Privy Council Appeal No. 104 *of* 1930.

The Carling Export Brewing and Malting Company, Limited - *Appellant*

v.

The King - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD THANKERTON.]

The appellant, who carries on a brewery at London, Ontario, is sued by the Crown in the present action for the recovery of (*a*) $260,662.21 gallonage tax under the provisions of the Special War Revenue Act (1915) 5 George V. cap. 8 and amendments thereto, in respect of beer manufactured and sold by the appellant between the 1st April, 1924 and the 1st May, 1927; (*b*) $163,828.07 for sales tax under the said statute and amendments in respect of beer sold by the appellant between the same dates; and (*c*) interest and penalties in respect thereof.

The appellant, in defence, claims the benefit of certain statutory exemptions in favour of goods exported, and the main issue between the parties raises important questions of construction of the statutory provisions as to exemption, as also a question of fact as to whether the dealings with the goods in question were such as to entitle them to the benefit of the exemptions. There is also a minor question as to the amount of the statutory penalties.

In the Exchequer Court of Canada, Audette J., who tried the case, on the 29th April, 1929, dismissed the claim of the Crown in respect of about 83 per cent. of the claim, but gave judgment in favour of the Crown for the balance, with interest and penalties on the basis contended for by the appellant.

On an appeal by the Crown and a cross-appeal by the present appellant, the Supreme Court of Canada, on the 4th February, 1930, gave judgment in favour of the Crown for the whole sums claimed, with interest and penalties as claimed, and dismissed the cross appeal. It is from this judgment that the present appeal is taken. The appeal relates only to the 83 per cent. of the Crown's claim, except as regards the amount of the penalties, the question in regard to which affects the whole claim.

The provisions as to gallonage tax, which may be conveniently considered first, are contained in section 19B, I of the Special War Revenue Act, 1915, as amended by 12-13 George V., cap, 47, section 14, and, so far as material, are as follows :—

(*b*) " There shall be imposed, levied, and collected upon all goods enumerated in Schedule II to this Part, when such goods are imported into Canada or taken out of warehouse or when any such goods are manufactured or produced in Canada and sold on and after the twenty-fourth day of May, one thousand nine hundred and twenty-two, in addition to any duty or tax that may be payable under this Act, or any other statute or law, the rate of excise tax set opposite to each item in said Schedule II."

(*c*) " Where the goods are imported such excise tax shall be paid by the importer and where the goods are manufactured or produced and sold in Canada, such excise tax shall be paid by the manufacturer or producer ; provided that if an automobile is, on the twenty-fourth day of May, one thousand nine hundred and twenty-two in the hands of a dealer and not sold to a *bona fide* user, the tax shall be paid by such dealer when such automobile is sold."

(*d*) " The Minister may require every manufacturer or producer to take out an annual license for the purposes aforesaid, and may prescribe a fee therefor, not exceeding two dollars, and the penalty for neglect or refusal shall be a sum not exceeding one thousand dollars. Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise."

Schedule II.—" Ale, beer, porter and stout, per gallon, twelve and one-half cents."

As regards this tax the Supreme Court upheld the contention of the Crown that no regulations had been made by the Minister under the proviso and that in the absence of such regulations, the proviso could have no operation, and based their decision on a comparison of other somewhat similar provisions in the statute and the decision of this Board in *Dominion Press, Ltd.* v. *Minister of Customs and Excise* [1928], A.C. 340.

The appellant challenges this decision of the Supreme Court, and maintains that the existence of regulations is not a condition precedent to the operation of the exemption, and that the proviso merely empowers the Minister to make regulations if he finds them expedient, for the protection of the revenue and to

ensure that the benefit shall only be secured in respect of goods which are, in fact, manufactured for export. He further maintains that in fact there were regulations in operation during the material period which were applicable to the proviso.

In their Lordships' opinion it is not to be readily assumed, in a taxing Act, that Parliament has delegated to a Minister the power to settle the limits of taxation, and such intention must be clearly shown by the terms of the statutory provision. A good example of such clear expression is to be found in the *Dominion Press* case (*supra*), which related to a statutory proviso that the taxes should not be payable " on goods exported or on sales of goods made to the order of each individual customer by a business which sells exclusively by retail under regulations by the Minister of Customs and Excise, who shall be the sole judge as to the classification of a business." It is obvious that no business could claim to be one of the class on which the benefit of exemption was conferred unless and until the Minister had placed the business within the class. Their Lordships are unable to find any similar clear expression in the present case, where, at the best for the Crown's case, the words may be said to be ambiguous, as they also appear to be in the somewhat similar provision in section 16A, 5. In section 19BB, I. (*b*) and (*e*), the provision as to regulations appears to apply only to accounting. These are the three similar provisions in the statute referred to by the Supreme Court as supporting the construction maintained for the Crown. Accordingly their Lordships are unable to agree with the conclusion of the Supreme Court on this point and are of opinion that the proviso merely empowers the Minister to make regulations if he deems it expedient, but that the absence of such regulations does not render the statutory exemption nugatory. Further, this view seems to be more in harmony with the general scheme of the statute, which appears to exclude trade to other countries from the area of taxation. This view renders it unnecessary to consider the somewhat doubtful alternative argument of the appellant that there were, in fact, such regulations in operation.

The construction of the words " when such goods are manufactured for export " in the proviso to section 19B, I, next falls to be considered. It may be first noted that " such goods " means the goods enumerated in Schedule I, which relates to automobiles, and in Schedule II, which relates to cigars and carbonic acid gas as well as to ale, beer, porter and stout, and that the proviso applies to export to any country outside Canada. Their Lordships are clearly of opinion that the existence of prohibitive legislation as regards ale, beer, etc., in a particular country of export can have no relevance to the general construction of the proviso and they are unable to accept the argument of the Crown on this point, in support of which, Mr. Rowell cited the case of *Foster* v. *Driscoll* [1929], 1 K.B. 470, as to the soundness of which

and of the opinions expressed therein their Lordships find it unnecessary to express any opinion in this case.

On the other hand, the prohibition laws of the United States may have a bearing on the question of fact in this case as to whether the goods are proved to have been exported to that country.

On the question of construction their Lordships are of opinion that the words used necessarily imply not only, as the bare words might suggest, that the goods are manufactured and sold with an intention of export, but that they must, in fact, have been exported before the benefit of the exemption can be obtained. The tax is imposed " where goods are manufactured or produced and sold in Canada," and the words " and sold " must be held to be implied in the proviso, though not repeated there. It is a possible view that subsequent export of the same goods by a purchaser, quite independently of the manufacturer, would sufficiently comply with the terms of the proviso, but their Lordships prefer the view that—the tax being levied on sale by the manufacturer, it is for the latter, in claiming exemption, to prove that under the arrangement for sale, the goods were to be exported and that he secured that that condition was in fact carried out.

In their Lordships' opinion, a similar construction applies in the case of the consumption or sales tax, which is imposed by section 19 BBB, I, of the same statute, as amended, the relevant provisions of which are as follows :—

> " In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent., on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him ; and in the case of imported goods, the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.
>
> " For the purpose of calculating the amount of the consumption or sales tax, ' sale price ' shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto.
>
> " Provided that the consumption or sales tax specified in this section shall not be payable on goods exported . . . . "

In the case of this tax there is provision for a refund under sub-section 10 :—

> " A refund of the consumption or sales tax may be granted on imported goods on which customs duties have been refunded on exportation ; and a refund of the same tax may be granted on domestic goods exported, under regulations prescribed by the Minister of Customs and Excise."

This, however, will apply to goods which, though not manufactured for export in the sense above described, are subsequently exported.

Accordingly, their Lordships are of opinion that the appellant is entitled to exemption from both gallonage and sales taxes in respect of the 83 per cent. of the goods in question if it is established (*a*) that the goods were sold under the arrangement that they were to be exported and (*b*) that the appellant saw to it that they were so exported.

The appellant company acquired the brewery at London, Ontario, in 1923 ; the brewery, which had an ale plant, had been closed down for some years, and the appellant changed the plant to a lager beer plant—though the ale plant was retained—and started brewing in April, 1924. The shareholders of the appellant company were the witness Harry Low and his wife, Mr. and Mrs. Leon and Mr. Burns ; throughout the period here in question Low was Vice-President of the company and export sales manager at Windsor, Ontario, on the Canadian border. Generally speaking, the Canadian market was an ale market, while the United States market was a market for lager beer made either from malt or rice. The 83 per cent. of the beer manufactured and sold in respect of which the Crown claims and with which alone we are now concerned, was all either malt lager or rice lager.

During the material period, from the 1st April, 1924 to the 1st May, 1927—the appellant company had an agreement first with one Grandi until October, 1925, and thereafter with one Savard that they should take the company's whole output of beer for export to the United States. Both Grandi and Savard resided in Detroit, Michigan, U.S.A., and the beer was put on rail at London, consigned to them at Windsor or one of the adjacent ports on the Canadian border. In their Lordships' opinion, it is proved that the beer was manufactured and sold under an arrangement with Grandi and thereafter with Savard that it was to be exported to the United States, but the further question as to whether the appellant saw that the goods were in fact exported involves a more critical consideration of the evidence.

According to the orders received, consignments of beer were put on rail at London for delivery at a port on the river front, where they were either shipped on small boats or warehoused at the dock until boats were ready for their shipment ; the warehousing and shipment was supervised by Low or a representative of his at the particular dock. In the large majority of cases, the boats were receiving the goods in fulfilment of sub-sales made by the purchaser from the appellant company ; in some few cases the shipment was on behalf of Grandi or Savard themselves. It is admitted that these sub-sales were arranged and the price—generally an advanced one—was fixed by Grandi or Savard independently of the appellant. Boats acting on behalf of sub-purchasers were required to pay the purchase price on shipment of the goods ; in the case of Grandi or Savard credit was usually given. Any monies so received were paid into a bank account in the name of the appellant company at Windsor, to which reference will be made later. The railway freight was paid by

the appellant at London; the expenses of handling and warehousing at the riverside were paid by the purchaser.

The bank account in the appellant's name, on which Low had authority to draw, was opened on the 12th May, 1924, and continued in operation during the rest of the period, and the appellant company at London drew from time to time on it for the invoice price of the goods delivered, which during the Grandi period, was the current market rate in Canada, and during the Savard period, was a fixed price, commencing at 1·75 per case and being later varied by agreement In their Lordships' opinion, the apparently abortive agreement with Fitzgerald of May, 1925, and the agreement with the Bermuda Export Company of June, 1926, with a view to stabilisation of prices, do not materially affect the matter. During the Grandi period the balance of the monies paid into this bank account, after deduction of the invoice prices, was accounted for to Grandi by Low, after deduction of the expenses which he had paid on Grandi's behalf. During the Savard period Low, as an individual, had an agreement with him under which the balance of the prices received from the sub-purchasers, after deduction of the appellant's invoice price and the expenses paid by Low on behalf of the purchaser, was divided between him and Savard. To enable him to pay the purchaser's expenses at the riverside, Low opened a bank account known as the " Harry Low Special Account," which he financed by drawing on the appellant's account. Soon after the beginning of this agreement with Savard, Low began to divide his share of the profits with Leon and Burns, who along with him were the real proprietors of the appellant company.

But the most important evidence is to be found in the documents relating to these consignments of beer. On the dispatch of each consignment from London, it was accompanied by an invoice, bills of lading and Customs forms known as " B.13s," examples of which are printed in the record. Sometime in the early part of 1926, a note began to be printed on the bill of lading to the effect that if the goods were for export from Canada, delivery should only be given by the railway company under supervision of the collector of customs, and thereafter the unloading at the riverside took place in the presence of a customs officer. Prior to March, 1926, the B.13s bore a certificate by the appellant company that the goods were delivered for exportation to the U.S.A., and it was the practice at the riverside to split up the bulk consignments into small parcels to suit the capacity of the river boats and to alter the B.13s accordingly; in these latter forms the appellant company certified that the particular parcel was being delivered by them to the particular boat for exportation to the U.S.A. and they were presented to and stamped by the customs officer at the port of exit. In accordance with a circular of the Customs and Excise Department dated the 13th March, 1926, this practice was altered, and the B.13s were made out at London in a variety of denominations from five cases upwards and the appropriate quantity was sent with each con-

signment so that, without alteration of them, the consignment could be divided into small parcels at the riverside. Further, instead of a certificate, the B.13 was sworn to by the appellant company or its attorney.

On shipment on board the boat, a report outwards was signed by the master, which stated the appellant to be the shipper of the goods and a port in the U.S.A. as the destination, and on this report a clearance certificate was granted by the Customs officer at the port of exit. The boats which made these shipments were all registered in U.S.A. ports. There is no evidence that any of these goods were landed again in Canada.

In these circumstances, their Lordships are of opinion that the appellant has sufficiently proved that the goods were in fact, exported. In their opinion, it is sufficient that the B.13s correspond in bulk with the total amount of the consignments included in the 83 per cent., there having been no B.13s for the consignments included in the 17 per cent., and that the appellant is not bound to prove the individual history of each consignment. Further, they are of opinion that the supervision of Low at the riverside up to the shipment of the goods on board the boats, along with the documentary evidence, sufficiently proves that the appellant company saw that the arrangement for export to the U.S.A. was, in fact, carried out.

Accordingly their Lordships are of opinion that the appellant company has established its claim to exemption from both taxes as regards the 83 per cent. of the goods in question.

As to the 17 per cent. of the goods, their Lordships agree with the view of the Supreme Court that the provisions of the Amending Act 17 Geo. V. cap. 69, as to penalties applies, as after its coming into force on the 14th April, 1927, whether the default of payment of tax has arisen prior to that date, or only subsequently.

Parties were agreed that the correct basis for computation of the sales tax was the invoice price at London and not the advanced price at the riverside, which was the basis adopted in the judgment of the Exchequer Court and also by the Supreme Court in its formal judgment. After special leave to appeal to His Majesty in Council had been granted, an agreed application was made to the Supreme Court for alteration of their formal judgment, but such alteration was then beyond their control, and their Lordships were requested to give effect to this agreement of parties.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed as regards the 83 per cent. of the Crown's claim, which should to that extent be dismissed, and that, as regards the 17 per cent. of the Crown's claim, the judgment of the Supreme Court should be varied to the effect that the sales tax should be computed on the basis of the invoice prices at London. The appellant should have his costs of this appeal and one half of those incurred in the Courts below.

In the Privy Council.

THE CARLING EXPORT BREWING AND MALTING COMPANY, LIMITED,

v.

THE KING.

DELIVERED BY LORD THANKERTON.

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