1959

*Jun. 11, 12
**Nov. 2

CANADIAN ADMIRAL CORPORATION LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND CANADIAN ELECTRICAL MANUFACTURERS ASSOCIATION .....RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Excise tax—Value for duty of imported electric refrigerator—The Customs Act, R.S.C. 1952, c. 58, s. 35(1), (2), (3), (7).

Canadian Admiral Corporation, a wholly-owned subsidiary of Admiral Corporation of Chicago, U.S.A., imported in 1956 an electric refrigerator, model D800. This refrigerator was made by Midwest Manufacturing Corporation, also a wholly-owned subsidiary of U.S. Admiral. The only customers of the manufacturer, whose profit margin was set by U.S. Admiral, were the U.S. and the Canadian Admiral corporations which sold the refrigerators to distributors in their respective countries. The value for duty was set by the Deputy Minister at $110.18. The Exchequer Court found no error in law in the declaration of the Tariff Board which affirmed the decision of the Deputy Minister.

Held: The appeal should be dismissed.

*PRESENT: Taschereau, Locke, Abbott, Martland and Judson JJ.
**Locke J., owing to illness, took no part in the judgment.

The value for duty was properly ascertained according to s. 35(3) of the *Customs Act* on the basis of the sales between the U.S. Admiral corporation and its distributors, because the transaction between the manufacturer and the U.S. Admiral corporation did not reflect a fair market value in the country of origin.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada, affirming a declaration of the Tariff Board. Appeal dismissed.

G. F. Henderson, Q.C., and *J. M. Godfrey, Q.C.*, for the appellant.

R. W. McKimm, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from the judgment of the Exchequer Court dismissing the appeal of the appellant from a declaration of the Tariff Board which affirmed a decision of the Deputy Minister on the value for duty of an electric refrigerator imported into Canada by the appellant. Leave to appeal was granted on this question of law by the Exchequer Court:

> Did the Tariff Board err as a matter of law in deciding that the value for duty of the household electric refrigerator Model D800 imported under Windsor Customs Entry No. 816D, dated May 9, 1956, is $110.18?

The Exchequer Court found no error and dismissed the appeal. Leave to appeal was granted to this Court. In my opinion this appeal also fails.

These are the facts as found by the Board:

> Evidence at the public hearing established as *fact* the following: The importation of an Admiral household electric refrigerator, Model D800, was made by Canadian Admiral Corporation Limited, Port Credit, Ontario (hereinafter called "Canadian Admiral") a wholly-owned subsidiary of Admiral Corporation of Chicago, Illinois (hereinafter called "Admiral"). The refrigerator in question had been manufactured by Midwest Manufacturing Corporation, Galesburg, Illinois (hereinafter called "Midwest"), also a wholly-owned subsidiary of Admiral which since 1953 has manufactured Admiral refrigerators for Admiral and for Canadian Admiral. Prior to Admiral's securing ownership of Midwest, Admiral refrigerators had been manufactured for it by American Central Manufacturing Company, Connorsville, Indiana (hereinafter called "American Central") and by Seeger Manufacturing Company, St. Paul, Minn. (hereinafter called "Seeger"). Prices paid for Admiral refrigerators by Admiral to American Central and to Seeger had been based upon "actual cost of production—materials, labor, and factory overhead—plus administration costs, which included selling costs, and a profit". All refrigerators so produced for Admiral had borne that company's trade-mark, "Admiral". The profit

1959

CDN. ADMIRAL CORPN. LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *et al.*

Judson J.

margin in favour of American Central and of Seeger had been between 3 and 5 p.c. of selling. Following purchase of Midwest by Admiral, the latter had continued with the former the manufacturing arrangements which had prevailed, previously, with American Central and Seeger, the profit margin for Midwest being set by Admiral in 1953 at 3½ p.c. As of the present, Midwest, manufacturing for Admiral a refrigerator to Admiral's design, with Admiral's tools, has two customers for such refrigerators, viz.: Admiral and Canadian Admiral. The trade-mark, in the United States, is owned by Admiral; in Canada, by Canadian Admiral. Prices charged by Midwest for Admiral refrigerators are as follows:

To Admiral:	Base Price	$ 96.87 U.S.
	U.S. Excise	4.84 U.S.
		$ 101.71 U.S.
To Canadian Admiral:	Base price	$ 96.87 U.S.
	Tooling charge	3.39 U.S.
		$ 100.26 U.S.

all such prices being f.o.b., Galesburg, Ill. The Admiral refrigerator, Model D800, is sold in the United States by Admiral to distributors in that country; in Canada, by Canadian Admiral to distributors in Canada. As regards units sold to either Admiral or Canadian Admiral, Midwest applies the trade-mark "Admiral" solely as an agent.

The relevant provisions of *The Customs Act* at the time the matter arose were as follows:

35. (1) Whenever duty *ad valorem* is imposed on goods imported into Canada, the value for duty shall be determined in accordance with the provisions of this section.

(2) The value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale.

(3) When the value for duty cannot be determined under subsection (2) for the reason that like goods are not sold under comparable conditions of sale, the value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions.

* * *

(7) Where the value for duty cannot be determined under the preceding subsections, the value for duty shall be the actual cost of production of like or similar goods at the date of shipment to Canada plus a reasonable addition for administration costs, selling costs and profit.

The appellant's argument is this: Subsection (2) does not apply because the sale between Midwest and Admiral U.S. was not made under fully competitive conditions. This prevents the application of subs. (3) because it is a

condition precedent to its application that inability to apply subs. (2) must be based upon lack of comparability of conditions of sale, not upon lack of fully competitive conditions. Subsection (3) having been ruled out, only subs. (7) is left, for the parties are agreed that none of the intervening subsections can apply. The argument is simple, clear and at first glance seemingly sound but, in my opinion, it fails because it is founded on the erroneous assumption that the Board, in considering subs. (2) must take as its standard the sale in the United States between Midwest and Admiral U.S. This the Board declined to do, correctly in my opinion, for two reasons—the first being that this transaction was not under fully competitive conditions, and the second being that it was not a sale at all, within the meaning of subs. (2), which could afford any guide to the determination of fair market value.

The first reason is unassailable but the second was attacked by the appellant. I accept the submission that the transaction was a sale in that it was a transfer of property in goods for a money consideration, called the price, but this does not end the argument. There are other characteristics which a sale must have to be of any use in the determination of fair market value and I think that this was all that the Board was saying in its reasons—that this transaction lacked these characteristics. In the words of the reasons given by the Board, "Determination under 35(2) of value for duty must be preceded by and predicated upon determination of fair market value of like goods in the country of origin." The statement of fact which I have quoted from the Board's reasons makes it plain why the sale from Midwest to Admiral U.S. does not qualify in this respect. The price was an arranged price between a parent company and a wholly-owned subsidiary. There may be sound and justifiable business reasons for the arrangements which were actually made but whatever they were they cannot make the transaction qualify as one "in the ordinary course of trade under fully competitive conditions". I therefore accept the opinion of the Board "that appraisal as to fair market value in the country of origin could not be

1959

CDN. ADMIRAL CORPN. LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *et al.*

Judson J.

effected under the provisions of s. 35(2) in so far as the transaction between Midwest and Admiral U.S. is concerned".

The first point at which there could be a determination of fair market value of like goods in the country of origin is in the transaction between Admiral U.S. and its distributors. This is the sale that the appraiser took into consideration when determining whether s. 35(2) applied, for this was one "in the ordinary course of trade under fully competitive conditions". Having chosen this particular sale as the starting point for his appraisal, the appraiser could have proceeded under s. 35(2) except for one condition. The sale between Admiral U.S. and its United States distributors and that between Midwest and Canadian Admiral were not under comparable conditions of sale for the United States sales were to regional distributors and the sale to Canadian Admiral was to a national distributor. The appraiser therefore found, and the Board affirmed his finding in this respect, that s. 35(2) could not be applied because of lack of comparability of conditions of sale.

The appraiser then proceeded under s. 35(3), which is expressly made applicable where 35(2) cannot be used for lack of comparability of conditions of sale, and applied the terms of s. 35(3), which are exactly the same as those of 35(2) with the exception of comparability of conditions of sale. Comparability of conditions of sale is not a consideration under s. 35(3). The Board was of the opinion that this was the correct solution. The Exchequer Court was of the opinion that there was no error in law shown, and I am of the same opinion.

The appellant complains that the sale that must be taken in the United States is that between Midwest and Admiral U.S. because this is on the same level of trade as that between Midwest and Canadian Admiral, both Admiral corporations being national distributors. If this compulsion exists, the appellant's argument is sound. If these two

sales are compared the only possible reason for the rejection of s. 35(2) would be lack of fully competitive conditions, not lack of comparable conditions of sale. There would then be no room for the application of subs. (3) for that can only be put in action where there is lack of comparability of conditions of sale. If subss. (2) and (3) are so ruled out, only subs. (7), above quoted, could apply for the parties are agreed that the intervening subsections can have no possible application. The argument fails, in my opinion, because the transaction between Midwest and Admiral U.S. does not reflect fair market value in the country of origin and must, therefore, be disregarded. On the other hand, the transactions between Admiral U.S. and its distributors are sales which expressly fall within all of the conditions of s. 35(3) and, consequently, the value for duty was properly ascertained according to s. 35(3) on the basis of these sales.

The finding of the Board expressed in the following terms therefore stands:

> The *fair market value* in the country of origin of Admiral refrigerator Model D800, as established by sales, under fully competitive conditions, by Admiral to its distributive trade, we find, upon the evidence, to have been $115.57 U.S. The *value for duty* of Admiral Model D800 imported into Canada, as represented by the invoice and customs entry filed in the case at issue, we find to be $115.57 U.S. less United States excise tax of $4.84 U.S., a total of $110.73 U.S., or $110.18 Canadian. This figure of $110.18 Canadian, the Deputy Minister, in his review and confirmation of appraisal, reduced to $110.00 Canadian for reasons not brought out in evidence.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the Deputy Minister: D. H. W. Henry, Ottawa.

Solicitors for the Canadian Electrical Manufacturers Association: Hume, Martin & Allen, Toronto.