

PFIZER CORPORATION and PFIZER
COMPANY LIMITED—LA COM-
PAGNIE PFIZER LIMITÉE

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APPELLANTS;

1966

*Feb. 14, 15

Apr. 26

AND

HER MAJESTY THE QUEENRESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Sales tax—Petition of right to recover tax paid under protest—
Dietary aid “Limmits”—Whether exempt as “foodstuff” or taxable as
“pharmaceutical”—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(cc),
30, 32, and Schedule III.*

* PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

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The two appellant companies sought, by way of petition of right, to recover sales tax paid under protest on a product in biscuit form sold and advertized for sale as a "limited calorie meal plan for weight control" under the trade mark "Limmits". The appellants claimed that these biscuits were exempt from sales tax as "foodstuff", more particularly as "bakers' biscuits or other similar articles", by reason of s. 32 and Schedule III of the *Excise Tax Act*, R.S.C. 1952, c. 100. The Crown contended that "Limmits" were subject to sales tax as "pharmaceuticals". The Exchequer Court dismissed the petition of right and ruled that "Limmits" were taxable. The taxpayers appealed to this Court.

Held (Ritchie J. dissenting): The appeal should be dismissed.

Per Abbott, Martland, Judson and Spence JJ.: The product "Limmits" was subject to sales tax. To be exempt from sales tax, a product must be a specific article described in Schedule III of the *Excise Tax Act*; in the present case, it had to be a "bakers' biscuit" or a "similar article". It had to be the ordinary product of the baker's art. It was certain that "Limmits" was not such a product. These biscuits were three times more expensive than baker's biscuits. They were advertised and sold not as a sweet or confection but as an elaborate, calorie-restricted meal for the purpose of reducing weight. Although manufactured by a baking company, they were produced for and under the specific direction of the appellants pursuant to a detailed formula supplied by them with ingredients compounded and provided by them, one of which was an inert appetite depressant.

Per Ritchie J., dissenting: Section 2(1)(cc) of the *Excise Tax Act*, by defining the meaning which Parliament intended to be attached to the word "pharmaceutical", does not have the effect of creating a distinct class of substance in contradistinction to and exclusion of the "foodstuffs" described in Schedule III. The character of a product for the purpose of entitling it to an exemption as a "foodstuff" under the Schedule is in no sense altered by the way in which it is sold or represented by the manufacturer or by the price charged for it. The product "Limmits" was a "bakers' biscuit" or at least a "similar article".

Revenu—Taxe de vente—Pétition de droit pour récupérer la taxe payée sous protêt—Produit diététique «Limmits»—Produit est-il exempt comme «denrée alimentaire» ou taxable comme «produit pharmaceutique»—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 2(1)(cc), 30, 32, et Annexe III.

Les deux compagnies appelantes ont cherché, au moyen d'une pétition de droit, à récupérer la taxe de vente qu'elles avaient payée sous protêt sur un produit sous forme de biscuit qu'elles vendaient sous la marque de commerce «Limmits» et qu'elles annonçaient comme étant un régime amaigrissant à calories limitées. Les compagnies ont prétendu que ces biscuits étaient exempts de la taxe de vente comme «denrée alimentaire», et plus particulièrement comme étant des «biscuits de boulanger ou autres articles semblables», en se basant sur l'art. 32 et l'Annexe III de la *Loi sur la taxe d'accise*, S.R.C. 1952, c. 100. La Couronne a soutenu que le produit «Limmits» était sujet à la taxe de vente comme étant un «produit pharmaceutique». La Cour de l'Échiquier a rejeté la pétition de droit et a jugé que le produit «Limmits» était taxable. Les compagnies en ont appelé devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Ritchie étant dissident.

Les Juges Abbott, Martland, Judson et Spence: Le produit «Limmits» était sujet à la taxe de vente. Pour être exempt de la taxe de vente, un produit doit être un article spécifique décrit dans l'Annexe III de la *Loi sur la taxe d'accise*; dans le cas présent, il devait être un «biscuit de boulanger» ou un «article semblable». Il devait être le produit ordinaire de l'art du boulanger. Il est certain que le produit «Limmits» n'est pas un tel produit. Ces biscuits sont trois fois plus dispendieux que les biscuits de boulanger. Ils sont annoncés et vendus non pas comme une sucrerie ou une friandise, mais comme étant un mets à calories restreintes dont le but est de faire perdre du poids. Quoiqu'ils soient confectionnés par une boulangerie, ils sont produits pour et sous la direction spécifique des appelantes en vertu d'une formule détaillée fournie par celles-ci et avec des ingrédients composés et fournis par elles, un de ces ingrédients étant un coupe-appétit.

Le Juge Ritchie, dissident: En donnant une définition du sens que le Parlement voulait attacher aux mots «produit pharmaceutique», l'art. 2(1)(cc) de la *Loi sur la taxe d'accise* n'a pas l'effet de créer une classe distincte de substances en opposition avec et en exclusion des «denrées alimentaires» décrites à l'Annexe III. Le caractère d'un produit, lorsqu'il s'agit de l'exempter comme «denrée alimentaire» en vertu de l'Annexe, n'est aucunement changé par la manière dont il est vendu ou représenté par le manufacturier ou par son prix de vente. Le produit «Limmits» était un «biscuit de boulanger» ou au moins un «article semblable».

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada¹, déclarant le produit «Limmits» sujet à la taxe de vente. Appel rejeté, le Juge Ritchie étant dissident.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada¹, holding that the product "Limmits" was subject to sales tax. Appeal dismissed, Ritchie J. dissenting.

Hon. R. L. Kellock, Q.C., and *J. C. C. Chipman*, for the appellants.

C. R. O. Munro, Q.C., and *D. H. Aylen*, for the respondent.

The judgment of Abbott, Martland, Judson and Spence JJ. was delivered by

JUDSON J.:—In these proceedings, which are by way of petition of right, the two Pfizer Companies seek to recover sales tax paid under protest. The Customs and Excise Division began to exact this tax following a declaration of the Tariff Board in March of 1963, which held that "Met-recal", a product similar to the one with which we are here

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¹ [1965] C.T.C. 394, 65 D.T.C. 5245.

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concerned, was not exempt from sales tax. The judgment of the Exchequer Court¹ was that the tax was payable. In my opinion this judgment should be affirmed.

The tax is imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, which reads as follows:

30. (1) 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.

In addition to this sales tax there is a 3 per cent old age security tax collected with it, making a combined tax of 11 per cent. This is imposed by R.S.C. 1952, c. 200, s. 10.

To be exempt the product must come within Schedule III of the *Excise Tax Act* and the appropriate part of the schedule reads:

Bakers' cakes and pies including biscuits, cookies or other similar articles;

In 1963 the following words were added after "similar articles":

but not including simulated chocolate bars or candy bars;

The addition of these words does not affect the decision in this case.

The product in question is sold under the trade mark "Limmits". Pfizer claims that it is a food product in biscuit form sold and advertised for sale as a "limited calorie meal plan for weight control". It was made and baked for Pfizer by Christie, Brown and Co. Limited, who are bakers. The baker receives its manufacturing instructions from Pfizer but not all the information as to the contents of the biscuit is communicated to the baker. Several of the ingredients are referred to by code letters alone.

In the reasons for judgment of Dumoulin J., there is a full reproduction of the material appearing on the packet of biscuits, including directions and a description of the composition of the product. Briefly, two biscuits are recommended to replace breakfast or lunch, together with tea or coffee, but no cream. The object is to provide a nutritious, satisfying, calorie-limited meal in biscuit form with the object of losing weight. The contents are described in the following paragraph:

Contents: This package contains 6 Limmits. Each biscuit weighing 1.14 oz. contains soya, baking and whole meal flour, sugar, malt extract, glucose syrup, powdered milk, sodium carboxymethyl cellulose (50 mg.) and the following essential minerals and vitamins: vitamin A (as palmitate) 894 I.U.; vitamin B₁ 0.31 mg.; riboflavin (vitamin B₂) 0.52 mg.; vitamin C

¹ [1965] C.T.C. 394, 65 D.T.C. 5245.

10.74 mg.; niacinamide 3.1 mg.; calcium (as dibasic calcium phosphate) 115.4 mg.; phosphorus (as dibasic calcium phosphate) 88.6 mg.; iron (as reduced iron) 2.5 mg.

An important ingredient mentioned is "carboxymethyl cellulose". This is described as "a bulking agent" without nutritional value which swells in the stomach and gives a feeling of fullness.

There is nothing distinctive about the shell of the biscuits. They are like other biscuits in this respect. Their peculiarity is to be found in the contents above described. I have real doubt whether they can be described as biscuits at all. I think this word means the ordinary, everyday product. But of this I am sure, they are not "bakers' biscuits". They are three times more expensive than bakers' biscuits. They are advertised and sold not as a sweet or confection but as an elaborate, calorie-restricted meal for the purpose of reducing weight. Although manufactured by a baking company, they are produced for and under the specific direction of Pfizer pursuant to a detailed formula supplied by Pfizer with ingredients compounded and provided by that company. Further, as already mentioned, a number of the ingredients are kept secret from the baking company. It is quite true that many foods are now sold with vitamins and other chemicals added. But to me the inert appetite depressant "sodium carboxymethyl cellulose" and its function to create the impression of fullness makes it impossible to hold that this product is a "bakers' biscuit".

It is unnecessary to go further than this. It is neither a "bakers' biscuit" nor a "similar article". Dumoulin J. put his judgment on three grounds. This is the only one I need to consider.

It is important to realize that under the *Excise Tax Act* all goods produced or manufactured in Canada are subject to tax. The exempting section 32(1) provides that

32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

It is not enough that a product may be described as a "foodstuff". To be exempt it must be a specific article described in Schedule III. The fact that one of the sections

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in Schedule III is headed "Foodstuffs" does not govern the decision. The article in question here must be a "bakers' biscuit" or a "similar article". This means the ordinary product of the bakers' art and it is certain that this article is not such a product.

I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment of my brother Judson in which he has outlined the circumstances giving rise to this appeal and has cited the provisions of the *Excise Tax Act* pursuant to which the appellants claim exemption for their products.

The question to be determined on this appeal, as I see it, is whether the appellants' products, which are sold under the trade name "Limmits", are disentitled to the exemption from sales tax which is extended to "bakers' . . . biscuits . . . or other similar articles" as "foodstuffs" within the meaning of Schedule III of the *Excise Tax Act*, by reason of the following facts:

- (a) That they are sold or represented for use in the treatment, mitigation or prevention of a disorder or abnormal physical state in man, namely overweight;
- (b) that they are produced for, and under the specific direction of, the appellants pursuant to a detailed chemical formula prescribed by them and for which they supply the ingredients.

In summarizing his reasons for deciding that "Limmits" were not "foodstuffs" within the meaning of the *Excise Tax Act*, Mr. Justice Dumoulin concluded in the following terms:

Above all else, the '*suprema ratio decidendi*' is that 'Limmits', pursuant to the clear language of paragraph (cc), s-s. (1) of s. 2, are 'sold or represented' in such a way, and intended to secure specified results that unmistakably stamp them with the statutory qualifications of 'pharmaceuticals'.

The relevant provisions of s. 2(1) of the Act read as follows:

(cc) 'pharmaceuticals' means any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, sold or represented for use in the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof, in man or animal, or for restoring, correcting or modifying organic functions in man or animal; . . .

In the course of his reasons for judgment, Mr. Justice Dumoulin placed the following interpretation on the words "sold or represented" as they occur in this subsection:

In my humble opinion those three governing words have paramount sway over the Act and are mandatory unless superseded by an exception, expressed or logically inferred.

It was convincingly shown, I believe, that the particular products, in biscuit form, called Limmits, were '*sold or represented*' to the public at large precisely in the manner and for the purposes foreseen by s. 2(1)(cc). How, then, could they escape the consumption taxes of eight percent and two percent imposed, respectively, by the *Excise Tax* and *Old Age Security Acts*?

Later in his judgment, the learned judge explained what he found to be the mandatory condition of the tax exemption in Schedule III in the following terms:

The determining, decisive, factor does not consist in the quantity of vitamins contained in, or calories excluded from, an edible substance; it is set and prescribed by the interpretative authority of s. 2(1)(cc) decreeing that: must be considered 'pharmaceuticals', unmentioned in Schedule III, 'any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, *sold or represented* for use in the . . . treatment, mitigation or prevention of a . . . disorder (or) abnormal physical state . . . in man'.

With the greatest respect for those who may hold a different view, I do not regard the subsection to which Mr. Justice Dumoulin refers as effective to do more than to define the meaning which Parliament intended to be attached to the word "pharmaceutical" as it is used from time to time in the *Excise Tax Act*, and I do not think that it has the effect of creating a distinct class of substance in contra-distinction to and exclusion of the "foodstuffs" described in Schedule III. If the definition of "pharmaceutical" had this effect it would mean, in my view, that "foodstuffs" which would otherwise come within the exemption provided by that Schedule would, if they were sold or represented for "use in . . . modifying organic functions in man or animal", cease to be "foodstuffs" for the purpose of the statute. It occurs to me that this would mean, for example, that upon a manufacturer representing that a particular "foodstuff" was beneficial for use by those suffering from indigestion, the product so represented would cease to be a "foodstuff" within the meaning of the schedule and would become subject to excise tax as a "pharmaceutical". In my opinion the character of the product for the purpose of entitling it to an exemption as a "foodstuff" under Schedule III is in no sense altered by

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the way in which it is sold or represented by the manufacturer or by the price charged for it.

The appellants' products are baked by a bakery company and each consists of two small biscuits between which is inserted a flavoured filling prepared according to a formula supplied by the appellants which contains chemical constituents, including the appetite depressant, sodium carboxymethylcellulose.

Although it is not expressly admitted that the so-called shells on each side of the filling are the same as the shell of any ordinary biscuit, the description given on behalf of the appellants by S.A.B. Dean remains uncontradicted. That witness said:

The shells of the biscuit are baked in equipment used for the manufacture of all other types of biscuits; and the ingredients that enter into the process are of necessity the same type of ingredients that go into ordinary everyday biscuits. . .

It is, however, contended on behalf of the respondent that the chemical constituents of the filling distinguish the product from the usual bakers' biscuits and exclude it from the class of "Foodstuffs" prescribed by Schedule III of the *Excise Tax Act*.

The class of "Foodstuffs" under which the exemption is here sought is described in the Schedule as "bakers' cakes and pies, including biscuits, cookies or other similar articles" (the italics are my own). While I agree that the special properties contained in the filling which is inserted between the two small biscuits in the preparation of "Limmits" differentiate them from ordinary "bakers' biscuits", I am nevertheless of the opinion, with the greatest respect for those who hold a different view, that the effect of inserting the prepared filling is to make the finished products a somewhat unusual type of "bakers' biscuits" with special dietary qualities which are said to aid in the treatment of obesity, but that they remain "bakers' biscuits" and as such are exempt under the Schedule. Even if I were not satisfied that "Limmits" were "bakers' biscuits" within the meaning of the Statute, I would not be prepared to say that, baked as they are in a baker's oven with two sides which are indistinguishable from ordinary "bakers' biscuits" they are not, at least, "similar" to such biscuits and therefore "similar articles" within the meaning of the Schedule and entitled to the exemption for which provision

is made under s. 32(1) of the *Excise Tax Act*, which also applies to the tax imposed by the *Old Age Security Act*.

I would accordingly allow this appeal and order that the Pfizer Corporation is entitled to recover from the respondent the sum of \$15,818.44 and that the Pfizer Company Limited is entitled to recover the sum of \$43,417.18 being the amounts paid under the *Excise Tax Act* and the *Old Age Security Act* by way of sales tax and Old Age Security tax in respect of these products between February 25, 1963, and January 31, 1964, together with interest on both amounts at the rate of five percent from the date of service of the petition of right herein.

I would award the appellants their costs in this Court and in the Exchequer Court.

Appeal dismissed with costs, RITCHIE J. dissenting.

Solicitors for the appellants: Howard, Cate, Ogilvy, Bishop, Porteous and Hansard, Montreal.

Solicitor for the respondent: E. A. Driedger, Ottawa.

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