, the Minister may direct that the amount thereof or any portion thereof be applied on account of the tax

the tax in this way. In the case of a partnership, tax could actually be collected once civilly under section 50(1) and then by prosecution under section 53(1) from each of the partners individually. Similarly, where the licensee is an incorporated company, tax may legally be collected from it and also from each of the persons connected with the company who fall within any of the categories mentioned in section 53(3).[40]

It seems difficult to justify the principle of allowing the department to prosecute for failure to pay tax instead of taking civil proceedings under section 50(1). It has been suggested that a trial before a magistrate is more convenient for the taxpayer because it enables him to have the hearing near his place of business, but this ignores the fact that civil suits under the Excise Tax Act may be brought in any court of competent jurisdiction. Not only does the Exchequer Court hold sittings in many cities, but provincial courts are also available. Prosecution, resulting in the imposition of a fine, is of course a deterrent to tax delinquency, but so also are civil suits, where costs are usually awarded to the successful party. Since mere failure to pay tax hardly smacks of moral turpitude, prima facie there is no reason why it should be treated in the same manner as a fraud on the revenues. It would seem that the ultimate "justification" for the Crown's choice of criminal proceedings is simply that the taxpayer will go to jail if the tax is not paid. An unkind critic might remark that many other creditors would welcome similar provisions to enforce the collection of debts owing to them.

It is reasonably clear from section 50(5)[41] that failure to pay a civil judgment for sales or excise tax renders the judgment debtor liable to prosecution under section 53(1). Consequently, the Crown does not have to elect which remedy it will pursue, and it may still use criminal proceedings if it is unable to realize upon the civil judgment. The wording of the last clause of section 50(5) seems somewhat inappropriate, for it states, "such penalty shall be recoverable in like manner as the judgment debt". What was probably meant is that "such penalty shall be recoverable for non-pay-

that should have been paid or collected or the indebtedness arising out of the failure to affix or cancel stamps".

[40] Section 53(3): "Where an incorporated company has been convicted of any offence against this Act, every officer, director or agent of the company who has directed, authorized, condoned or participated in the commission of the offence, is liable to the like penalties as such company and as if he had committed the like offence personally, and he is so liable cumulatively with the company and with such officers, directors or agents of the company as may likewise be liable hereunder".

[41] Section 50(5).

ment of the judgment debt in like manner as for non-payment of the debt itself". This clause really adds nothing to the section and could probably be omitted.

If the civil judgment is paid, section 50(5) does not apply and the question may then be asked whether the minister is precluded by the payment from taking criminal proceedings In the *Pacific Bedding* case[42] Cameron J. asserted that section 50(1) and section 53(1) are entirely distinct, inferring that, even if a civil judgment for sales tax is paid, criminal proceedings may still be taken under section 53(1). A similar situation exists where there has been no civil suit and the tax is paid after the due date, but before the information is laid under section 53(1).

The court's right to impose the additional penalty where the arrears are paid after the information is laid, but before trial, can hardly be disputed. The cases are at variance, however, where the arrears are paid before the information is laid. The correct view appears to be that the additional penalty is still due,[43] but there is a decision to the contrary.[44] The practice in prosecutions under section 53(1) also varies from province to province. In Ontario, the Crown asks for a fine which does not include the amount of the tax. In Quebec, however, and possibly in some other provinces, the magistrate imposes a fine which includes the amount of the tax paid, but this additional amount is not actually collected. In neither event is tax actually collected more than once.

If the dictum of Cameron J. in the *Pacific Bedding* case is correct, it follows that an acquittal by a magistrate hearing a charge under section 53(1) does not allow a plea of *res judicata* in subsequent civil proceedings under section 50(1), and that dismissal of the civil proceedings does not prevent a successful criminal prosecution, a state of affairs which has apparently not yet arisen. Finally, the *Pacific Bedding* case establishes that conviction under section 53(1) is not a bar to civil proceedings under section 50(1). Cameron J. expressed this matter quite clearly:

> The proceedings in the Police Court at Vancouver were for the recovery of penalties incurred for violation of the Excise Tax Act and that Court had jurisdiction to hear the matter by reason of the provisions of section 108(2)(b) of the Act [now section 50(2)(b)]. The taxes now claimed could not have been recovered in the proceedings in the Police Court, but only in the Exchequer Court, or in any other court of competent jurisdiction (section 108(1)) [now section 50(1)], or by

[42] *Supra.*

[43] *Rex* v. *Smith* (1947), 89 C.C.C. 397 (Alta.).

[44] *Rex* v. *Freedman* (1946), 86 C.C.C. 310 (Man.), disapproved in *Rex* v. *Smith*, *supra.*

proceedings under section 108(4) [now section 50(4)]. It is the case that in proceedings in the Police Court the penalties assessed for a non-payment of taxes could include an amount equal to the unpaid taxes, but section 109(2) [now section 51(2)] makes it abundantly clear that even if the penalties assessed included an amount equal to the unpaid tax, the taxpayer is not absolved from liability to pay the taxes which are properly due.[45]

4. *Appeal to the Tariff Board*

A fourth course of action is open to the minister, to apply to the Tariff Board under section 57[46] for a declaration whether any, or what rate of, tax is payable on any article under the act. It is not known whether the minister has ever availed himself of this provision, although the right to do so is clearly not confined to taxpayers.

The jurisdiction of the Tariff Board under the Excise Tax Act is somewhat limited. Of the seven types of dispute mentioned at the beginning of this article, only the first appears to be within its purview. This limited jurisdiction is derived from the Customs Act,[47] which between the years 1904 and 1948 contained a similar section, providing an interesting example of the influence of the customs administration on its sister branch.

Under section 57 notice of a hearing is published in the Canada Gazette at least twenty-one days before the day of the hearing and any person who enters an appearance with the secretary of the

[45] *Supra*, at p. 460

[46] Section 57 provides:

"1. Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the Tariff Board Act may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act

"2. Before making a declaration under subsection (1) the Tariff Board shall provide for a hearing and shall publish a notice thereof in the Canada Gazette at least twenty-one days prior to the date of the hearing; and any person who, on or before that day enters an appearance with the Secretary of the Tariff Board may be heard at the hearing.

"3. A declaration by the Tariff Board under this section is final and conclusive, subject to appeal as provided in section 58.

"4 Notwithstanding the provisions of section 46 relating to the time within which an application for a refund or deduction may be made, no refund or deduction shall be made under that section as the result of any declaration of the Tariff Board under this section or an order or judgment under section 58 in respect of taxes paid prior to such declaration, order or judgment unless the application mentioned in section 46 is made within twelve months after such taxes were paid

"5. An application to the Tariff Board for a declaration or the entering of an appearance with the Secretary of the Tariff Board under subsection (2) of this section, shall, for the purposes of section 46, be deemed to be an application in writing."

[47] R.S.C., 1927, c. 42, s. 54.

Tariff Board may be heard. The declarations of the Tariff Board are also published in the Canada Gazette.

Since the only question the Tariff Board is called upon to decide is whether an article is subject to tax under any of the provisions of the act, it appears that the onus of proof, if any exists, is upon the Crown, unless the dispute concerns a claim for exemption, when the onus is upon the person asserting the claim.[48] If, however, the Tariff Board's jurisdiction under section 57 extends only to matters of law, no question of onus arises. Moreover, it seems from the wording of section 57 that matters may be brought before the Tariff Board for rulings with only prospective operation, in which case it may be difficult to say that there is a claim by the Crown for tax or by the citizen for exemption, and the question of onus becomes problematical.

It is a nice question whether the Tariff Board is entitled to deal with cases involving a dispute over the proper wholesale discount to be allowed a manufacturer. I am informed that this question has never arisen in practice, but the departmental view is that the board is required to declare "what amount of tax is payable" and that in doing so it may not do more than declare that it is payable on the "sale price" as defined by the act.[49] This view is reinforced by the fact that an appeal lies on matters of law from the board to the Exchequer Court, which presumably would be obliged to declare the law in accordance with the decision in the *Coleman Products* case.

Another answer, however, appears possible. In *Reference Concerning the Jurisdiction of the Tariff Board*,[50] the Supreme Court of Canada dealt with a determination by the Tariff Board of customs

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[48] *The King* v. *Gooderham & Worts Ltd.*, [1928] 3 D.L.R. 109; *The King* v. *Sarnia Brewing Co. Ltd.*, [1928] Ex. C.R 219, reversed on other grounds, [1929] S C.R. 646.

[49] Section 29(1)(f) reads:

" 'sale price' for the purpose of determining the consumption or sales tax, means the aggregate of

(i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,

(ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price (whether payable at the same time or some other time) including without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and

(iii) the amount of excise duties payable under the Excise Act whether the goods are sold in bond or not, and,

in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof"

[50] [1934] S C.R. 538

duties on certain imports, the board's decision having been given under section 54 of the Customs Act.[51] The reasons for judgment of Rinfret J. (as he then was) throw light on the meaning of section 54, which is analogous to section 57 of the Excise Tax Act, so that some of the learned judge's conclusions may be applicable to the Excise Tax Act as well. These conclusions were, first, that the Tariff Board has no authority to determine questions of law, as distinct from questions of fact; secondly, that in the performance of its duties the board must give effect to the orders of the minister; and, thirdly, that its decisions are subject to the approval of the minister. It is rather difficult to determine the extent to which this decision is applicable to section 57 of the Excise Tax Act. It would seem that the Supreme Court expressed itself rather broadly on the first point: in the form in which section 54 of the Customs Act then existed it seems clearly to imply an authority to decide questions of law,[52] and it is interesting that a right of appeal to the Exchequer Court was subsequently given on such questions.[53] The third conclusion is probably based upon the particular wording of section 54 of the Customs Act, which, unlike section 57 of the Excise Tax Act, provided that the decision of the board must be approved by the minister before becoming final. Consequently, neither the first nor the third part of the Supreme Court's decision is necessarily relevant to the interpretation of section 57 of the Excise Tax Act. The second part of the decision, that in the performance of its duties the board must give effect to the orders of the minister, is however derived from the Tariff Board Act[54] itself, and it is, therefore, relevant to both the Customs Act and the Excise Tax Act.

If this analysis is correct, it appears that, in deciding questions submitted to it under section 57, the Tariff Board is obliged to follow the orders of the minister.[55] In the absence of a specific order affecting the taxpayer, there seems no reason why the board should not be obliged to look to the minister's regulations, which,

[51] R.S.C., 1927, c. 42.

[52] In Appeal No. 200 (1950), 84 Can. Gaz. 1044, the Tariff Board, however, following the decision in the Tariff Board Reference, held that it was not within its competence to decide the question whether a particular transaction was one of ordinary importation or of goods shipped on consignment. The jurisdiction of the Tariff Board under the Customs Act has also recently been dealt with in an unreported decision of Thorson P. in *Deputy Minister of National Revenue for Customs and Excise* v. *Parke, Davis & Company Limited* (Ex. Ct., Dec 23rd, 1953).

[53] 1948, c. 41, s 5.

[54] Tariff Board Act, R.S.C., 1952, c. 261

[55] It is not intended to suggest by these remarks that the Tariff Board is in practice anything other than a fully independent tribunal.

although not necessarily having the force of law, are none the less his orders. Since these regulations permit wholesale discounts, it may be possible for the board to make a declaration which in effect upholds the validity of the assessment procedure. What would happen to their decision on an appeal to the Exchequer Court is another matter, for the Exchequer Court is certainly not obliged to give effect to the minister's orders.

Appeals from the Tariff Board to the Exchequer Court are allowed on questions of law only. The extent of the jurisdiction of the Exchequer Court on appeals from the Tariff Board was recently discussed in the unreported case of *Deputy-Minister of National Revenue for Customs and Excise* v. *Parke, Davis & Company Limited*[56] Thorson P. held in this case that, if there was material before the board from which it could reasonably decide as it did, no question of law arises and the decision of the board will not be interfered with. "Question of law" under section 45(1) of the Customs Act (which is similar to section 58(1) of the Excise Tax Act) was explained by Thorson P. somewhat differently from Cameron J. in *Deputy-Minister of National Revenue for Customs and Excise* v. *Rediffusion Inc.*,[57] in which Cameron J. had held that it was a question of law whether certain devices installed by the taxpayer came within a particular classification in schedule I of the Excise Tax Act (listing goods subject to excise tax) and, accordingly, leave was given to appeal to the Exchequer Court.[58] Thorson P. did not define a "question of law" in such broad terms and in effect allowed the Tariff Board a jurisdiction not entirely unlike that of the General Commissioners under the British Income Tax Act.

Procedures Available to the Taxpayer

The types of proceedings available to the taxpayer for litigating tax liability are the following:

(1) payment of the assessed tax under protest followed by a petition of right for a refund;

(2) an informal request to the department to take proceedings either for recovery of the tax claimed or for recovery of the penalty for non-payment of the tax;

(3) a declaratory action;

(4) appeal to the Tariff Board.

[56] *Supra* [57] (1953), 53 D T C. 1143.

[58] Cameron J followed the *Rediffusion* case in *General Supply Co. of Canada* v. *Deputy Minister of National Revenue for Customs and Excise*, [1953] 2 D L.R 556, on whether an imported article is dutiable under a particular tariff item On this point see the comment in I Canadian Tax Journal 615.

1. *Payment under protest*

There is no specific provision in the Excise Tax Act for payment of tax under protest, although there is a refund procedure under section 46, allowing the department to refund moneys paid under a mistake either of law or of fact. Although the department is entitled to refund taxes paid under a mistake of law, it would appear that unless tax is paid either under protest or under a mistake of fact, a taxpayer cannot force a refund by suit in the common-law provinces at least.[59] If these conditions exist, however, a petition of right would lie to the Exchequer Court should the department refuse to make the refund.[60] This procedure would be of no assistance to a taxpayer desiring to litigate questions involving wholesale discounts or the fixing of the "wholesale price" under regulation 6 of circular 1-C, but any of the other five questions listed at the beginning of this article could be litigated. Payment would stop the running of the interest penalty and is, therefore, indicated where the taxpayer's hope of success is slim. If the taxpayer wins, however, interest is not payable by the Crown, except after judgment, a point on which a difference exists between the Excise Tax Act and the Income Tax Act.[61] Applications for refund are limited by section 46(6) to taxes paid within the preceding two years.

2. *Informal request to take proceedings*

"An informal request to the department to take proceedings" is self-explanatory. In most cases a taxpayer would, of course, prefer to be sued under section 50(1) rather than prosecuted under section 53(1) for failure to pay tax. If the minister has already certified the taxes due and has registered a certificate in the Exchequer Court under section 50(4), a motion to set aside the default judgment would appear to be in order, but if the notice of arrears has

[59] See *Francis* v. *The Queen* (Ex. Ct., 1953, unreported), in which an Indian, who imported goods from the United States and paid the customs duty and sales tax under protest, brought a petition of right for refund of the moneys, relying on a treaty of 1794 between Great Britain and the United States.

[60] Cases in which proceedings were taken by petition of right for recovery of sales tax include *Vandeweghe Ltd.* v. *The King*, [1933] Ex. C.R. 54, reversed [1934] S.C.R. 244; *A. Hollander & Sons Ltd.* v *The King*, [1935] Ex C.R. 90; *Dominion Distillery Ltd.* v. *The King*, [1937] Ex. C.R. 145, affirmed [1938] S C.R. 458; *Dominion Bridge Co. Ltd.* v. *The King*, [1939] Ex. C.R. 235, affirmed [1940] 2 D.L.R. 545; and *United Profit Sharing Systems Ltd.* v. *The King*, [1947] 3 D.L.R. 859 (Ex. Ct.).

[61] Income Tax Act, s. 57 (3) and (3A). Section 53 of the Exchequer Court Act provides for interest from the date of judgment.

been sent and the certificate has not been registered before the department decides to sue or prosecute, the taxpayer probably would not have to take any further steps beyond defending the action or prosecution.

3. *Declaratory action*

Suit may be brought in a provincial supreme court for a declaration that the taxes claimed by the Crown are not owing. A declaratory action has been used in only one reported case, *Gruen Watch Company of Canada Limited* v. *Attorney-General for Canada*.[62] Here the trial judge, McRuer C.J.H.C., meticulously examined the question of when a declaratory action would lie, holding that a declaration would not be granted as a matter of right, where no consequential relief is sought, this being most particularly the case in revenue matters: that is, the court may refuse to entertain the action and require the taxpayer to wait for the Crown to take proceedings.[63] In proper circumstances, the exact nature of which no court has ever ventured to define, a declaration will be granted, which, from the taxpayer's point of view, will be as useful as judgment in an action for recovery of the tax. A declaratory action has the further advantage of being a proceeding initiated by the taxpayer, who can to some extent choose the judge before whom it will be heard. In the case of a taxpayer carrying on business in several provinces, it might even be possible to choose the provincial court in which the action will be brought. If a favourable declaration is given a taxpayer who has paid his tax under protest, the two-year limitation on refunds provided by section 46(6) will presumably apply.

4. *Appeal to the Tariff Board*

The fourth possibility is to bring the matter before the Tariff Board under section 57. The board's jurisdiction has already been discussed in dealing with the various alternatives available to the minister, but one further matter remains to be mentioned. Under section 57(4) refunds made as a result of a declaration of the Tariff Board are limited to taxes paid within twelve months of the date of application to the board. It is difficult to understand why a

[62] [1950] O.R. 429; varied on appeal, [1951] O.R. 360 (*sub nom., Bulova Watch Co.* v. *A. G. Can.*).

[63] Where the department has already registered a certificate of arrears under section 50(4), whether or not it has been set aside, the taxpayer's chances of getting the provincial court to make a declaration may be better.

shorter period of limitation is provided under section 57(4) than under section 46(6), but the reason may be related to the fact that usually, after the board delivers a ruling favourable to a taxpayer, all his competitors also make application for refunds. If a taxpayer wishes to claim refund of taxes paid more than twelve months previously, it appears that he should choose one of the three other possible procedures.

It is difficult to see how anyone can be satisfied with the proliferation of actions, prosecutions, appeals and other proceedings at present permitted under the Excise Tax Act. Some of these procedures are of such restricted utility that one may well wonder why they exist, while some important types of controversy apparently cannot be litigated at all. The time is surely ripe for a revision of the Excise Tax Act which would provide for a simplified right of appeal initiated by the taxpayer for all types of disputes arising under the act.

Litigants and Law

My thesis is founded upon what to me at least is a glimpse of the obvious. It is this The paramount duty of a court of law and of all who participate in its decisions is a duty owed not to the legal theorist, nor to the writer of text-books, nor to the legal profession, but to the litigant The judicial function was well described by one of my predecessors in office as one 'which every human community craves, without which no human community can hold together, and on the well or ill performance of which the well-being of every human community depends', — the function of *jus dicere*, the function of translating into prompt and effective action in a concrete case the *constans et perpetua voluntas jus suam cuique tribuendi*. It is true that that function cannot long be performed in any community without the gradual formation of a precipitate of principle and generalised doctrine which provides the raw material for the invaluable philosophic synthesis of the academic lawyer. But that precipitate is only an incidental by-product of a process the primary object of which is the rendering of a service to the community, represented in each case by the parties to the litigation You may not wholly agree with this; but if you had spent a lifetime face to face with live pursuers and defenders, petitioners and respondents, plaintiffs and defendants, I rather think that you would The question is whether our Courts are discharging that primary function efficiently, or whether they have lagged behind the needs of an age which has witnessed social economic and political transformations as sweeping as any that have occurred since the Middle Ages. If that function still is being discharged efficiently, it must be little short of miraculous, for in basic essentials our civil courts are still operating the same judicial machine in much the same way as in the last quarter of the nineteenth century. (The Rt. Hon. Lord Cooper, Defects in the British Judicial Machine (1953), 2 J. Soc. Public Teachers of Law (N.S) 91, at pp 91-92)