

HIS MAJESTY THE KING on the in-
formation of the Attorney-General of
Canada (PLAINTIFF)..... } APPELLANT;

1948
*Feb. 25, 26
*Apr. 13

AND

GAS AND OIL PRODUCTS, LIMITED }
(DEFENDANT) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs Tariff Act, R.S.C. 1927, c. 44, s. 35, Schedule A, Item 710 (a), (b), (bb), (c), (d), (e), (f)—Gasoline imported in drums—Packaging charges—Whether duty payable on packaging charges—“Packing”—Fair market value of fluid as packaged.

The respondent agreed to purchase Ethyl fluid from the Ethyl Corporation, a company carrying on business in the United States, either in tank cars f.o.b. Ethyl's plant or in drums. If the fluid was shipped in drums, Ethyl would credit the respondent with a freight allowance based on the weight of the fluid content of the drums and at the prevailing tank car rate, and the respondent agreed to pay Ethyl “a per drum packaging charge which will be established from time to time by Ethyl.” From October 1942 to September 1945, the respondent imported a certain quantity of fluid in drums, and, on each importation, duty was paid upon a declared value marked on the invoice and showing merely the cost of the fluid at the price agreed upon between the parties but not the packaging charge. The Crown took proceedings to recover the duty on the charges for packing the fluid. The Exchequer Court dismissed the action.

Held, reversing the judgment appealed from, [1947] Ex. C.R. 452, that there were packaging charges imposed on respondent by Ethyl.

Held: The contention that the word “packing” in paragraph (f) of Item 710 does not describe the placing of a liquid in containers such as drums, cannot be upheld.

Held: The fair market value of the fluid as packaged is the invoice price of the fluid plus the actual amount charged for packaging.

Held: Even if the packaging charge had been charged separately on the invoice, it would not have taken the lower rate applicable to the fluid itself.

APPEAL by the Attorney-General of Canada from the judgment of the Honourable Mr. Justice O'Connor of the Exchequer Court of Canada (1), dismissing the action brought by His Majesty The King on the information of the Attorney-General of Canada against the present respondent in which the Crown claimed the sum of \$898.28 customs duty on packaging charges of fluid in drums.

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

(1) [1947] Ex. C.R. 452.

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The material facts of the case and the questions at issue are stated in the above headnote and in the judgment now reported.

F. P. Varcoe, K.C. and W. R. Jackett for the appellant.

Redmond Quain, K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.:—This is an appeal by the plaintiff from the dismissal by the Exchequer Court (1) of an Information exhibited by the Attorney-General of Canada to recover from the respondent \$898.28 customs duty on packaging charges made by Ethyl Gasoline Corporation, hereinafter called Ethyl, against the respondent in connection with various shipments, in drums, by Ethyl to the respondent, of an anti-knock motor fluid known as Ethyl fluid. These charges are alleged to be dutiable under item 710(b) in Schedule A to the *Customs Tariff, R.S.C. 1927, chapter 44*, and amendments thereto. In order to appreciate the various arguments advanced on behalf of the parties, it is necessary to reproduce the whole of item 710:—

710. Coverings, inside and outside, used in covering or holding goods imported therewith, shall be subject to the following provisions, viz.:—

- (a) Usual coverings, containing free goods only; usual coverings, except receptacles capable of holding liquids, containing goods subject to a specific duty only, n.o.p.
- (b) Usual coverings containing goods, not machinery, subject to any ad valorem duty, when not included in the invoice value of the goods they contain.
- (bb) Usual coverings containing machinery subject to any ad valorem duty, when not included in the invoice value of the goods they contain.
- (c) Provided that usual coverings containing goods subject to any ad valorem duty, if included in the invoice value of the goods they contain, and not charged separately on the invoice, shall be subject to the same rate of duty ad valorem as the goods they contain, and may be combined with the goods for valuation and duty on the Customs entry;
- (d) Provided further that receptacles capable of holding liquids, when containing goods subject to a specific duty, shall be charged with the rate of duty to which the same would be subject, if imported separately, except when the coverings and the goods contained therein are rated together in the tariff item;

- (e) Provided further that usual coverings designed for use other than in the bona fide transportation of the goods they contain, shall be charged with the rate of duty to which the same would be subject if imported separately;
- (f) Provided also that the term coverings in this paragraph shall include packing boxes, crates, casks, cases, cartons, wrapping, sacks, bagging, rope, twine, straw or other articles used in covering or holding goods imported therewith and the labour and charges for packing such goods, subject to regulations prescribed by the Minister.

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The information was tried on an agreed statement of facts and on the evidence of a customs appraiser for the appellant and that of the respondent's accountant. The respondent company was incorporated under the laws of the Province of Alberta and operated a refinery in that province, which, however, was not situate on any railway. It agreed to buy Ethyl fluid from Ethyl, a company carrying on business in the United States of America, either in tank cars f.o.b. Ethyl's plant or in suitable drums. If shipments were made in Ethyl's tank cars, that company agreed to absorb the freight from its plant to the respondent's refinery. If the fluid was shipped in drums, the respondent was to pay the full freight charges but Ethyl would credit the respondent with a freight allowance based on the weight of the fluid content of the drums and at the prevailing tank car rate. The respondent also agreed to pay Ethyl "a per drum packaging charge which will be established from time to time by Ethyl."

Because of its lack of railway facilities the respondent was forced to purchase the fluid in drums, which drums it also purchased from Ethyl. Upon the first entry of these drums into Canada, the appropriate customs duty thereon was paid and, while the drums went back and forth, no further duty was claimed with respect thereto. From October 13, 1942, to September 19, 1945, the respondent imported a certain quantity of Ethyl fluid in these drums and, on each importation, an invoice was made out and also a customs declaration showing merely the cost of the fluid at the price agreed upon between the parties. Duty was paid upon such declared value. These proceedings were taken to recover the duty on the "charges for packing" the fluid as being brought by paragraph (f) of Item 710 within the term "coverings" in paragraph (b).

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It is contended by the respondent that although the agreement between it and Ethyl describes the charge made by Ethyl as a "packaging charge", it does not fall within the description of "labour and charges for packing" in paragraph (f), because "packing" does not properly describe placing a liquid in containers such as drums. This contention cannot be supported. The term "coverings" is stated in (f) to include casks or other articles used in holding "goods" imported therewith, and "goods" must include liquids in view of the wording of paragraph (d) and the reference therein to receptacles capable of holding liquids. In the last part of paragraph (f), the phrase is "labour and charges for packing *such* goods" and "goods" must there also include liquids. Furthermore, in the agreed statement of facts, it is stated that the charge "is in essence a service and labour charge for filling the drums with the said product to be imported."

The trial judge (1) did not deal with this contention because he proceeded on the ground that there was no charge for packaging the drums but that on the contrary what was done between the respondent and Ethyl was merely a method of equalizing the cost to the respondent between a shipment by tank car and a shipment in drums. This conclusion is opposed to the very terms of the agreement by which the respondent agreed to pay "a per drum packaging charge" and, with respect, for other reasons I am unable to agree with that view. The respondent always paid the freight charges and no duty was payable on these charges. Any credit given by Ethyl to the respondent under the terms of the agreement in connection with the freight could therefore not be taken into account, and the fact that the credit notes were reduced by the packaging charges instead of a separate account being sent for such charges by Ethyl to the respondent cannot alter the fact that there were "charges for packing such goods" within paragraph (f) of Item 710 of the *Customs Tariff*.

Section 35 of the *Customs Act, R.S.C. 1927, chapter 42*, and amendments provides that the value for ad valorem duty imposed on any goods imported into Canada shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence

and at the time when the same were exported directly to Canada. It was argued that there was no evidence of the fair market value of the fluid as packaged. However, the declaration by an officer of Ethyl, attached to each invoice, fulfils the requirements of this section in so far as the fluid itself is concerned. Section 45 provides:—

No deduction from the value of goods in any invoice shall be made on account of charges for packing, or for straw, twine, cord, paper, cording, wiring or cutting, or for any expense incurred or said to have been incurred in the preparation and packing of goods for shipment, and all such charges and expenses shall, in all cases, be included as part of the value for duty.

The last part of this section, “and all such charges and expenses shall, in all cases, be included as part of the value for duty”, indicates that the actual amount of the packaging charge should have been included in the invoice and, if that had been done, the appropriate rate would be found in the provisions of the *Customs Tariff*. The invoice did not include the packaging charge but the very terms of the agreement between Ethyl and the respondent, and the statements in the agreed statement of facts that such charge “is in essence a service and labour charge for filling the drums with the said product to be imported”, and that the total of such charges “is in effect the aggregate of the charges so described by the Ethyl Corporation as packaging charges” is sufficient evidence, in the absence of anything to the contrary, to determine that the fair market value of the fluid as packaged is the invoice price of the fluid plus the actual amount charged by Ethyl for packaging.

It was finally contended that, in any event, the duty was not 20 per cent as prescribed in item 710 (b) but only 10 per cent, and reliance is placed upon section 45 of the *Customs Act* quoted above. In the first place, as we have seen, the invoices sent from time to time did not include the labour and charges for packing and, in any event, this section does not set the rate which is dealt with in the *Customs Tariff*. The proviso in paragraph (c) of item 710 in the Schedule to the latter shows that, even if the packaging charge had been charged separately on the invoice, it would not have taken the lower rate applicable to the fluid itself, and the same result must follow where, as here, the charge was not even known to the customs authorities.

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The appeal should be allowed and judgment directed to be entered for the appellant for the amount claimed with costs throughout. In order to obviate the necessity of any further application, the judgment may provide that the money paid into the Exchequer Court with the defence may be paid out to the appellant and applied on the amount owing under the judgment.

Appeal allowed with costs.

Solicitors for the appellant: *F. P. Varcoe and W. R. Jackett.*

Solicitors for the respondent: *Helman, Mahaffy and Barron.*
