BETWEEN:

ACCESSORIES MACHINERY LIMITED APPELLANT;

AND

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

1955
Oct. 13
1956
Mar. 6

Revenue—Customs and Excise—Electric motor imported as replacement for electric shovel—Whether dutiable under tariff item 445g: "electric motors and complete parts thereof, n.o.p." or item 427a: "All machinery composed wholly or in part of iron or steel, n.o.p., and complete parts thereof"—Customs Tariff Act, R.S.C. 1952, c. 60, Schedule "A", Tariff items 427a, 445g—Customs Act, R.S.C. 1952, c. 58, ss. 44, 45.

The appellant imported from the United States a motor as a replacement to be installed in an electric shovel. The appraiser classified the motor under tariff item 445*g*: "Electric motors and complete parts thereof, n.o.p.". The appellant contending it was classifiable under tariff item 427*a*: "All machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof", requested a review by the Deputy Minister who upheld the appraiser. The Tariff Board unanimously dismissed an appeal to it and the present appeal, by leave granted under s. 45 of the *Customs Act*, is on the question of

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law: "Did the Tariff Board err as a matter of law in deciding that a part, namely a 125 h.p. open ball bearing vertical shaft motor for P & H Model 1,500 5-cubic yard electric shovel is dutiable under Tariff item 445*g* rather than Tariff Item 427*a*?"

It was agreed on appeal that the motor was imported for the purpose of installing it as a replacement motor in an electric shovel and that the electric shovel (in which the imported motor was to be installed) as a complete unit would have been classifiable under item 427*a* and the appellant conceded that if the phrase "not otherwise provided for" did not appear in item 445*g* it would have been properly classifiable under that item but it contended that while the imported article was an electric motor, item 445*g* refers only to motors "not otherwise provided for" and that the motor as part of an electric shovel was otherwise provided for, namely as part of an electric shovel, and therefore within the ambit of "complete parts of the foregoing" in item 427*a* and that the Tariff Board has misinterpreted the meaning of the phrase by giving it an unwarranted and limiting effect.

Held: That the appeal being on a question of law only, the issue was not whether the motor was properly classifiable under Item 445*g* but whether the Board erred as a matter of law in deciding that it was. *Deputy Minister of National Revenue for Customs and Excise* v. *Parke Davis & Co.* [1954] Ex. C.R. 1 at 20.

2. That there was material before the Board from which it could reasonably decide, and it was within its powers to decide as it did, that as Parliament had seen fit to establish an *eo nomine* classification for electric motors it must have intended to classify such articles in a special category separate and apart from the general and residuary items of machinery or parts thereof in tariff item 427*a*.

APPEAL under the *Customs Act* from a decision of the Tariff Board. The Canadian Electrical Manufacturers' Association at the hearing of the appeal was added as a party respondent.

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

G. F. Henderson, Q.C. for the appellant.

K. E. Eaton for the Deputy Minister of National Revenue.

F. R. Hume, Q.C. for Canadian Electrical Manufacturers' Association.

CAMERON J. now (March 6, 1956) delivered the following judgment:

This is an appeal from a declaration of the Tariff Board, brought under the provisions of s. 45 of the *Customs Act*, R.S.C. 1952, c. 58. It relates to an importation by the appellant of a 125 h.p. open ball bearing vertical shaft

motor for P & H Model 1500, 5-cubic yard Electric Shovel, imported from Milwaukee, U.S.A., under Montreal Customs Entry No. 121526-C on February 3, 1954.

The appraiser classified the motor under Tariff Item 445*g* which reads as follows:

Electric motors, and complete parts thereof, n.o.p. . . .

The appellant, being of the opinion that the motor should have been classified under Tariff Item 427*a*, requested the Deputy Minister to review the appraiser's classification. That item is as follows:

427*a*. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

* * *

The Deputy Minister on August 10, 1954, made his finding as follows:

The electric motor, is, in my opinion, more specifically provided for in Tariff Item 445*g* than as "complete parts" under Tariff Item 427*a*, and the departmental ruling is hereby confirmed.

From that decision an appeal was taken to the Tariff Board. By its declaration of March 1, 1955, the Board unanimously dismissed the appeal. Leave to appeal to this Court was granted by Fournier J. on June 27, 1955, on the following question of law:

Did the Tariff Board err as a matter of law in deciding that a part, namely, a 125 h.p. open ball bearing vertical shaft motor, for P & H Model 1500 5-cubic yard Electric Shovel, imported under Montreal Customs Entry No. 121526-C, February 3, 1954, is dutiable under tariff item 445*g*, rather than tariff item 427*a*?

At the hearing of this appeal, I added the Canadian Electrical Manufacturers' Association as a party respondent. That association was represented at the hearing before the Tariff Board but due to an inadvertence was not added as a party in the Notice of Appeal. It is entitled by virtue of s-ss. (1) and (2) of s. 45 of the *Customs Act* to appear on this appeal, and with the consent of its counsel and all parties, it was made a party respondent.

It is not in dispute that the motor in issue was imported for the purpose of installing it as a replacement motor in an electric shovel. It is agreed also that the electric shovel (in which the imported motor was to be installed) as a complete unit would have been classifiable under Item 427*a*.

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The contention of the appellant is that while the imported article is an electric motor, Item 445*g* refers only to motors "not otherwise provided for"; that the motor as part of an electric shovel is otherwise provided for, namely, as a part of an electric shovel, and therefore within the ambit of "complete parts of the foregoing" in Item 427*a*.

The decision of the Board is stated as follows:

> It is the opinion of the Board that the contention of the appellant as to the influence of the "n.o.p." in item 427*a* is correct: The "not otherwise provided for" does *not* apply to that portion of the item which follows the semicolon and which reads: "complete parts of the foregoing." Further, it is our opinion that a "part" (incontrovertibly recognizable as such) of or for a machine, which machine itself is classifiable under item 427*a*, would qualify for the benefits of the item whether or not such part is of a class or kind not made in Canada.
>
> Electric motors are in their very nature generally intended to be incorporated in or attached to machinery or equipment. They would, therefore, unless elsewhere provided for, be considered to be parts for such machinery.
>
> However, since the legislators have provided for electric motors, *eo nomine*, in tariff item 445*g*, we must conclude that this classification is intended to override any "basket" provision such as "parts" in tariff item 427*a*; otherwise, tariff item 445*g* is virtually ineffective. As regards the "n.o.p." provision in tariff item 445*g*, that must be deemed to exclude from that item such electric motors as are elsewhere provided for as *motors*. It is conceivable that there might come into being an electric motor of such unique shape or design as to make it, for tariff purposes, more specifically a *part* of a particular machine than an electric motor, n.o.p., but exceptional instances of this nature do not, in our opinion, override the general proposition above: that item 445*g* covers all electric motors not elsewhere specifically provided for *as motors*.
>
> Accordingly, the Appeal is dismissed.

It is conceded by the appellant that if the phrase "not otherwise provided for" did not appear in Item 445*g*, the imported motor would have been properly classifiable under that item. The submission, however, is that the Board misinterpreted the meaning of the phrase by giving it an unwarranted and limiting effect. The submission is based on the wording used in the decision, namely, "as regards the 'n.o.p.' provision in Item 445*g*, that must be deemed to exclude from that item such electric motors as are elsewhere provided for *as motors*. . . . That Item 445*g* covers all electric motors not elsewhere specifically provided for *as motors*." It is argued that by their decision they have interpreted Item 445*g* as if it read: "Electric motors, and complete parts thereof, not otherwise provided for *as*

motors." The addition of the words "as motors" is said to be unwarranted and erroneous. It is also said that the declaration of the Board has the effect of eliminating the phrase "n.o.p." entirely from Item 445*g*.

The declaration of the Board in this case follows that made by it on July 6, 1953 (A-269) on a reference by the Deputy Minister under s. 51 of the former *Customs Act*. It appears from that declaration that prior thereto it had been the rather general practice of the Customs authorities for duty purposes to segregate electric motors (other than built-in motors) entering Canada as components of (or in connection with) machines and machinery. The opinion of the majority of the Board in that case was that such machines as constituted single physical units are dutiable as entireties without segregation of the motor component, whether such motor was "built-in" or "attached." All the members of the Board were in agreement with the final clause of that opinion, namely:

> This is not, of course, to suggest that motors imported separately for repair or replacement for such machines would be dutiable other than under the tariff item appropriate to the motor, as such.

The declaration of the Board in the instant case follows logically from that expressed in the last clause which I have just quoted.

What then did the Board mean when it stated that in interpreting the provisions of Item 445*g*, the "n.o.p." must be deemed "to exclude from that item such electric motors as are elsewhere provided for *as motors*". Did it mean that the "n.o.p." provision in that item would be effective only in cases in which other tariff items used the specific words "electric motors", as suggested by counsel for the appellant? If that were so, I would be inclined to agree with him that its use of the words "as motors" would result in drastically limiting the effects of the phrase "not otherwise provided for". It was stated in argument that other than in Item 445*g*, the specific words "electric motors" appear in but one tariff item.

In my opinion, however, that is not the proper meaning to attribute to the Board's use of "as motors". The Board, with a full knowledge of the details of the Customs Tariff, would not have been likely to reach any such conclusion. It seems to me that when one considers the nature of the

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problem before the Board, the evidence adduced, the arguments submitted to them, and their declaration as a whole, that they meant something quite different than the interpretation above suggested.

The issue before the Board was, as stated at the outset of its declaration, to be, "Is the replacement motor imported for installation in an electric shovel, a part of the shovel, or an electric motor 'n.o.p.'?" In answering that question, the Board was required to consider the provisions of both Tariff Items 445*g* and 427*a*. As the imported article was an electric motor and as an *eo nomine* classification was provided for "electric motors" in Item 445*g*, it was logical for them to conclude that the imported article, *prima facie* at least, would be properly classifiable under that item. The next step to be taken was to determine the effect of the addition thereto of "n.o.p." and to determine whether elsewhere in the tariff electric motors were otherwise provided for. That involved, in this case, a direct reference only to Item 427*a*.

In considering the provisions of Item 427*a* and as noted above, the Board came to the conclusion that the "n.o.p." therein did not apply to "complete parts of the foregoing" and "that a 'part' (incontrovertibly recognizable as such) of or for a machine, which machine itself is classifiable under Item 427*a*, would qualify for the benefits of the item whether or not such part is of a class or kind not made in Canada." Had their conclusion been otherwise on this point, it is clear that the imported electric motor would have been classifiable only under Item 445*g* as electric motors are named therein and are manufactured in Canada.

The Board was also aware that in its declaration dated July 6, 1953 (A-269), it had stated in its majority decision that such machines as constitute single physical units are dutiable as entities without segregation of the motor component. It knew, therefore, that had the imported electric motor been imported with and as a part of the electric shovel, the entire entity would have been classifiable under Item 427*a*.

Evidence was submitted to the Board that electric motors are in their very nature generally intended to be incorporated in or attached to machinery or equipment. The

Board found that to be the fact and so stated in its declaration. Notwithstanding the argument of counsel for the appellant that that is not always the case, I am not at liberty in this appeal to disturb any findings of fact made by the Board. It was that finding of fact which led to its conclusion that a declaration that the electric motor was classifiable as a "part" of machinery under Item 427*a* would have made Item 445*g* virtually ineffective.

The Board also considered the nature of the tariff items in question. It will be noted that in Item 445*g* electric motors are classified *eo nomine;* the term is clear and quite unambiguous. Moreover, it is not subject to any qualifications such as "of a class or kind not made in Canada". It covers all electric motors of every sort and kind "n.o.p.". On the other hand, Item 427*a* is a "basket" or residual item intended to bring within its reach all machinery composed wholly or in part of iron or steel not otherwise provided for. The Customs Tariff includes a great number of pieces of machinery referred to *eo nomine* or by reference to their "end-use", but quite obviously it would be impossible to specify with particularity each individual item of machinery by name or by end-use. It was therefore necessary to use this type of "basket" item (and also Item 427) so as to include all machines not elsewhere provided for.

It is clear from the Board's decision that in solving this problem it came to the conclusion that Parliament in setting up a tariff item for "electric motors"—which are machines in themselves—dealt with them in a specific way by giving them an *eo nomine* classification, thereby removing them from the more general and unspecific designation of "all machinery . . . n.o.p., and complete parts of the foregoing".

Weighing the specificity of the words "electric motors" in Item 445*g* against the very general nature of the words "all machinery . . . and complete parts of the foregoing" found in Item 427*a*, the Board concluded that the *eo nomine* classification in the former was intended to override a "basket" or "catch-all" provision such as "all machinery . . . and 'parts'." In my opinion the Board, in interpreting the effect to be given to "n.o.p." in Item 445*g*, came to the conclusion that "electric motors" would not by reason of

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the "n.o.p." be excluded from the specific classification of "electric motors" unless in other items of the tariff such words were used as would clearly indicate that electric motors—that is, machinery providing motion—were included therein. That, of course, could be done by the use of the specific words "electric motors" as in Item 409*q*(2); or by such words as "including motive power" as in Item 410*a*(ii). In the Board's opinion there was nothing in the words "parts of the foregoing" in Item 427*a* which in any way pointed directly to "electric motors"; the word "parts" was therefore inadequate to destroy or overcome the *eo nomine* classification that Parliament had seen fit to confer on "electric motors". That interpretation of the Board's use of "as motors" accorded with the submissions made by counsel for the Minister before it, and reading the declaration as a whole, I think that is what they intended.

Counsel for the appellant, however, submits that if the Board's declaration be interpreted in that manner, the result would be that in certain "end use" items where neither "electric motors", "motive power", nor words of similar import are used—but in which it is clear that *all* the specified machinery is to be put to the named "end use" —electric motors will be excluded. He referred to the case of *General Supply Company of Canada* v. *Deputy Minister of National Revenue, Customs and Excise* (1), in which I decided that the "n.o.p." in the item there referred to was apt to exclude therefrom not only an *eo nomine* classification, but also "end use" items as well. If the declaration in the instant case was intended to exclude all "end use" items, I would be inclined to think that the Board had placed too limited a meaning on "n.o.p." in Item 445*g*. I do not think it necessary, however, to consider that point as it was not directly before the Board and need not be determined in this case. The expression "end use" item is not defined in the Act but as I understand it, it refers to certain tariff items in which special treatment is given to imported goods because of the industry or activity in which they will be used—such as logging, farming and the like. Item 427*a* is not an "end use" item in the sense that I understand that expression; it is rather a "catch-all" or

(1) [1954] Ex. C.R. 340 at 347.

"basket" item, there being no reference therein to the ultimate use to which the "machinery" will be put.

After considering with great care the argument submitted by Mr. Henderson, counsel for the appellant, I am unable to reach the conclusion that the Board was in error in deciding as it did, namely, that the electric motor imported should be classified as dutiable under Tariff Item 445*g*.

In considering an appeal to this Court from a declaration of the Tariff Board, it is always necessary to keep in mind the distinction between the duties cast on the Board in deciding which item of the tariff is applicable to the goods imported, and those placed on this Court when hearing an appeal from such a declaration. The distinction was noted by the President of this Court in *Deputy Minister of National Revenue for Customs and Excise* v. *Parke Davis & Co. Ltd.* (1). The appeal to this Court being on a question of law only, the issue is not whether the imported motor was properly classifiable under item 445*g*, but whether the Board erred as a matter of law in deciding that it was. As stated in the *Parke Davis* case, "If there was material before the Board from which it could reasonably decide as it did, this Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it."

In my opinion there was material before the Board from which it could reasonably have decided as it did. It attributed special weight to the fact that Parliament had seen fit to establish an *eo nomine* classification for "electric motors" and reached the conclusion that Parliament must therefore have intended to classify such articles in a special category, separate and apart from the general and residuary items of machinery or parts therefor in Item 427*a*. In a somewhat difficult problem, the Board was endeavouring to ascertain from the words used in the Customs Tariff what was the true intent of the items, as they were required to do by s. 2(2) of the *Customs Act*, R.S.C. 1952, c. 58, which is as follows:

2(2). All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

(1) [1954] Ex. C.R. 1 at 20.

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It seems to me that it was within their powers to determine on the material before them that the attainment of the purpose for which a special tariff item relating to electric motors was established and the protection of the revenue would be best ensured by deciding as they did. To interpret the limiting provisions of the "n.o.p." in Item 445*g*, as I think they have done, has the result of retaining the effectiveness of that item instead of rendering it "virtually ineffective" as the Board stated would have been the case had it decided otherwise. Its interpretation of the "n.o.p." in that item does not result in eliminating it from the item itself, as suggested by counsel for the appellant, but allows it to be effective in cases where, in other items, it is clear that electric motors are intended to be included. Examples of the former may be found in Item 409*q*(2)—"Electric motors incorporated in or attached to . . . agricultural implements or agricultural machinery"—and in Item 410*a*(ii)—"Trucks or tractors, self-propelled, mounted on wheels or endless tracks, including *motive power* . . ."

A further argument was submitted to the Board by counsel for the Minister, namely, that the electric motor which was imported was by itself "Machinery, composed wholly or in part of iron or steel;" and since electric motors were provided for *eo nomine* in Item 445*g*, the presence of the "n.o.p." provisions in Item 427*a* excluded the motor from the latter item. The Board did not refer to that submission in its declaration and I do not know, therefore, what weight, if any, it placed thereon. A similar argument was submitted to me on the appeal.

There is perhaps much to be said in favour of that submission. Electric motors are undoubtedly "machinery composed wholly or in part of iron or steel" and are manufactured in Canada. The Board might perhaps have reached the same conclusion on the basis of that submission, but in view of my finding on the main point in dispute, I do not find it necessary to consider it or the other submissions made by counsel for the Minister.

For these reasons my answer to the question of law submitted is "No". The appeal therefore fails and will be dismissed.

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There remains only the question of costs. In accordance with the principles established by the President of this Court in *The Goodyear Tire and Rubber Co. of Canada Ltd., et al.* v. *The T. Eaton Co. Ltd., et al.* (1), the appellant will be required to pay only one set of costs, namely, those of the Deputy Minister, counsel for whom had the main conduct of the case against the appellant. The other respondent will pay its own costs.

Judgment accordingly.