

In the Privy Council.

No. 104 of 1930.

CANADIAN
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APPELLANT'S CASE.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN :

THE CARLING EXPORT BREWING AND
MALTING COMPANY LIMITED (Defendant) *Appellant*

AND

HIS MAJESTY THE KING on the Information
of the Attorney-General of Canada (Plaintiff) - *Respondent.*

APPELLANT'S CASE.

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1. This is an Appeal by special leave from a judgment of the Supreme Court of Canada, dated the 4th day of February, 1930, allowing the Respondent's appeal from a judgment of the Exchequer Court of Canada dated 29th April, 1929, whereby the Respondent's claim under the Special War Revenue Act 1915 and amendments for gallonage or excise tax and for sales tax on goods sold by the Appellant between the 1st April, 1924, and the 1st May, 1927, had been dismissed in respect of about 83 per cent. of the claim and allowed in respect of the balance. Under the judgment of the Supreme Court the taxes, interest and penalties, payable by the Appellant amount to \$475,728.

Record.
p. 684 j.
p. 684 i.
p. 684 n.
p. 673.

2. The Special War Revenue Act 1915, imposing the taxes in question, contained provisoes exempting from the gallonage or excise tax "goods . . . manufactured for export, under regulations prescribed by the Minister of Customs and Excise" and exempting [from the sales tax "goods exported."

App. p. 102.

" p. 111 "

The substantial question in dispute is whether these provisoes, on their true construction, exempted from the taxes in question the goods of the Appellant which had been shipped to the United States.

3. The following provisions of the Special War Revenue Act 1915, including relevant amendments, are referred to.

The enactment regarding excise tax contained in Section 14 of 12-13 Geo. V, c. 47, is in part as follows :—

App. p. 162

“ 19B. (1) . . . (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. 10

“(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 . . .

“(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 20 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.

App. p. 165

“ Ale, beer, porter and stout, per gallon . . . twelve and one-half cents.”

App. pp 116-111

The enactment regarding sales tax contained in Section 6 of 13-14 Geo. V, c. 70, as amended by Section 1 of 14-15 Geo. V, c. 68, is in part as follows :—

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“ 19BBB. (1) 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 40 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 ;”

By an amendment of 1927, 17 Geo. V, c. 36, Section 3, the rate of tax was changed from 5 per cent. to 4 per cent. as from the 18th day of February, 1927. App. p. 130

By a further amendment 17 Geo. V, c. 69, Section 4, it is provided :— App. p. 134

10 “ 19cc. (1) Every person liable for taxes under Part IV of this Act who neglects to file each month a true return of his taxable sales for the next preceding month in accordance with the regulations made by the Minister, shall in addition to any other penalties provided by Part IV of this Act pay a penalty of five per cent. of the taxes payable : Provided, however, that such penalty shall not exceed twenty-five dollars in respect of each such return.

“ (2) The tax shall be paid not later than the last day of the first succeeding month to that in which the sales were made.

20 “ (3) In default of payment of the tax or any portion thereof within the time prescribed by this Act or by regulations established thereunder, there shall be paid in addition to the amount in default a penalty of two-thirds of one per centum of the amount in default in respect of each month or fraction thereof during which such default continues after the coming into force of this section.”

The last-mentioned amendment came into force on the 14th day of April, 1927. Prior to this amendment the Act contained no provision for the payment of either interest or penalties.

4. The Appellant is a licensed brewer and manufactured beer at the City of London in Ontario. It is admitted that, in accordance with the regulations, monthly returns were made and gallonage and sales taxes paid by the Appellant on all goods except those in question in the present action. Record.
p. 1, l. 14.
p. 15, l. 23.
p. 1041.

The sale of beer containing more than 2½ per cent. of alcohol was prohibited by the Ontario Statute 6 Geo. V, c. 50, but this did not extend to sales to persons outside Ontario. App. p. 137
" p. 116

5. In assumed compliance with both the Dominion and Provincial enactments, the Appellant from time to time accepted orders for goods from persons in Detroit, Michigan, U.S.A., and shipped such goods from Record.
p. 630, l. 32.

London, Ontario, invoiced to the purchaser in the United States in care of a consignee at a border point in Ontario. The practice was that bills of lading and Customs export entry forms were made out in London for each shipment. Prior to 13th March, 1926, one Customs export entry form was made out for each carload and when the goods arrived at one of the ports of shipment new export entry forms for the quantities to be shipped by particular boats were substituted and a certificate as to correctness furnished by the Appellant's local agent. After the 13th March 1926, pursuant to instructions issued by the Deputy Minister of Customs, separate export entry forms were furnished at the interior point of lading for each quantity to be included in each shipment and the correctness of the export entry forms, in lieu of being certified, was verified by the oath of the shipper. 10

Goods for export were shipped from London in sealed cars. On arrival of the cars at the port the seals were broken under the supervision of a Customs officer and the goods, on being released by him, were transferred to one of the export docks and thence from time to time loaded into launches and other boats for transport to the United States. Each boat on entering the port made to the authorities the usual "Report inwards." When each boat was loaded the Captain made and declared before the Customs officer a "Report outwards" containing certain particulars regarding the goods, the shipper and the consignee. The Customs officer examined the cargo and, on being satisfied that it was properly entered for export, officially stamped four copies of each of the export entry forms, and then signed and gave to the Captain the usual Customs clearance. 20

Certain agents were from time to time appointed by the Appellant to receive payment for shipments and to authorise delivery from the dock warehouses. The payments made, frequently at the port of shipment, were usually the amounts payable by sub-purchasers from the original purchaser and only a portion of the payments came to the hands of the Appellant. 30

6. By an information filed by the Respondent in the Exchequer Court of Canada on the 22nd October, 1927, as amended on the 6th May, 1929, claim was made for gallonage or excise tax and for sales tax alleged to be due from the Appellant in respect of goods manufactured and sold after the 1st April, 1924, and prior to the 1st May, 1927.

7. On the 22nd November 1927, the Appellant filed a defence alleging that the goods in question were manufactured for export and were exported and were consequently exempt from both gallonage and sales tax under the provisions of Sections 19B and 19BBB of the Act.

8. In proof of the export of the goods the Appellant produced at the trial Customs export entry forms, known as "B.13's," duly stamped 40

by the Canadian Customs Authorities, in respect of about 83 per cent. of the goods, but was unable to trace the export entry forms for the remaining 17 per cent.

Under the official regulations of the Department of Customs and Excise regarding refunds of sales tax the prescribed method of proving the export of goods throughout the period in question was by production of a certified copy of the export entry form. APP. p. 39.

The regulation in question which came into effect on 1st January, 1924, is as follows :—

10 “ REFUNDS AND DEDUCTIONS.

 “(c) Claims for refund of the tax paid on domestic goods exported shall be accompanied by a certified copy of Customs Export Entry and proof of payment of the tax. Claims shall not be allowed on goods sold and used for domestic consumption and subsequently exported.”

9. The Exchequer Court (Audette, J.) on the 29th April, 1929, delivered judgment. In the view of the learned Judge the whole question depended on whether or not the goods in question had been duly exported and whether they had been exported in the manner provided by Canadian Record.
p. 671.
20 law. To that question he was of opinion that there could be only one answer, that these goods had been lawfully exported to a foreign purchaser and did not return to Canada and that the Appellant was therefore exempt from both the taxes :—

He said :—

 “ The fact that these goods were exported to the United States p. 671, l. 20.
is amply proved by the ‘ B.13’s ’ which are the manner and the forms provided by law to show that the goods were duly exported according to the usual practice. But there is more, the evidence clearly discloses that these goods were actually placed
30 on board vessels for foreign destination after due clearance from the Customs.”

He also referred to other evidence corroborating the due exportation.

With regard to the smaller quantity of goods for which no “ B.13’s ” p. 672, l. 1.
could be produced, he held the Appellant liable for both the sales tax and the excise tax, with interest upon transactions prior to the 14th April, 1927, and penalties in respect of transactions subsequent to that date. He also held that these taxes ought to be computed on prices in advance of those shown on the invoices. This claim was abandoned by the Crown in the Supreme Court. In case the amounts could not be agreed upon
40 by the parties, he reserved to either party liberty to apply.

p. 675. 10. The Respondent having appealed and the Appellant having
 p. 684. cross-appealed to the Supreme Court of Canada, the Court (Duff, Newcombe,
 Rinfret, Lamont and Smith, JJ.) gave judgment on the 4th February,
 1930, allowing the Respondent's appeal.

p. 684 a. 11. Mr. Justice Duff, who delivered the judgment of the Court,
 construed the exemption from the excise tax, viz., "manufactured for
 export, under regulations prescribed by the Minister," to mean that to
 attract the exemption the export must be under government regulation
 and in the absence of regulations the proviso could have no operation.

With regard to sales tax the learned Judge considered that 10
 Section 19BBB of the Act clearly assumed that the liability to pay was
 completely ascertainable, as well as completely constituted, at the time
 of the sale; that the proviso exempting goods exported did not qualify
 this and that the effect of the proviso was to exempt from the operation
 of the tax only such goods as were exported by the vendor in execution of
 the contract of sale. In the view of the learned Judge the sales in question
 were sales completed in Canada, the obligation to pay the tax then arose
 and the subsequent export did not effect a defeasance of the obligation to
 pay the duty.

--- The learned Judge did not consider the production of the export entry 20
 forms alone sufficient to prove export. He said:—

p. 684 g,
 l. 46.

" My conclusion is that while there is some evidence of export,
 while no doubt beer was exported in large quantities, it is impossible
 to say judicially with regard to any particular shipment that that
 shipment reached the United States side and was landed there,
 or that it was captured by the United States preventive officers,
 or that it was returned to the Canadian side and sold there."

The learned Judge also held that interest was payable on the amount
 of the taxes up to the 14th April, 1927, and that thereafter the penalty of
 two-thirds of one per cent. per month was payable. 30

p. 684 m. On an application by the Crown to correct the formal judgment in
 accordance with a draft agreed by both parties, Mr. Justice Duff, in his
 reasons delivered on the 5th September, 1930, intimated that as leave to
 appeal to His Majesty in Council had been granted, the Court would not
 feel at liberty to make any amendment. The agreed formal judgment is
 p. 684 n. printed in the Record.

12. The Appellant submits that the intention of the exemption
 proviso as to gallonage tax is to exempt goods manufactured and exported
 in accordance with all applicable regulations; that regulations were made;
 that the omission of the Minister of Customs and Excise to make any
 regulations for this purpose would not render the exemption proviso entirely 40

nugatory, and that the goods intended to be excluded from the exemption were those either illicitly manufactured or exported without due clearance by a Customs officer.

The Appellant further submits that the intention of the exemption proviso as to sales tax is to exempt from the tax all goods sold in Canada which, pursuant to the contract of sale, have been in fact exported; that the exemption would extend to goods sold for export to the resident agent of a foreign purchaser, and that, if the exemption applied only when the contracts for sales were to be completed abroad, it was superfluous, seeing that the sales tax applied only to sales within Canada.

The fact that under the law of the United States the importation into that country of the goods in question was illegal did not interfere with the granting of clearances by the Canadian Customs Authorities and did not, it is submitted, prevent the goods from being "exported" within the meaning of the exemption.

13. The Special War Revenue Act contains exemption provisions in respect of various classes of goods exported or manufactured for export, e.g., Matches (Section 16A, Sub-section (5)), Automobiles (Section 19B, Sub-section (1)), Playing Cards and Wines (Section 19BB, Sub-section (1)), all manufactured goods other than those specified (Section 19BBB, Sub-section (1)). By an Amending Act of 1928 the exemption in the case of spirituous and fermented liquors other than wine is restricted to goods exported in bond by the manufacturer for which foreign landing certificates are produced. A refund of the tax may also be granted when domestic goods are exported in accordance with the regulations (Section 19BBB, Sub-section (10)). The intention of the Act is, it is submitted, to enable all goods manufactured in Canada to compete with foreign goods in foreign markets on favourable terms and free from the burden of special Canadian taxation.

App. pp. 20-23

App. p.

App. p. 28

14. The Appellant submits that the judgment of the Supreme Court dated 4th February, 1930, should be reversed; that the Respondent's claim for gallonage and sales taxes in respect of goods for which export entry forms were produced should be dismissed, and that it ought to be declared that no interest or penalties are payable in respect of sales prior to the coming into force of the Amending Act of 1927, for the following, among other

REASONS.

- (1) BECAUSE the goods in question were within the meaning of Section 19B (1) D. of the Special War Revenue Act 1915 "goods . . . manufactured for export under regulations prescribed by the Minister of Customs and Excise."

- (2) BECAUSE regulations were prescribed by the Minister and were complied with.
- (3) BECAUSE the omission, if any, of the Minister to prescribe regulations did not render the exemption of no effect.
- (4) BECAUSE the goods were within the meaning of Section 19BBB (1) of the Act " goods exported."
- (5) BECAUSE the finding of the Exchequer Court that the export of the goods was amply proved by the export entry forms and other evidence is right. 10
- (6) BECAUSE the regulations expressly provided for refunding the tax on production of the export entry form.
- (7) BECAUSE the evidence establishes that goods in respect of which export entry forms were not produced were in fact exported.
- (8) BECAUSE the Respondent has not shown that the Appellant's returns were inaccurate.
- (9) BECAUSE sales, other than sales for export, were illegal and void and not subject to the tax.
- (10) BECAUSE the evidence discloses that the Crown has on 20 hand moneys of the Appellant sufficient to pay all taxes due on goods for which no export entry forms were produced.
- (11) BECAUSE penalties ought not to have been allowed in respect of goods sold or exported prior to the coming into force of the Amending Act 17 Geo. V, c. 69, on the 14th April, 1927.
- (12) BECAUSE prior to 1927 there was no statutory provision for payment of interest upon taxes.

W. N. TILLEY. 30

J. H. CLARK.

C. F. H. CARSON.

In the Privy Council.

No. 104 of 1930.

*On Appeal from the Supreme Court of
Canada.*

BETWEEN

THE CARLING EXPORT
BREWING AND
MALTING COMPANY
LIMITED (Defendant) - *Appellant*

AND

HIS MAJESTY THE KING
on the Information of
the Attorney-General of
Canada (Plaintiff) - - *Respondent.*

APPELLANT'S CASE.

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