

THE J. W. WINDSOR COMPANY
LIMITED APPELLANT;

AND

CITY OF CHARLOTTETOWN RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD
ISLAND

1948

*Mar. 3
*April 13

Exemption from taxation—Proviso to The City of Charlottetown Incorporation Act, P.E.I., 1931, chapter 31, section 65—"provided that no property in transit or awaiting shipment abroad shall be assessed;"—Goods in stock and held for preparation and disposal prior to shipment excluded from exemption.

The appellant engaged in the buying and selling at wholesale of canned fish, chiefly lobsters. It bought from packers along the shores of the Maritime Provinces, the Magdalen Islands and Newfoundland. The goods were delivered to appellant's warehouse at Charlottetown; here they were tested for defects in canning, graded, labelled, assembled in cases and stored. On receipt of directions from its head office in

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

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Montreal, they were then shipped out of the Province to various points, mostly in carload lots. The City of Charlottetown assessed the goods so stored and the appellant claimed exemption under the proviso contained in The City of Charlottetown Incorporation Act, 21 Geo. V. (1931) ch. 31 sec. 65 i.e. "provided that no property in transit or awaiting shipment abroad shall be assessed;" (Reporter's note:—It was common ground that the word "abroad" as used in the Statute meant "out of the Province" and that the canned goods were not "in transit".)

Held: The transitory nature of the "awaiting" envisaged in the words "awaiting shipment" in section 65, City of Charlottetown Incorporation Act, P.E.I., 1931, chapter 31, excludes goods which are in stock and are held for preparation and disposal.

APPEAL from a decision of The Supreme Court of Prince Edward Island (in banco) affirming a decision of the Board of Appeal of the City of Charlottetown in favour of the respondent.

The material facts of the case and the question in issue are fully stated in the above head-note and the judgments now reported.

Hugh O'Donnell K.C. and *J. O. C. Campbell K.C.* for the appellant.

K. M. Martin K.C. for the respondent.

KERWIN J.:—By section 50 of the City of Charlottetown Incorporation Act, being chapter 31 of the Statutes of 1931 of the Province of Prince Edward Island, all real and personal property within the City limits is liable to taxation except such as are and to the extent only that any may be exempt or exempted under the provisions of the Act. Section 65 provides:—

The person in possession of personal property at the time of the valuation of the same, shall be deemed the owner of such property in case the real owner has not been assessed therefor, and the property shall be liable for the rates and taxes assessed in his name; provided that no property in transit or awaiting shipment abroad shall be assessed; and provided also, that no property shall be assessed unless its value amounts to two hundred dollars.

The canned lobsters and other fish of the appellants in its Water Street premises in Charlottetown were assessed during the latter part of 1945 for the year 1946 at \$20,000, and the question in dispute in the present appeal is

whether such goods are exempt by virtue of the first proviso in section 65. It is common ground that "abroad" means outside the Island whether within or out of Canada and that the canned goods are not "property in transit", and, therefore, the neat point for determination is whether under the circumstances the goods are "awaiting shipment". The Supreme Court of the Island, by an equal division, affirmed the decision of the Board of Appeal but gave special leave to the Company to bring the case to this Court.

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The Company is engaged in buying and selling at wholesale (among other goods) canned fish, chiefly (in value) lobsters. Its head-office is in Montreal but it has an establishment on Water Street in Charlottetown to which the fish is sent from various packing establishments in the Maritime Provinces and the Magdalen Islands. In Charlottetown its employees grade the products, label the cans, assemble them in boxes and cartons, and stencil the packages. The permanent staff consists of seven, augmented by about twenty girls to assist in labelling, from September to January inclusive. The value of the stock on hand was very substantial from May to December 1946 while, for the remaining months, the value ran from \$800 to about \$17,000. The orders for the sale of the fish would be taken by the Company in or from Montreal and relayed to its Charlottetown office. To fill these orders, the goods on hand were not necessarily shipped out in the order in which they had been received—the matter of selection depending to a great extent upon the quality demanded. While an occasional order might be received direct from the Island by the Charlottetown office, practically the entire stock would be disposed of "abroad".

Under these circumstances, were the goods "awaiting shipment"? While admitting the onus that rests on a party claiming to fall within an exemption from taxation, the Chief Justice of the Island considered that the "or", before the phrase in question, was distributive, and decided that on the proper construction of the phrase, property is held for shipment abroad if that is the purpose for which the owner or possessor is holding it—and that, whether to a purchaser or broker or storage depot, and whether by

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the first available transport or at such times as favourable markets and storage conditions dictate. On the other hand, MacGuigan J., concluded that the mere intention to export was insufficient and that taking the words in their natural and ordinary meaning, the goods in storage in the Company's warehouse were not "awaiting shipment abroad."

The point is a difficult one but upon consideration I am of opinion that the appellant has failed to bring itself within the tax exemptions. I agree that "or" is distributive (see *In re Diplock* (1) affirmed by the House of Lords sub nom *Chichester Diocesan Fund and Board of Finance v. Simpson* (2) and therefore the last leg of the proviso connotes something beyond the meaning to be attributed to the first. However, goods might very well be not "in transit" and also not "awaiting shipment". Section 65, without the second proviso, first appeared in 1885 as section 21 of chapter 8 of that year, at a time when commerce between the Island and mainland was much more difficult than at present, and particularly during the winter months, and it seems reasonable that the legislature had those difficulties in mind in enacting the legislation. Again, the appearance of the proviso in question in a section enacting that the person in possession of personal property at the time of its valuation should be deemed the owner in case the real owner had not been assessed therefor, indicates the transitory nature of the "awaiting" that was envisaged by the legislature which in my view never meant to include such a case as this where, to use the words of the Board of Appeal, there was a "permanency of inventory". The appeal should be dismissed with costs.

The judgment of Taschereau and Rand JJ. was delivered by:

RAND J.:—The appellant has its head office in Montreal and is licensed to carry on what is known as an assembling business in Charlottetown, P.E.I. The assembling is of canned lobsters and fish purchased from packers along the shores of the Maritime Provinces, Newfoundland and the Magdalen Islands. The goods upon arrival in Charlottetown are tested, classified, labelled and stored; under the

(1) [1941] 1 Ch. 253.

(2) [1944] A.C. 341.

license, they may be sold to retailers or wholesalers in Prince Edward Island but not to individual consumers. Contracts for sales to points outside of the Province are made at the head office and shipments from Charlottetown follow directions from that office. The fishing season commences in the Spring, and along different parts of the coast continues until late Autumn, and the stocks are generally disposed of by March or April. The storage reaches its maximum about September.

The City of Charlottetown has assessed these goods under section 65 of the charter:—

65. The person in possession of personal property at the time of the valuation of the same, shall be deemed the owner of such property in case the real owner has not been assessed therefor, and the property shall be liable for the rates and taxes assessed in his name; provided that no property in transit or awaiting shipment abroad shall be assessed; and provided also, that no property shall be assessed unless its value amounts to two hundred dollars.

The controversy arises upon the interpretation of the proviso "that no property in transit or awaiting shipment abroad shall be assessed".

The contention of the company is that these goods are either in "transit" or are "awaiting shipment abroad"; and that the purpose of the provision is to encourage business abroad, which would be defeated by the taxation in this case.

For the respondent, it is argued that the proviso was introduced into the section in 1887 at a time when shipments from the Island could not be made during the closed season of navigation; and that the goods intended to be exempted are those "awaiting shipment abroad", as the language implies, because of the exigencies of transportation.

I think it impossible to treat the goods as "in transit": *Hollingsworth & Whitney Ltd. v. Bridgewater* (1). What that expression as used here contemplates is a single movement from origin to destination in which the goods are in the control of the carrier. Whether they are "awaiting shipment" presents more difficulty, but I think the conclusion must be the same. The operations in relation to the goods at Charlottetown, as well as the negotiation of

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(1) [1929] 1 D.L.R. 481.

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sales and the shipment, constitute together the purpose of their presence there; and in fact the shipment, meaning by this the act of shipping, takes place only when the other requirements have been fulfilled. The goods are not in Charlottetown by reason of transportation: they are held there, as they must be somewhere, for the purposes of commercial functions which are essential preliminaries to transportation: they are there awaiting not shipment, but preparation and disposal.

I would, therefore, dismiss the appeal with costs.

The judgment of Kellock and Locke, JJ. was delivered by:

KELLOCK J.:—This is an appeal from the judgment of the Supreme Court of Prince Edward Island which on an equal division dismissed an appeal from the Board of Appeal affirming an assessment in respect of the stock of lobsters and canned fish of the appellant company for the year 1946.

The facts are not in dispute. The appellants are dealers in lobsters and other canned fish which they purchase from the packers during the fishing season holding them in their warehouse in Charlottetown until they receive orders from the appellant's head office in Montreal as to the disposition of the same. The goods are eventually shipped out of the province to various points, mostly in carload lots. The stock is low during the winter months but in the summer and fall it is quite large. The largest stock in the warehouse in Charlottetown in 1946 was in the month of September and the value of the canned fish in that month amounted to almost \$360,000, while in the month of April the stock was as low as \$800. The warehouse in Charlottetown had not general instructions to ship the goods to Montreal or any other outside point but the goods were shipped as and when specific instructions from Montreal were received. The appellant company had a general intention to export the goods from the province but it could change its mind at any time and dispose of the same to dealers in the province.

The relevant legislation is contained in the following sections of Chapter 31 of the Statutes of 1931, being An Act to Consolidate and Amend the Several Acts Incorporating the City of Charlottetown.

Section 50. All real and personal property within the City limits, shall be liable to taxation except such as are and to the extent only that any may be exempt or exempted under the provisions of "The City of Charlottetown Incorporation Act".

Section 65. The person in possession of personal property at the time of the valuation of the same, shall be deemed the owner of such property in case the real owner has not been assessed therefor, and the property shall be liable for the rates and taxes assessed in his name; provided that no property in transit or awaiting shipment abroad shall be assessed; and provided also, that no property shall be assessed unless its value amounts to two hundred dollars.

The controversy turns upon the proper construction of the words "awaiting shipment abroad" in the first proviso to section 65. It is common ground that "abroad" means "off the Island". It is not contended by the appellant that the goods assessed were "in transit" within the meaning of the legislation.

The appellant does contend however, and this contention was accepted by Campbell C.J., in the Court below, that as to property held exclusively for the purpose of shipment off the island, whether before or after sale and whether by the first available means of transport or at such times as favourable markets and storage conditions dictate, the exemption applies. The contention really is that the statute is satisfied if the goods are subject to a general intention on the part of the owner, without limitation in point of time, ultimately to export them from the Island.

It appears that the appellant received these goods into its warehouse in unlabelled cans and that its procedure was then to test them for quality and for defects in canning, that thereafter the goods were labelled either with the appellant's own label or with particular labels of its customers and that they were then held until instructions were received from the head office in Montreal to ship out in specific lots. On this evidence the respondent therefore contends that the goods, on receipt by the appellant, were not goods merely awaiting shipment but were held for the performance of the above operations and until sale or subject to the decision of the appellant to place in another location off the Island without prior sale. He

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contends that when the statutory provision was first enacted in 1885, the legislature had in mind the fact that shipment from the Island being literally by ship in all cases was subject to the inevitable delays consequent upon shipping not being always immediately available. Counsel says that while the words "in transit or awaiting shipment abroad" are disjunctive, nonetheless the collocation of the two phrases lends a colour to the words "awaiting shipment" which they might not have standing alone and the last mentioned words were merely used to cover the case of goods which while not actually in transit would have been so had the commencement of their transit not been delayed because of the fact that transportation for them was not immediately available. It was this view which in essence found favour with MacGuigan J. With this view I respectfully agree.

As the evidence shows, the goods on receipt by the appellant at its warehouse awaited the further action of the appellant in testing, labelling and packing and the decision as to ultimate disposal. While in a general sense, the goods were awaiting their ultimate shipment it is not shown as to any of the stock here in question that it awaited shipment in the sense that it was awaiting suitable means of transportation and in my opinion the appellant has not brought itself within the exempting clause.

To give to the statutory language the effect contended for by the appellant would be in my opinion to strain the language beyond the intention of the legislature as gathered from the language used and the context in which it is found. To take a case suggested on the argument, if a mail order house were to maintain a stock in a warehouse in Charlottetown for the purpose of filling orders by mail received from the mainland or Newfoundland, or elsewhere off the Island, orders from the Island itself being handled otherwise, say for instance by retail from stock maintained in other premises, the mail order stock would be exempt if the appellant's contention were to be accepted. In my opinion while such stock would be in one sense awaiting shipment off the Island, it would not be awaiting shipment in the sense in which those words are used in the statute here in question.

It is sufficient for the purposes of the present case to hold that the goods here in question have not, upon the evidence, been brought within the exemption. It is not necessary to decide within what particular limits the exemption would apply or whether, e.g., goods held for transportation by a particular conveyance would be outside the exemption because an earlier conveyance could have been obtained. Each case will have to be decided upon its own circumstances.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the Appellant: *J. O. C. Campbell.*

Solicitor for the Respondent: *K. M. Martin.*

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