1957

Apr. 11

May 15

W. T. HAWKINS LIMITED .....APPLICANT;

AND

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENT.

Revenue—Excise Tax Act, R.S.C. 1952, c. 102, 30, 32(1), 58(1)—Magic Pop —Schedule III of the Excise Tax Act—Application for leave to appeal from decision of Tariff Board—Decision of Tariff Board based on construction of provisions of Excise Tax Act—Leave to appeal granted.

The applicant applied for leave to appeal from a decision of the Tariff Board under s. 58(1) of the *Excise Tax Act*, R.S.C. 1952, c. 102 as amended, to the effect that a product called *Magic Pop* consisting of popping corn placed in a block of solidified shortening wrapped and

(1) [1956] Ex. C.R. 264.

packaged for the retail trade is not "grains or seeds in their natural state" within the meaning of Schedule III of the *Excise Tax Act* and consequently taxable under section 30 of the Act.

Held: That leave to appeal should be granted since the decision of the Tariff Board was based on an interpretation of the Act and the Schedules and the construction of a statutory enactment is a matter of law only and the applicant has a fairly arguable case to submit to the Court.

APPLICATION for leave to appeal under section 58(1) of the Excise Tax Act.

The application was heard before the Honourable Mr. Justice Cameron at Ottawa.

G. F. Henderson, Q.C. for applicant.

R. W. McKimm for respondent.

CAMERON J.:—This is an application for an Order, (a) extending the time for applying for leave to appeal to this Court from a decision of the Tariff Board dated February 27, 1957 (Appeal 395); and (b) granting leave to appeal to this Court from a decision of the Board. By consent of the parties, the time for applying for leave to appeal was extended to April 11, 1957, on which date the motion was heard.

The application for leave to appeal is made under the provisions of section 58(1) of the *Excise Tax Act,* R.S.C. 1952, c. 102, as amended. By that section the person who applied to the Tariff Board for a declaration may, upon leave being obtained from the Exchequer Court or a Judge thereof, appeal to the Exchequer Court upon any question that, in the opinion of the Court or Judge, is a question of law.

The applicant packages a product called "Magic Pop" which consists of popping corn placed in a block of solidified shortening wrapped and packaged for the retail trade. The Assistant Deputy Minister for Excise ruled that the popping corn in the package is not "grains or seeds in their natural state" within the meaning of Schedule III of the *Excise Tax Act* and consequently that the product was taxable under section 30 of the Act. The applicant appealed that ruling to the Tariff Board.

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

1957

W. T. HAWKINS LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

Cameron J.

Schedule III which are applicable to the issue are as follows: salt; shortening; grains and seeds in their natural state.

The decision of the Tariff Board, which contains a brief summary of the essential facts, is as follows:

The Appellant, in the words of his counsel, "packages a *product* called 'Magic Pop' which consists of popping corn placed in a block of solidified shortening wrapped and packaged for the retail trade." (Our italic.)

The question at issue is whether this product falls within Schedule III to the *Excise Tax Act*.

The case for the Appellant amounted to a denial that "Magic Pop" is a product in the ordinary sense at all. It was contended that "Magic Pop" ought to be regarded simply as salt, shortening, and grains or seeds in their natural state. Since each of these products (or constituents) is exempt, it was argued that "Magic Pop" therefore is exempt.

However, is the mixture of these ingredients, as sold by the producer, three products or one product? Is the vendor selling shortening, salt, and corn, or is he selling a new product, in effect, a carefully prepared recipe? We think the answer to these questions is clear.

The exemption for shortening, salt, and grains or seeds in their natural state applies to these materials when sold as such, but does not apply to them when they are simply components or ingredients of another product, even though this product is capable of being separated into its original constituents.

Accordingly, the Appeal is dismissed.

The question of law on which the applicant now requests leave to appeal is stated as follows:

Did the Tariff Board err as a matter of law in deciding that a product called "Magic Pop" sold by W. T. Hawkins Limited of Tweed, Ontario, is not exempt from sales tax imposed by the Excise Tax Act.

Counsel for the respondent opposed the application on the ground (1) that no question of law was involved; and (2) that the applicant did not have a fairly arguable case to submit to the Court.

In *Canadian Horticultural Council, et al. v. Freedman & Son Limited* (1), a case decided by the President of this Court, it was held:

Held: That in an application under section 45 of the Customs Act the Court or judge before whom the application is made must not only form an opinion on whether there is a question of law involved in the order, finding or declaration of the Tariff Board but also, if in its or his opinion there is such a question, exercise judicial discretion in determining whether, in the circumstances of the case, leave to appeal on such question should be granted or refused.

(1) [1954] Ex. C.R. 541.

2. That if it appears to the Court or judge hearing an application for leave to appeal under section 45 of the Customs Act that the order, finding or declaration of the Tariff Board from which leave to appeal is sought was plainly right or sound or that there was no reason to doubt its correctness or that the applicant would not have a fairly arguable case to submit to the Court leave to appeal should be refused.

While the decision in that case was made under the provisions of the Customs Act, the principles so stated are of equal application to applications for leave to appeal under the Excise Tax Act.

It seems clear to me that the decision of the Tariff Board was based on an interpretation of the Act and the Schedules. As stated in the final paragraph of its decision, the Board came to the conclusion that while the ingredients of "Magic Pop" were entitled to exemption when sold as such, the exemptions did not apply to them when they are simply components or ingredients of another product, even though the product is capable of being separated into its original constituents.

They decided that exempting provisions of section 32(1) did not apply to the articles mentioned in Schedule III where they were not sold *as such*, although the words which I have underlined are not found in the Act or the Schedule. I do not suggest that they were wrong. I am of the opinion, however, that in so doing they were construing the provisions of the Excise Tax Act.

In the case of *The Deputy Minister of National Revenue for Customs and Excise v. Rediffusion Inc.* (1), I came to the conclusion that the construction of a statutory enactment is a matter of law only. Reference may be made to the cases therein referred to and also to *General Supply Co. Ltd. v. Deputy Minister of National Revenue (Customs and Excise) et al.* (2).

I am of the opinion, also, that the applicant has a fairly arguable case to submit to the Court and that leave to appeal should be granted. Moreover, the precise point in issue—which is one of considerable importance to the public—has not previously been before the Court so far as I am aware.

(1) [1953] Ex. C.R. 221. (2) [1953] Ex. C.R. 185.

1957

W. T. HAWKINS LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

Cameron J.

The application for leave to appeal will therefore be granted and as no question was raised as to the form in which it is proposed that the point of law should be presented to the Court, it will be as proposed in the Notice of Motion for leave to appeal. Costs of the application will be costs in the cause.

Judgment accordingly.