BETWEEN:

HER MAJESTY THE QUEEN ..... PLAINTIFF;

AND

MEAD JOHNSON OF CANADA LTD. .....DEFENDANT.

Toronto
1965
June 21, 22

June 22

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(cc), 30-57 —Old Age Security Act, R.S.C. 1952, c. 200, ss. 10-32—"Metrecal" product, a foodstuff—Exemption from sales tax which falls within one of the categories in Schedule III of the Excise Tax Act—"Metrecal" not a pharmaceutical within the meaning of s. 2(1)(cc) of the Act.

In this action the plaintiff claims from the defendant sales tax imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, and *Old Age Security Act*, R.S.C. 1952, c. 200, in respect to the product "Metrecal" manufactured or produced by the defendant.

"Metrecal", that is the subject of this litigation, was and still is manufactured or produced in four forms or articles, namely: in soup form, in biscuit form, in powder form and in liquid form.

Held: That the Tariff Board could not, as a matter of law, make a decision and it was therefore open to the Court to decide whether the powder form of the product was taxable or not.

2. That "Metrecal" was a "foodstuff" within the meaning of Schedule III.

3. That "Metrecal" was not a "pharmaceutical".

4. That even if "Metrecal" was a pharmaceutical, the fact that it was also a foodstuff exempted it from tax in the absence of any statutory indication to the contrary, such as by the use of the words "other than a pharmaceutical" in the case of "farm and forest products".

5. That the action be dismissed.

INFORMATION of the Deputy Attorney-General of Canada.

D. H. Aylen and *D. G. H. Bowman* for plaintiff.

Hon. R. L. Kellock, Q.C. for defendant.

GIBSON J.:—In this action the plaintiff claims from the defendant sales tax imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, and old age security tax imposed by s. 10 of the *Old Age Security Act*, R.S.C. 1952, c. 200, in respect to the product "Metrecal" manufactured or produced by the defendant during the month of March 1964. The result of this litigation, however, will determine the liability for such taxes and as a consequence very substantial sums of money are contingently involved.

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The product "Metrecal" that is the subject of this litigation was and still is manufactured or produced in four forms or articles, namely, in soup form, in biscuit form, in powder form and in liquid form. The defendant submits that the product is exempt from sales tax and old age security tax by reason of s. 32 of the *Excise Tax Act* and Schedule III referred to in the said s. 32.

In respect to "Metrecal" in powder form the plaintiff first of all contends that this Court does not have jurisdiction in this action to decide whether or not it is subject to or exempt from consumption or sales tax. The submission is that the Tariff Board by its declaration made on the 25th of February 1963, a copy of which was filed as Exhibit 8 in this action, in an application made by the defendant under s. 57 of the *Excise Tax Act,* decided that "Metrecal" in powder form is subject to and not exempt from the consumption or sales tax imposed by s. 30 of that Act; that the defendant sought leave to appeal from that declaration to this Court, and on the 1st of May 1963, in suit No. A-2216, the then President of this Court dismissed the motion for leave to appeal.

The then President gave no reasons for dismissing the motion for leave to appeal. It was within his jurisdiction to decide either that there was a question of law to be adjudicated upon, in which event he would have given leave, or in the alternative he could have decided that the question of law decided by the Tariff Board in respect to this matter was correctly decided. In any event, even though it is not known what the basis for the decision was in refusing leave, it is my respectful opinion that the Tariff Board cannot, as a matter of law, make a decision *in rem.* It follows, therefore, that it is open to the Court in this litigation to decide whether or not "Metrecal" in powder form is subject to or exempt from consumption or sales tax.

The evidence is that "Metrecal" in its various forms or articles as previously listed is essentially the same product, that the difference between the various forms or articles arises in the carrier employed. Considering the whole of the evidence, I am of opinion that "Metrecal" is a foodstuff in its various forms and that each of those forms falls within one of the categories in Schedule III of the *Excise Tax Act*—that is, that "Metrecal" in the form of soup is listed

in the said Schedule III under "soups", that "Metrecal" biscuits are listed there under "biscuits", that "Metrecal" powder is listed there under "bases or concentrates for making food beverages", and that "Metrecal" in liquid form is listed there under "drinks prepared from milk or eggs".

I am also of opinion that "Metrecal" in all its forms is not a pharmaceutical within the meaning of s. 2(1)(*cc*) of the *Excise Tax Act*. It is true that the findings made by the Tariff Board in its declaration of February 25, 1963 have a basis by employing the words in one sense adduced in evidence at this hearing. Those findings were:

> The Metrecal label stresses a "dietary plan for weight control". It is clear from the evidence that the words "weight control" mean the control of excessive weight. The labels on Metrecal packages and the advertising by the applicant advise consumers of Metrecal to consult physicians on weight control.
>
> Metrecal is designed for human consumption, without other food, over a period, for the purpose of reducing or preventing excessive weight.
>
> It is undisputed in the evidence that overweight in man is an abnormal physical state.

I am not prepared to concur that these findings lead to the conclusions found by the Tariff Board.

Following on those findings of fact the Tariff Board concluded that:

> Section 2(1)(*cc*) of the Act is very broad in its application, but is binding in the determination of what a pharmaceutical is within the meaning of the Excise Tax Act; from the evidence it is clear that Metrecal was "sold or represented" by the applicant "for use in the...treatment, mitigation, or prevention of...abnormal physical state...in man".

The words employed by the Tariff Board in its declaration, namely, "for use in the...treatment, mitigation, or prevention of...abnormal physical state...in man", in reference to the merchandising language and techniques used by the defendant in selling its product "Metrecal" in its various forms, are a literal quotation from s. 2(1)(*cc*) of the *Excise Tax Act*. This results in a completely erroneous concept of what the product is. In the evidence reference was made by one of the witnesses, Dr. le Riche, to the meaning of "abnormal physical state" from a medical point of view. Apparently the term is difficult to define, but Dr. le Riche, who was the only physician called, said in essence that a medical person would consider it to mean a disease. In my respectful opinion it is a wrong interpretation of the statute to employ the words in the manner in which the Tariff Board employed them in its decision, and I disagree

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with the conclusion reached by employing those words in that literal fashion.

The evidence was clear that the defendant recommends that its various forms of "Metrecal" be taken in doses which result in a person's consuming about 900 calories daily. The evidence of Dr. le Riche was that a person who ate every day food containing only 900 calories would lose weight, so there is no miracle attached to a particular product which makes it a pharmaceutical by reason of the fact that the quantity or amount recommended for daily consumption contains only 900 calories.

The evidence of the defendant's witnesses also was that "Metrecal" is in essence vitamins and minerals, with a carrier. The vitamins and minerals contained in this product are, according to the evidence, contained also in some proportion in some foodstuffs. The evidence also is that "Sustagen" is a very closely related product, but has no soy content and no flavour. This latter product was used in the treatment of infants and old people.

Obviously the defendant hit upon a very economic product and entered upon a merchandising technique that resulted in a substantial mark-up over competitive and noncompetitive food products. The fact is, as everyone knows, that the word "diet" on the label of any particular food product facilitates merchandising of the product at a substantial mark-up over what could be obtained if the product were marketed as a non-diet food.

In any event, however, irrespective of whether the various forms of "Metrecal" are pharmaceuticals, the fact that they are also foodstuffs within Schedule III of the *Excise Tax Act* in my opinion exempts them from sales tax. It is my respectful opinion that, on a true interpretation of the Act, once it is found that an article is a foodstuff, then in order for it not to be exempt from taxation by reason of its being a pharmaceutical also there would have to be in Schedule III or elsewhere in the Act clear words denying the article exemption from sales tax by the employment of such words as "other than a pharmaceutical", as was done in the case of farm and forest products listed in Schedule III.

In the result, therefore, the action is dismissed with costs.