

BETWEEN:

ECONOMIC TRADING LTD. SUPPLIANT;

AND

HER MAJESTY THE QUEEN RESPONDENT.

Montreal
1968
Dec. 10-11

Customs duty—Imported goods in sufferance warehouse destroyed by fire after duty paid—Claim for refund of duty—Whether goods in “custody” of customs officers—Customs Act, R.S.C. 1952, c. 58, secs. 62, 68, 96(1).

Suppliant’s goods were brought into Canada by vessel and placed by the carrier in a sufferance warehouse operated by the carrier’s agent and were there destroyed by fire after being duly entered for customs and payment of duty and after the customs officers had formally indicated that they could be delivered to suppliant.

Held, dismissing a claim under s. 62 of the *Customs Act* for refund of the duty paid, the goods were not in the custody of the customs officers while in the warehouse, which was an essential condition to the application of s. 62. While the officers had free access etc to the warehouse under s. 62 and the goods were subject to their control under s. 96(1), these circumstances did not amount to custody of the goods.

PETITION OF RIGHT.

Irving J. Halperin for suppliant.

J. P. Fortin for respondent.

JACKETT P. (orally):—This is a petition of right for refund of Customs duty under section 62 of the *Customs Act*,¹ which reads as follows:

62. Upon production of satisfactory proof to the Minister of the actual injury or destruction, in whole or in part, of any goods by

¹ R.S.C. 1952, c. 58, s 62.

1968
 {
 ECONOMIC
 TRADING
 LTD.
 v.
 THE QUEEN
 Jackett P.
 —

accidental fire, or other casualty, while they remained in the custody of the officers in any Customs warehouse, or while in transportation in bond from one port of entry to another port of entry in Canada, or while within the limits of any port of entry and before they were landed under the supervision of the officers, the duties on the whole or the part thereof so proved to have been injured or destroyed may be abated or refunded, if the claim is made within thirty days after the date of the casualty, and due appraisal is made of the goods so alleged to be injured as soon as they can be examined.

With section 62, there should be read the following definitions in section 2 of the Act:

2. (1) In this Act, or in any other law relating to the Customs,
 * * *
- (f) "Customs warehouse" includes sufferance warehouse, bonding warehouse and examining warehouse;
 * * *
- (n) "officer" means a person employed in the administration or enforcement of this Act, and includes any member of the Royal Canadian Mounted Police;

It is common ground that the facts on which the suppliant relies satisfy all the factual conditions precedent to the application of section 62 except that it is not conceded by the respondent that the goods in question "remained in the custody of the officers" within the meaning of those words in that section. The other defence to the action relied on at trial is that section 62 confers a discretionary power on the Minister to abate or refund customs duty, but does not create a right in the importer to an abatement or refund.

The facts briefly are that the goods in question were taken off the vessel by which they were brought into Canada and were placed by the carrier in a sufferance warehouse operated by the carrier's agent. While there, they were destroyed by fire after they had been duly entered and customs duty had been paid on them and after the officers of customs had formally indicated that the goods could, as far as the *Customs Act* was concerned, be delivered to the suppliant.

Counsel for the suppliant has, I am satisfied, exhausted all possibilities on these facts of endeavouring to bring the matter within section 62. I do not propose to try to do justice to his argument, which involved a far reaching examination of the scheme of the *Customs Act*. I propose merely to indicate very briefly why I cannot come to a conclusion on the first point in favour of the suppliant.

1968
 }
 ECONOMIC
 TRADING
 LTD.
 v.
 THE QUEEN
 —
 Jackett P.
 —

There are four possibilities that have been envisaged as to the meaning of “custody of the officers” in section 62.

The first and most obvious one is the actual physical possession of the goods on behalf of the Department of National Revenue such as the officers would have if goods were taken to a customs warehouse under section 23(1). Clearly, the goods in question were never in such “custody”.

The second possible meaning of “custody of the officers” is the one that the officers seem to have had in mind when they refused the suppliant’s applications for refunds on a recital reading, “Entry being passed and released prior to fire”. This possibility is that the custody of the officers contemplated by section 62 is the restriction imposed by the *Customs Act* on the removal of the goods from either the ship, a customs warehouse, or other similar place, so long as duty is not paid or some acceptable arrangement for payment thereof has not been made, which restriction is, of course, policed by customs officers. I do not need to come to any conclusion as to whether this or some similar meaning is the correct view of the word “custody” in section 62 because any such restriction had been removed before the destruction of the goods by fire.

The third view is that the powers contained in section 68 of the *Customs Act* create a “custody” within the meaning of that word as used in section 62. Section 68 reads as follows:

68. The unshipping, carrying and landing of all goods and the taking of the same to and from a Customs warehouse or other proper place after landing shall be done in such manner and at such places as are appointed by the collector or other proper officer, and the collector or other proper officer shall at all times have free access to any warehouse wherein are stored goods subject to duty, and may, when requiring entrance in the performance of his duty, lawfully force or break any lock or other fastening placed upon any such warehouse, or upon or in any premises necessary to be passed through in order to obtain access to such warehouse.

Counsel for the suppliant argues that the power of appointing the manner and the places for the taking of goods “to and from” a customs warehouse, and the right of “free access” to a warehouse where goods are, constitutes a concurrent “custody” of the goods sufficient to satisfy the requirements of section 62. I do not accept this submission. It does not seem to me that a right to regulate the movement of goods or the place where they are to be moved or

1968
 ECONOMIC
 TRADING
 LTD.
 v.
 THE QUEEN
 JACKETT P.

the right of access to the place where they are can, by any stretch of the meaning of that word, be regarded as "custody" of such goods.

Finally, counsel for the suppliant argues that section 96(1) was applicable to the goods at the time of the fire and created a situation in which the customs officers must be regarded as having had custody for the purpose of section 62. Section 96(1) reads as follows:

96. (1) All the packages mentioned in any one entry, although some of such packages have been delivered to the importer, or some one on his behalf, are subject to the control of the Customs authorities of the port at which they are entered, until such of the packages as have been sent to the examining warehouse for examination have been duly opened and the contents examined and approved.

I do not express any opinion as to whether section 96(1) had any application to the goods in question at the relevant time. It is sufficient to say that, in my view, the fact that the goods were "subject" to control, if they were so subject to control, does not mean that there was an actual *de facto* "control" of the goods at the time, and, therefore, even if actual control as contemplated by section 96 would have been sufficient to satisfy section 62, a matter on which I express no opinion, it did not in fact exist.

I am, therefore, of the opinion that the suppliant has failed to show that the goods in question "remained in the custody of the officers" at the time that they were destroyed by fire and that the petition of right must be dismissed with costs.

While I do not, in the circumstances, have to say anything about the respondent's other defence, I should say, perhaps, that I would have had to be satisfied that the decisions following *Julius v. The Bishop of Oxford*² did not require, where the factual conditions precedent contemplated by section 62 were satisfied, that I imply a duty on the Minister to make the refund contemplated by that section.

² 5 A.C. 214.