

1937 DOMINION DISTILLERY PROD- }
 * May 30, 31. UCTS CO. LTD. (SUPPLIANT)..... } APPELLANT;
 * Oct. 21.

AND

HIS MAJESTY THE KING (RE- }
 SPONDENT) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of right—Action for recovery of money paid for sales tax and excise tax—Period of limitation—Claims barred—Section 32 of the Exchequer Court Act, R.S.C., 1927, c. 34—Section 48 of Ontario Limitations Act, R.S.O., 1927, c. 106—Sec. 117 of the Special War Revenue Act, as enacted by 23-24 Geo. V, c. 50, s. 24.

The suppliant, by its petition of right, sought recovery of moneys paid the Crown as sales taxes and excise duties upon liquors purchased by it for export and which it claimed were exported to the United States. The liquors had been manufactured by one Walker Company and were alleged by the suppliant to have been purchased by it from that company at prices that included such sales taxes and excise duties. In May, 1926, the suppliant by an agreement in writing sold and transferred to Dominion Distilleries Limited its business and undertaking as a going concern, the sale and transfer including all debts due to the suppliant in connection with the business. The terms of

* PRESENT:—Duff C.J. and Cannon, Davis, Kerwin and Hudson JJ.

the agreement were fulfilled and the suppliant had not carried on business since 1926. The transactions in liquor by the suppliant with the Walker Company took place between January 31st, 1924, and January 25th, 1926. And the petition of right was filed before the Exchequer Court of Canada on December 14th, 1934. The claim of the suppliant was to recover the sum of \$1,417,958.62, being \$1,296,557.01 in respect of excise duties and \$121,401.61 in respect of sales taxes. The Exchequer Court of Canada dismissed the petition of right.

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Held that the appeal should be dismissed with costs.

Per The Chief Justice and Davis and Hudson JJ.—Without deciding the question as to whether some one other than the manufacturer or producer, upon whom the duties and taxes were imposed and by whom they were actually paid to the Crown, could recover such payments from the Crown—assuming that the suppliant as the purchaser of the liquor could recover in its own name and assuming further that the suppliant's charter had not become forfeited for non-user and that it was an existing company entitled to maintain the petition—*held* that the claim for \$1,296,557.01 in respect of the payment of excise duties was barred at the end of six years by virtue of the combined effect of section 2 of the *Exchequer Court Act* and section 48 of the *Ontario Limitations Act*, such claim not being liable to be treated as a specialty debt for which the prescriptive period is 20 years; and that the claim for \$121,401.61 in respect of the payment of the sales taxes was also barred by the six-year limitation above mentioned as the suppliant has made no application for a refund within the time prescribed by the statute and did not invoke the statutory right to a refund, the whole in conformity with the provisions of section 117 of the *Special War Revenue Act*.

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. (1) dismissing the suppliant's petition of right with costs.

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

Is. St. Laurent K.C., L. A. Landriau K.C. and Oscar Gagnon K.C. for the appellant.

W. N. Tilley K.C. and C. F. H. Carson K.C. for the respondent.

The judgment of The Chief Justice and Davis and Hudson JJ. was delivered by

DAVIS J.—The appellant is a suppliant by petition of right whose claim against the Crown was dismissed by a judgment of the President of the Exchequer Court of Canada from which judgment this appeal was taken.

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The claim of the suppliant is to recover from the Crown the sum of \$1,417,958.62 paid by Hiram Walker & Sons Limited (hereinafter for convenience referred to as the Walker Company) to the Crown in respect of excise duties and sales taxes on liquor manufactured by the Walker Company and alleged by the suppliant to have been purchased by it from the Walker Company at prices that included the excise duties and sales taxes. The claim put forward by the suppliant is that it resold and exported this liquor to purchasers in the United States and that by reason of such export, the duties and taxes collected by the Crown were not payable and that the Crown is liable to repay to the suppliant the moneys paid together with interest. The sum of \$1,417,958.62 is made up of \$1,296,557.01 in respect of excise duties and \$121,401.61 in respect of sales taxes. The transactions in question were said to have taken place between January 31st, 1924, and January 25th, 1926.

The suppliant was a Dominion company having its office at Montreal. Although it had a distillery licence it did nothing in the way of carrying on a distillery business other than the blending of some Scotch whiskies in relatively small quantities. Commencing in January, 1924, orders for liquor were furnished in the name of the suppliant to the Walker Company. In the early part of 1924 the liquor was transferred from the Walker Distillery in Walkerville to a nearby warehouse from which it was distributed in accordance with instructions given by one Cooper, who appears to have been active in the business of the suppliant company. The orders, invoices and other documents that were made out at the time gave the transactions the appearance of sales by the Walker Company to the suppliant and of resales by the suppliant to either W. Kemp or G. Scherer. On or about April 26th, 1924, the excise officer in charge of the Walker Distillery was instructed to refuse the delivery or the issue of permits for the removal of duty paid spirits from the Walker distillery to the suppliant unless the goods were shipped to the suppliant's licensed premises in Montreal. Thereafter the liquor was shipped from the Walker Distillery to Montreal where it was at once reshipped (often without unloading) to Sandwich or one of the border points on the Detroit river, where it appears to have gone into Cooper's posses-

sion and thence was resold and distributed by him. It is claimed by the suppliant that all the liquor was exported from the border points in and about Walkerville to the United States but this claim was strenuously challenged by the Crown.

Under the *Excise Act* the liquor could not be removed from the Walker Distillery until the excise duties had been paid or secured by bond. In the case of each of the transactions in question the Walker Company made a requisition to the excise officer for a permit to remove the liquor "duty paid," paid the duties and obtained a permit for removal. Pursuant to the regulations respecting sales tax, the Walker Company paid before the end of each month the sales tax due in respect of transactions of the previous month, in accordance with returns made by it to the Department of National Revenue showing the sales for the month and the taxes payable thereon. No suggestion was made at any time that the moneys were paid under protest or subject to any reservation either on behalf of the Walker Company or the suppliant.

By agreement dated May 26th, 1926, the suppliant sold its business as a going concern to a company known as Dominion Distillers Limited. The sale and transfer included all debts due to the suppliant in connection with the business. In 1927 Dominion Distillers Limited sold its assets to Dominion Distillers Consolidated Limited. In 1930 Dominion Distillers Limited and Dominion Distillers Consolidated Limited went into liquidation. The suppliant had ceased doing business sometime in 1925 or 1926 and no meetings of its directors or shareholders were held from March 9th, 1926, until February 16th, 1935. In these circumstances the respondent launched a motion before the trial for an order dismissing the action and directing that the respondent's costs be paid by the solicitor for the suppliant upon the grounds that the action was brought without authority and that the company had before the commencement of the action sold and transferred all its assets. The motion was adjourned to the trial and the respondent gave a supplementary notice that on the return of the motion it would rely upon the additional ground that if there was any such corporation as the suppliant it had ceased to exist and its charter had become forfeited by reason of non-user under the provisions of *The Companies*

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Act, R.S.C., 1927, ch. 27, sec. 29, and amending Acts. On the second day of the trial this motion was argued before the learned judge as well as a motion to dismiss on the ground that the suppliant's cause of action, if any, was barred by the Statute of Limitations. The learned judge, however, decided that the trial should proceed to the end and adjourned the motions to the conclusion of the trial.

Judgment was reserved at the trial and was pronounced on June 12th, 1937, dismissing the petition with costs. The learned judge felt bound by the *Carling* case (1) to hold that in the main the liquor was exported. He thought the proof of export in the case (upon this point, since the appeal fails on other grounds, it is unnecessary to pronounce a decision) was equally strong as in the *Carling* case (1). He was of opinion, however, that the claim to recover in respect of sales taxes was barred by sec. 117 of the *Special War Revenue Act* (enacted by 21-22 George V, ch. 54, sec. 21, and amended by 23-24 George V, ch. 50, sec. 24) because it did not appear that any application in writing had been made for a refund within two years from the time when such refund first became payable. His judgment was also based on the conclusion that the suppliant company had ceased to exist by reason of the forfeiture of its charter for non-user and that the petition was, therefore, unauthorized and a nullity. The learned judge also held that the Ontario *Limitations Act*, R.S.O., 1927, ch. 106, sec. 48, was applicable and that the cause of action was barred because the petition was laid more than six years after the cause of action arose.

In the first place it is to be observed that all the moneys paid, either as excise duty or as sales taxes, on the liquor in question were paid by the Walker Company to the Crown, neither by compulsion nor under protest, and now form part of the Consolidated Revenue Fund of Canada, and that the Walker Company is not a party to this action to recover back these moneys. We should find it difficult to decide, if it were necessary to do so, that some one other than the manufacturer or producer, upon whom the duties and taxes were imposed and by whom they were actually paid to the Crown, could recover the payments from the Crown. But assuming that the suppliant, as the

(1) [1931] A.C. 435.

purchaser of the liquor, whose purchase moneys included these outlays by its vendor, could recover in its own name and on its own behalf, the difficulties in its way appear to be insurmountable. We shall assume, further, in the suppliant's favour, without expressing any opinion upon the point, that the suppliant's charter had not become forfeited for non-user and that it was an existing corporation entitled to maintain the action. It is, moreover, unnecessary to express any opinion upon the contention of the Crown that at the date of the petition of right the suppliant had no longer any interest in the claim upon which it sues by virtue of the fact that the claim had been transferred to the Dominion Distillers Consolidated Limited through the Dominion Distillers Limited. We have arrived at our conclusion without taking into account the difficulties which might be raised by these questions.

Two or three dates are of importance in the consideration of the appeal. The date of the filing of the petition of right was December 14th, 1934; the transactions in liquor in respect of which the Walker Company paid excise duty and sales taxes were, as already stated, between January 31st, 1924, and January 25th, 1926.

As to the claim for \$1,296,557.01 in respect of the payment of excise duties. These duties were paid by the Walker Company voluntarily in the ordinary course of business before removal of the liquor. Liability for payment during the period in question was imposed by the *Excise Act*, R.S.C., 1906, ch. 51—(prior to 1921 the statute was called *The Inland Revenue Act*, 11-12 George V, ch. 26, sec. 2). Under sec. 174 the duties could not be refunded on export unless when specially permitted by some regulation made by the Governor in Council. No such regulation was made. Under *The Consolidated Revenue and Audit Act*, 1931 (21-22 George V, ch. 27, sec. 33), the Governor in Council, whenever he deems it right and conducive to the public good, may remit any duty or toll payable to His Majesty, imposed or authorized to be imposed by any Act of the Parliament of Canada. Remit, by the context, involves "the refund of any sum of money paid to the Minister for" any duty imposed or authorized to be imposed by any Act of the Parliament of Canada. No such order in council was ever passed. Treated as an action for moneys had and received, the

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claim was clearly barred at the end of six years by virtue of the combined effect of sec. 32 of the *Exchequer Court Act*, R.S.C., 1927, ch. 34, and sec. 48 of the *Ontario Limitations Act*, R.S.O., 1927, ch. 106. The claim cannot be treated as a specialty debt for which the prescriptive period is 20 years.

As to the claim for \$121,401.61 in respect of the payment of the sales tax. The following provision was added to the *Special War Revenue Act* in 1931 (21-22 George V, ch. 54, sec. 21):

117. No refund or deduction from any of the taxes imposed by this Act shall be paid unless application for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulations made thereunder.

The above section was repealed in 1933 (23-24 George V, ch. 50, sec. 24) and the following substituted:

117. (1) No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulations made thereunder.

(2) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

No application was made for a refund within the time prescribed by the statute. Moreover, the suppliant did not invoke the statutory right to a refund; the claim was not put upon that basis. Treated as an action for moneys had and received, this part of the applicant's claim also fails, being barred by the six-year limitation above mentioned.

The appeal must be dismissed with costs.

CANNON J.—This appeal should be dismissed with costs.

KERWIN J.—The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Oscar Gagnon.*

Solicitor for the respondent: *W. Stuart Edwards.*
