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BETWEEN:

THE GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LTD., FIRESTONE TIRE AND RUBBER COMPANY OF CANADA LTD. AND B. F. GOODRICH COMPANY OF CANADA LTD. .. APPLICANTS;

AND

T. EATON CO. LTD., SIMPSON-SEARS LTD., ATLAS SUPPLY COMPANY OF CANADA LTD., GENERAL TIRE AND RUBBER COMPANY OF CANADA LTD., AND THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENTS.

Revenue—Excise tax—Sales tax—The Excise Tax Act, 1952, c. 100, as amended, ss. 2(a)(ii), 57 and 58—"Special brand" automobile tires manufactured for and sold by retail agencies—Meaning of "manufacturer or producer" in s. 2(a)(ii) of the Act—Tariff Board—Finding of the Board—Jurisdiction of the Board challenged—Application for leave to appeal from finding of the Board—Leave to appeal a matter of judicial discretion—Leave to appeal from Tariff Board granted.

Certain Canadian rubber companies are making "special brand" automobile tires bearing the names of the purchasers or having treads which are molded with special markings and are sold only to various retailing agencies such as T. Eaton Co. Ltd. On a reference to the Tariff Board by the Deputy Minister of National Revenue, Customs and Excise, following objections by competing manufacturers to his ruling that the manufacturers of these "special brand" tires were the manufacturers or producers of the tires for the purposes of the Excise Tax Act, the Board before which the contention was renewed that the "special brand" customers should be considered as the manufacturers or producers of the tires within the meaning of s. 2(a)(ii) of the Act and subjected to tax on their sale, upheld the Deputy Minister's ruling. On an application under s. 58 of the Act for leave to appeal from the Board's decision

Held: That this is not a case in which such rights as the applicants may have should be summarily disposed of on an application of this nature by a finding that the Tariff Board exceeded its jurisdiction. The matter here is not so clear and indisputable that it would be the duty of a judge hearing an application such as this to declare the entire proceedings a nullity.

2. That under the circumstances of the case and in the exercise of the discretion conferred by the Excise Tax Act R.S.C. 1952, c. 100, as amended, s. 58, the applicants here have a fairly arguable case to

submit to the Court and should be permitted to do so. *Canadian Horticultural Council et al.* v. *J. Freedman and Sons Ltd.* [1954] Ex. C.R. 541 referred to.

APPLICATION for leave to appeal under section 58 of the Excise Tax Act, R.S.C. 1952, c. 100, as amended.

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

The Honourable S. A. Hayden, Q.C. and *K. E. Kennedy* for applicants.

Gordon F. Henderson, Q.C. for respondent T. Eaton Co. Ltd.

C. W. Lewis for respondent Simpson-Sears Ltd.

A. S. Pattillo, Q.C. and *J. F. Barrett* for respondent Atlas Supply Company of Canada Ltd.

Stuart Thom for respondent General Tire and Rubber Co. of Canada Ltd.

K. E. Eaton for respondent Deputy Minister of National Revenue for Customs and Excise.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (February 26, 1955) delivered the following judgment:

Under section 58 of The Excise Tax Act, R.S.C. 1952, chapter 100, as amended, the applicants ask leave to appeal from a decision of the Tariff Board dated December 7, 1954, made under the provisions of section 57 of that Act. While the notice of motion was duly served on all the parties who had appeared before the Tariff Board, only the above-named respondents appeared on the return of the motion. These two sections set out the jurisdiction of the Board to settle doubts and differences and the procedure to be followed when it is desired to appeal from the Board to this Court; the parts thereof which are here relevant are as follows:

57. (1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the Tariff Board Act may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

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(2) Before making a declaration under subsection (1) the Tariff Board shall provide for a hearing and shall publish a notice thereof in the *Canada Gazette* at least twenty-one days prior to the day of the hearing; and any person who, on or before that day, enters an appearance with the Secretary of the Tariff Board may be heard at the hearing.

(3) A declaration by the Tariff Board under this section is final and conclusive, subject to appeal as provided in section 58.

58. (1) Any of the parties to proceedings under section 57, namely

(*a*) the person who applied to the Tariff Board for a declaration,

(*b*) the Deputy Minister of National Revenue for Customs and Excise, or

(*c*) any person who entered an appearance with the Secretary of the Tariff Board in accordance with subsection (2) of section 57,

may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the declaration sought to be appealed, or within such further time as the Court or Judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

(2) The appellant under subsection (1) shall give to the Tariff Board, and to the other parties to the proceedings under section 57, seven clear days' notice of his application for leave to appeal, and the Tariff Board and such other parties have the right to be heard by counsel or otherwise upon the application or upon the appeal, or both.

(4) The Exchequer Court may dispose of an appeal under this section by dismissing it, by making such order as the Court may deem expedient or by referring the matter back to the Tariff Board for re-hearing.

The matter came before the Board under a reference by the Deputy Minister of National Revenue (Customs and Excise) dated August 19, 1954, the relevant parts thereof being as follows:

For some years certain Canadian rubber companies have been manufacturing "special brand" automobile tires for sale to various retail corporations as well as to other rubber companies. These tires bear the names of the purchasers and the treads are molded with special markings which are not sold to others. The former companies have been regarded by the Department as the manufacturers or producers of the tires for the purposes of the Excise Tax Act.

However, competing manufacturers of automobile tires object to our ruling and contend that the "special brand" customers should be treated as the manufacturers or producers of the tires within the meaning of Section 2(a)(ii) of the Excise Tax Act and subjected to sales and excise taxes on their sales.

I am therefore referring this case to the Board in accordance with Section 57 of the Excise Tax Act for a declaration as to the correctness or otherwise of the Department's ruling.

Before the Board the main dispute was between tire manufacturers who make "standard brand" tires and sell them through their own distributors, and other manufacturers who in some cases make "special brand" tires bearing

the name and/or trade marks of a retailing agency or have treads which are molded with special markings and are sold only to such retailing agencies, such as T. Eaton Co., Ltd. The applicants herein are manufacturers of "standard brand" tires and on their behalf it was contended that on a proper interpretation of section 2(a) of the Act which defines "manufacturer or producer", the "special brand" customers such as T. Eaton Co., Ltd. should be found to be the "manufacturer or producer" and that accordingly the excise and sales taxes should be levied on the sale price of the "special brand" customers and not, as has been done by the Department, on the actual manufacturers of such tires, such as The Dominion Rubber Company which manufactured the "special branch" tires for T. Eaton Co., Ltd.

The conclusions of the Board as stated in the last two paragraphs of its declaration are as follows:

> We find, therefore, that The T. Eaton Co. Limited, not being the producer or manufacturer of the special-brand tires "Bulldog" and "Trojan" is not liable for tax on sales of such tires.
>
> In so far as any other "special brand" customer may have a relationship with his supplier which parallels that of The T. Eaton Co. Limited, he is not liable to account for tax on the sale of such "special brand" tires.

Mr. Pattillo and Mr. Thom, counsel respectively for Atlas Supply Company of Canada and General Tire and Rubber Company of Canada, vigorously opposed the application on the ground that in making the declaration on the questions submitted to it by the Deputy Minister, the Board had exceeded its jurisdiction. I was asked by them to refuse the application on the ground that the declaration was a nullity and also that I should declare it to be a nullity. Their main contention is that the Board was not empowered to consider such a reference as that made by the Deputy Minister or to make the declaration which it did make. It was submitted that, as tires are clearly taxable at specified rates under the provisions of The Excise Tax Act and its schedules, there could not possibly be any doubt or difference as to whether any or what rate of tax is payable on tires; and that what the Board actually did by its declaration was to determine that the T. Eaton Co.

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Ltd. (and other special-brand customers whose relations with their suppliers were parallel to that of the T. Eaton Co. Ltd.) was not a "manufacturer or producer" as that term is defined in section 2 of the Act.

However valid this submission may be—and I express no opinion on the matter—it seems to me that this is not a case in which such rights as the applicants may have should be summarily disposed of on this application by a finding that the Board exceeded its jurisdiction. It is conceivable, at least, that there might be a case in which the matter is so clear and beyond dispute that it would be the duty of a judge hearing an application such as this to declare the entire proceedings a nullity, but in my opinion this is not a case of that sort.

In the case of *Canadian Horticultural Council et al* v. *J. Freedman & Son Limited,* (1), decided by the President of this Court, consideration was given to the powers and duties conferred on this Court by section 45 of The Customs Act, R.S.C. 1952, chapter 58, on an application for leave to appeal from an order, finding or declaration of the Tariff Board. By that section also, a right of appeal is given "upon any question that in the opinion of the Court or judge is a question of law" and leave to appeal must be obtained from this Court. The learned President pointed out that the right of appeal is dependent on leave to appeal being granted, a matter which connotes the exercise of judicial discretion in determining whether leave should be granted even although a question of law is involved. After reviewing the reported cases in which the Supreme Court of Canada had discussed the principles to be followed on applications for leave to appeal, the President stated:

> While it may be conceded that since an item in the Customs Tariff is involved leave to appeal should not be refused on the ground that no question of public importance is involved, I am of the view that, as in the case of applications for leave or special leave to appeal to the Supreme Court of Canada, it is not possible to lay down specific and all-embracing rules for the granting of leave to appeal under section 45 of the Customs Act. But I see no reason why the grounds for refusing leave to appeal should not be similar to those taken by the Supreme Court of Canada in dealing with applications for leave to appeal to it. Consequently, in my opinion, 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

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

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.

Under the circumstances of this case and in the exercise of the discretion conferred, I have reached the conclusion that the submission so made in opposition to the motion must be rejected. I shall say no more than that, in my opinion, the applicants have a fairly arguable case to submit to the Court and should be permitted to do so.

At the hearing Senator Hayden, counsel for the applicants, was content to have the question of law submitted in the following form:

> Did the Tariff Board err as a matter of law in deciding that The T. Eaton Company, Ltd. was not the producer or manufacturer of the special brand tires "Bulldog" and "Trojan" and was not liable for tax on sales of such tires?

It is the duty of the Court or judge to reach an opinion as to whether or not the question raised is a question of law. In this case I am of the opinion that it is. It is also the duty of the Court or judge to determine the form in which the question of law should be presented for the hearing of the appeal. It will be noted that the concluding clause of the Board's declaration (*supra*) makes applicable to a "special brand" customer whose relationship to its supplier parallels that of the T. Eaton Co. Ltd., the decision made in the paragraph immediately preceding. The applicants did not appeal from that part of the declaration and their counsel now objects to any reference being made thereto in the question of law to be submitted for hearing. It seems to me, however, that as the concluding paragraph is based entirely on the preceding one, the two should be treated as a whole. If the applicants are successful in their appeal, the concluding paragraph should not be allowed to stand—at least in its present form—as it would be contradictory to the finding which the applicants now seek to have substituted for the present immediately preceding clause.

Counsel for the T. Eaton Co. Ltd. and for Simpsons-Sears Ltd. did not oppose the application except as to the form in which the question should be submitted; counsel for the Deputy Minister took a neutral position.

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The applicants will therefore have leave to appeal on the following question of law:

Did the Tariff Board err as a matter of law in deciding that the T. Eaton Co. Ltd. was not the producer or manufacturer of the special brand tires "Bulldog" and "Trojan" and was not liable for tax on sales of such tires and that, in so far as any other "special brand" customer may have a relationship with his supplier which parallels that of the T. Eaton Co. Ltd., he is not liable to account for tax on the sale of such "special brand" tires?

I was asked by counsel for the Deputy Minister to include a further question for the decision of the judge hearing the appeal, namely whether the Board had exceeded its jurisdiction in making the declaration. In my view, it is unnecessary to do so as such a question is implicit in the form of the question I have set out above. It seems to me that if the Board exceeded its jurisdiction, it erred as a matter of law in making its declaration.

Costs of all parties appearing on the matter will be costs in the cause.

Judgment accordingly.