

BETWEEN :

HER MAJESTY THE QUEEN PLAINTIFF;

AND

O-PEE-CHEE COMPANY LIMITED DEFENDANT.

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Revenue—Excise Tax—The Excise Tax Act, R.S.C. 1952, c. 100, s. 22(b), s. 23, Schedule I, para. 16, s. 30, s. 38, s. 50—“Sale Price”—Imposition of tax on manufacture of chewing gum in Canada does not include a tax on the wrapper, labels, packages or other material accompanying the chewing gum when sold—“Incorporated into and form a constituent or component part” of an article or product—Wrappers and other materials do not form constituent or component parts of main article or product—Defendant liable for tax on chewing gum only.

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Defendant manufactures, produces and sells in Canada several kinds of popcorn and chewing gum. It sold large quantities of gum in individual packages each of which contained a small slab of gum wrapped in waxed paper and a card bearing a picture of some individual, fictional or historical, an aeroplane or something of interest to children. The gum so sold was manufactured or produced in Canada by the defendant. It did not manufacture the individual wax paper wrapper, the picture cards, the outside individual wrappers and the display boxes containing the individual pieces of gum. The picture cards and some outside wrappers of the individual pieces of chewing gum were purchased in and imported from the United States of America.

The Excise Tax Act, R.S.C. 1952, c. 100, s. 23, Schedule I, para. 16, imposes a tax on "candy, chocolate, chewing gum . . .". The action is brought to recover the tax so imposed from defendant as the manufacturer or producer in Canada of chewing gum during the period of time set forth in the information.

During the period in question defendant deducted from the face value of its sales of chewing gum the cost of the picture cards and paid the excise tax on the cost of the gum only. Plaintiff contends that defendant is liable for excise tax on the total cost of each sale which includes the wrappers, picture cards, display boxes and sealing tape used thereon as well as the cost of the chewing gum.

Held: That the general words in s. 22(b)(ii) of the Act should be construed as being limited to the actual object of the Act which here is the imposition of a tax on chewing gum manufactured or produced in Canada.

2. That the wrappers, picture and other materials sold with the chewing gum were not incorporated into and did not form constituent or component parts of the main article or product, namely the chewing gum.
3. That the defendant is liable for excise tax on the cost of the chewing gum only.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover excise tax from the defendant.

The action was tried before the Honourable Mr. Justice Potter at London.

M. Lerner for plaintiff.

M. J. Grant, Q.C. for defendant.

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

POTTER J. now (January 16, 1954) delivered the following judgment:

This is a proceeding by way of information within section 30 of The Exchequer Court Act, chapter 34 of the R.S.C. 1927, as amended, now section 29 of chapter 98 of the R.S.C. 1952, brought in accordance with the provisions of section 108 of The Excise Tax Act, chapter 179 of the

R.S.C. 1927, as amended, now section 50 of chapter 100 of the R.S.C. 1952, to recover from the defendant corporation the sum of \$2,261.77 for which it is alleged to be liable under section 80 of the said Act of 1927, as amended, now section 23 of The Excise Tax Act, chapter 100 of the R.S.C. 1952, as the manufacturer or producer in Canada of chewing gum in the period from December 5, 1951, to May 31, 1952, both dates inclusive; for penalties to the 31st day of March, 1953, amounting to \$163.13, and additional penalties or interest to the date of judgment.

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Section 7 of chapter 67 of the Statutes of Canada, 1948, an Act respecting the Revised Statutes of Canada, provides in effect that certain statutes shall stand and be repealed on from and after the day on which the said Revised Statutes come into force and section 9 of the said chapter 67 provides in effect that all proceedings under statutes in force before the effective date of the said Revised Statutes may and shall be continued under the said Revised Statutes as if no such repeal had taken place.

The Revised Statutes of Canada, 1952, were by Statutory Order and Regulation 53-286 dated the 2nd day of July, 1953, declared in force on from and after the 15th day of September, 1953, and this proceeding, which was commenced before that date is continued under the relevant provisions of the Revised Statutes of Canada, 1952.

The testimony of the General Manager and of the Secretary-Treasurer of the defendant corporation was to the effect that as part of its business, it manufactures or produces and sells several kinds of popcorn and chewing gum.

According to Exhibit "1", filed on behalf of the plaintiff, and which was prepared by an Inspector under The Excise Tax Act, the excise tax of fifteen per cent on sales of chewing gum during the said period, payable under paragraph 16 of Schedule I to The Excise Tax Act, section 80 of chapter 179 of the R.S.C. 1927, now section 23 of chapter 100 of the R.S.C. 1952, was \$27,116.03, on which the defendant corporation had paid \$24,854.26, leaving a balance of \$2,261.77, the amount claimed as excise tax in this proceeding.

Counsel for the Crown frankly stated that the defendant corporation's omission to pay the amount claimed was not a fraudulent attempt to evade payment of taxes for which

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it was lawfully liable but that it contended that it was not, according to its interpretation of the Statute, liable to pay the same.

Counsel for the defendant corporation stated that it had made an honest attempt to meet the requirements of the statute, and what were understood by its officers to be rulings of the Department administering the same.

The relevant parts of section 80 of chapter 179 of the R.S.C. 1927, as amended to and including chapter 27 of the Statutes of Canada, 1952, and paragraph 16 of Schedule I thereto are as follows:—

80. (1) Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other Statute or law, an excise tax in respect of goods mentioned

(a) In Schedule I, at the rate set opposite to each item in the said Schedule computed on the duty paid value or the sale price, as the case may be;

(b) . . .

2. Where the goods are imported, such excise tax shall be paid by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption, and where the goods are manufactured or produced and sold in Canada, such excise tax shall be paid by the manufacturer or producer at the time of delivery of such goods to the purchaser thereof.

3. The tax imposed by this section or by section eighty-three is not payable in the case of goods that are purchased or imported by a manufacturer licensed under this Part or under section one hundred and thirty of The Excise Act, 1934, and that are to be incorporated into and form a constituent or component part of an article or product that is subject to an excise tax under this Part or to an excise duty under The Excise Act, 1934.

SCHEDULE I

16. Candy, chocolate, chewing gum and confectionary that may be classed as candy or a substitute for candy . . . fifteen per cent.

Section 23 of The Excise Tax Act, chapter 100 of the R.S.C. 1952, and paragraph 16 of Schedule I thereto, are to the same effect.

The defendant corporation during the period in question sold, in wholesale lots, boxes containing several hundred individual packages of chewing gum. Each individual package contained or was made up of a small slab of gum, wrapped in waxed paper, a card bearing a picture of some

individual, fictional or historical, an aeroplane or something of interest to children. Some of the cards carried numbers indicating that they were parts of sets to induce the purchasers to make enough purchases to complete the same.

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The defendant corporation manufactured or produced in Canada the chewing gum contained in the said packages, but did not manufacture the individual wax paper wrappers, the picture cards, the outside individual wrappers, the "display boxes" containing the individual pieces of gum, etc.; the picture cards and some outside wrappers of the individual pieces of chewing gum being purchased in and imported from the United States of America.

It is not disputed that during the period in question the defendant corporation deducted from the face values of its sales of chewing gum the cost of the picture cards and paid the excise tax of fifteen per cent on the cost of the chewing gum alone.

The plaintiff contended that excise tax was payable on the total cost of each sale, i.e. on the cost of the wrappers, picture cards, "display boxes" and the sealing tape used thereon, as well as on the cost of the chewing gum, and in support of such contention relied on certain sections of The Excise Tax Act, including section 80 of chapter 179 of the R.S.C. 1927, as amended, now section 23 of chapter 100 of the R.S.C. 1952, already quoted, and in particular, section 79(b) of said chapter 179, now section 22(b) of chapter 100, R.S.C. 1952, which defines "sale price" and which is in part as follows:—

79. In this Part,

(b) 'sale price,' for the purpose of determining the excise tax payable under this Part, means the aggregate of

- (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto
- (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price (whether payable at the same or some other time) including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter,

The plaintiff suggested that in reading section 22(b)(ii), only the following words should be considered, viz. "any amount that the purchaser is liable to pay to the vendor by

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reason of or in respect of the sale"—“or any other matter.” He urged that the use of the words “without limiting the generality of the foregoing” removes the words “any other matter” from the operation of the *ejusdem generis* rule.

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“Sale price” is however determined in one case (ss(b)(i)) by taking the amount charged as price, and in the other, (ss(b)(ii)) by taking the amount charged as price plus those named charges which are added to the same. To accept this argument of the plaintiff would be to render meaningless section 22(b)(i).

Furthermore, the words used in section 22(b)(ii) indicate the intention to include in the sale price, the amount charged as price for the article or material upon which tax is imposed, and in addition thereto, any other specific amounts which the purchaser renders himself liable to pay concurrently with the sale or at some future time or to some third party.

The general words contained in section 22(b)(ii), though wide and comprehensive in their literal sense, should be construed as being limited to the actual object of the Act, which, in the case under consideration, is the imposition of a tax on chewing gum, manufactured or produced in Canada.

If Parliament had intended to impose a tax on the wrappers, labels, packages and other material accompanying chewing gum when sold by the manufacturer or producer, appropriate provisions could have been enacted.

The plaintiff also relied on the provisions of section 80.3, now section 23(3) of chapter 100, R.S.C. 1952, quoted above, and in particular, the words “that are to be incorporated into and form a constituent or component part of an article or product that is subject to excise tax under this Part” and in support of this contention adduced evidence to prove that the defendant corporation had not paid excise tax on the wax paper wrapper which had been purchased in Canada, the picture card and in some cases the outside wrapper of the individual piece of gum which had been imported from the United States, and further contended that all these articles were incorporated into and formed constituents or component parts of the main article or product, viz.—the chewing gum, which is subject to an excise tax under Schedule I, paragraph 16 to the Act.

The plaintiff also relied on paragraph 1 of the regulations pertaining to Part 13 of The Excise Tax Act with regard to Certificates of Exemption and quoted the same as follows:—

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1. CERTIFICATES OF EXEMPTION Licensed Manufacturers:—

(a) A licensed manufacturer, when purchasing or importing goods which cannot be used in, wrought into, or attached to articles to be manufactured or produced for sale, shall not quote his licence number nor give the certificate on the order or entry. On purchases or importations of goods which can be used in, wrought into, or attached to taxable goods for sale, a licensed manufacturer shall quote his licence number and give the certificate on the order or entry. The certificate to be given by a licensed manufacturer is to be in the following general form:—

I/We certify that the goods ordered/imported hereby are to be used in, wrought into, or attached to taxable goods for sale,

Licence No. (Name of Purchaser).

The plaintiff produced and showed to the Secretary-Treasurer of the defendant corporation as Exhibits "4" and "5", dated March 7 and March 31, 1952, respectively, on which the Secretary-Treasurer of the company admitted the following certificates had been endorsed, "We hereby certify that the goods covered by this entry are to be used in, wrought into, or attached to taxable articles for sale. Sales Tax Licence No. 169." Exhibit "4" was a customs entry for home consumption for 62 packages of "Frank Buck" animal insert cards, printed matter, of a value for duty of \$890, and Exhibit "5" was a customs entry for home consumption of 156 packages of "Hopalong Cassidy" coloured cards, printed matter, and "Hopalong Cassidy" wraps, printed or partly printed having a value for duty of \$1,934. Both these shipments had been purchased from Topps Chewing Gum Incorporated in the United States of America and the defendant corporation had used its sales tax licence no. 169 and was relieved from the payment of sales tax on the same by virtue of the certificates endorsed on the entries.

Section 99 of chapter 179 of the R.S.C. 1927, as amended, is as follows:—

99. (1) The Minister of Finance or the Minister of National Revenue, as the case may be, may make such regulations as he deems necessary or advisable for carrying out the provisions of this Act.

Section 38 of chapter 100 of the R.S.C. 1952, is to the same effect.

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86. (1) There shall be imposed, levied and collected a consumption or sales tax of ten per cent on the sale price of all goods

(a) produced or manufactured in Canada, etc. etc.

2. Notwithstanding anything contained in the preceding subsection, the consumption or sales tax shall not be payable on goods

(c) imported by a licensed manufacturer if the goods are partly manufactured goods.

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Section 30(2)(b) of chapter 100 of the R.S.C. 1952, with some alterations is to the same effect.

Counsel for the plaintiff submitted that the defendant corporation by having used its sales tax licence and endorsed the certificates quoted on the entries for home consumption, Exhibits "4" and "5", is now stopped from contending that the wrappers, the picture cards and the outside wrappers were not wrought into or attached to taxable goods for sale, viz.—the actual chewing gum and that in any event, these articles formed constituents or component parts of the chewing gum.

It is evident that these articles were not used in or wrought into the chewing gum.

If, by being included in, or forming part of the same package as the chewing gum they were "attached" to it within the meaning applied by the plaintiff to that word in the regulation, it might be necessary to decide whether so much of the regulation is authorized by the statute. It is, however, clear from what is hereinafter stated that purchased or imported goods can be attached to articles to be manufactured or produced in such a manner as to be constituents or component parts of the same and that the regulations relative thereto are therefore authorized as being necessary or advisable for carrying out the provisions of the Act.

The law of estoppel is a branch of the law of evidence, and has been defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Halsbury's Laws of England, Volume 13, page 398.

The liability of the articles in question to sales tax is not before this Court, and the acts of the defendant corporation in connection with the importation of the same are not relevant to the interpretation and application of the statute to the issues raised in this proceeding.

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It is important to ascertain the meanings to be given to the words "form a constituent or component part." It is not clear whether these words mean "a constituent part or a component part" or a "constituent" or "component part."

It is for the Court to interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find including of course the consultation of standard authors and references to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found. Per Cozens-Hardy, M.R. in *Camden v. Inland Revenue Commissioners* [1914] K.B. at pp. 647 and 648.

The Shorter Oxford English Dictionary has the following:—

Constituent: That constitutes a thing what it is. That jointly constitute or compose; component.

Component: Composing, making up, constituted. A constituent part or element.

Murray's English Dictionary, published in 1893 gives the following:—

Component: 2. A constituent element or part. Logically applicable only in plural to the whole of the elements or parts of a compound body; but in practice each element is called a component.

In the supplement to this dictionary, published in 1933, the following was added:—

Applied specially to the separate parts of motor cars and bicycles. Hence attributively and combined as component maker, component built.

Analytical chemistry has for its purpose the determination of the constituents of which a substance or mixture (or compound) is composed by methods which are qualitative when the identity only is ascertained or quantitative when the quantity or proportion is determined. *Encyclopaedia Britannica*, 1952 edition, volume 5, page 395.

The words "constituent" and "component" have special meanings in the science of chemistry and the following is taken from Hackh's *Chemical Dictionary*, 3rd Edition, 1944:—

Constituent (1) Any of the elements or parts of a compound (in contradistinction to the ingredients or components of a mixture). (2) Elements or compounds present in a system which are formed from the components thus in the system



there are three constituents (Ca CO₃, CaO and CO₂), but only two components, as any two substances will determine the amount of the third.

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Component: (1) An ingredient or part of a mixture (as distinct from the constituents of a compound). (2) The smallest number of chemical substances capable of forming all the constituents of a system in whatever proportion they may be present.

And the following is a definition of a compound:—

Compound. (a) A substance whose molecules consist of unlike atoms and whose constituents cannot be separated by physical means. A compound differs from a physical mixture by reason of the definite proportions of the constituent elements (a proportion which depends upon their atomic weights), by the disappearance of the properties of the constituent elements and the appearance of entirely new properties characteristic of the compound.

There was no evidence given by either party to assist the Court in determining whether the chewing gum in question was a compound or a mixture. The composition of the chewing gum was, however, given as—the gum base, sugar, glucose and flavour.

If the meanings to be attached to the words “constituent” and “component” are to be accepted as those given in the ordinary dictionaries of the English language, and in dictionaries of technical terms, as already quoted, it undoubtedly follows that the wax paper wrapper on the slab of gum itself, the picture card contained in the package and the outside wrapper, the display box in which the individual packages were packed, the corrugated shipping container and the sealing tape, were not constituent or component parts of the chewing gum itself, on which alone the Statute and Schedule thereto imposes an excise tax of fifteen per cent.

In *Poer v. Curry* (1), the Appellate Court of Alabama was required to deal with a somewhat similar problem, although other provisions of a taxing statute were considered. And it was held that a cap on bottled soft drink was not an ingredient or component part of the drink itself within statutes exempting from use tax a manufacturer purchasing at wholesale personalty becoming an ingredient or component part of manufacturer’s products.

Considerable correspondence passed between the defendant corporation and the Department which indicated an attempt by the defendant corporation to obtain a definite ruling and some difference of opinion, at least between the

(1) (1942) 8 So.2d. 418 at 421.

officials of the Department, and no definite ruling was made by the Department until its letter of December 5, 1951, which was marked Exhibit "S".

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The only question for this Court is whether the defendant corporation should have paid excise tax on the selling price or the prices of the packages of gum and their contents or on the chewing gum portion of the same only.

Statutes which impose pecuniary burdens are subject to a strict rule of construction:—

It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. Maxwell on Interpretation of Statutes, 10th edition, page 288.

The defendant corporation sold in its packaged goods chewing gum, which is liable to an excise tax of fifteen per cent, but the statute does not expressly or by implication impose a tax on the accompanying picture cards.

The action will therefore be dismissed with costs.

Judgment accordingly.