[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT; PLAINTIFF,

AND

F. H. FAULDING AND CO. LIMITED . . RESPONDENT. DEFENDANT,

H. C. OF A. 1950.

ADELAIDE, *Oct.* 5, 6.

MELBOURNE, *Nov.* 2.

Latham C.J. Webb and Fullagar JJ.

Sales Tax (Cth.)—Exemption—Essences, concentrates and cordials, consisting wholly or principally of juices of Australian fruits, for the making of non-alcoholic beverages—"Consisting . . . principally of"—Test—Cordial containing less than 50 per cent of Australian fruit juice—Sales Tax (Exemptions and Classifications) Act 1935-1948 (*No.* 60 *of* 1935—*No.* 42 *of* 1948), *s.* 5, *First Schedule, item* 36 (3).

Item 36 (3) of the First Schedule to the *Sales Tax (Exemptions and Classifications) Act* 1935-1948, sets out the following as being exempt from sales tax: "Essences, concentrates and cordials, consisting wholly or principally of juices of Australian fruits, for the making of non-alcoholic beverages; non-alcoholic beverages consisting wholly of juices of Australian fruits."

Held, that the words "consisting . . . principally of," in item 36 (3), refer to quantity, expressed in terms of either volume or weight; and that, accordingly, cordials containing less than 50 per cent by volume or by weight of the juices of Australian fruits did not fall within the exemption.

Decision of *Rich* J. reversed.

APPEAL from *Rich* J.

The Federal Commissioner of Taxation claimed from F. H. Faulding and Co. Limited the sum of £17 18s. 4d., as sales tax payable under the provision of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942 in respect of 100 dozen bottles of "Lemon Squash Cordial" and 100 dozen bottles of "Raspberry Balm Cordial", sold by the company between 10th April 1946 and 30th June 1949. The company claimed that the goods were exempt from sales tax by virtue of the provisions of the *Sales Tax (Exemptions and Classifications) Act* 1935-1948, s. 5 and the First Schedule, item 36 (3), the text of which is set out in the headnote.

It was not disputed that the Lemon Squash Cordial and the Raspberry Balm Cordial were cordials for the making of non-alcoholic beverages; nor was it contended that they were non-alcoholic beverages consisting wholly of juices of Australian fruits. The evidence showed that the lemon squash cordial contained 29 per cent of juices of Australian fruits by volume and 26.4 per cent by weight and that the raspberry balm cordial contained 13.4 per cent of juices of Australian fruits by volume and 11.44 per cent by weight. The other main ingredients of each of the cordials were sugar and water.

Rich J. held that the words "consisting . . . principally of juices of Australian fruits" in item 36 (3) refer to that element in the cordial which gives it its distinctive quality, and, therefore, that each of the cordials fell within the exemption.

From this decision the Commissioner of Taxation appealed to the Full Court.

J. F. Brazel (with him *R. M. Napier*), for the appellant.

K. L. Ward K.C. (with him *J. J. Redman* and *G. M. Ward*), for the respondent.

Cur. adv. vult.

Nov. 2.

The following written judgments were delivered :—

LATHAM C.J. The question which arises upon this appeal from a decision of *Rich* J. is whether the respondent company, F. H. Faulding & Co. Ltd., is entitled to an exemption from sales tax under the First Schedule to the *Sales Tax (Exemptions and Classifications) Act* 1935-1948, item 36 (3). Under that item the following articles are exempt from sales tax under the relevant statute, namely, *Sales Tax Assessment Act (No.* 1) 1930-1942 :—

"(3) Essences, concentrates and cordials, consisting wholly or principally of juices of Australian fruits, for the making of non-alcoholic beverages; non-alcoholic beverages consisting wholly of juices of Australian fruits."

The Federal Commissioner of Taxation sued the respondent company for sales tax alleged to be due. The defendant admitted upon the pleadings that during the relevant year the company had manufactured and sold to persons not registered under the *Sales Tax Assessment Act* or to registered persons who did not quote their certificates of registration certain quantities of cordials, namely, lemon cordial and raspberry balm cordial. It was not contended that the latter part of the exemption applied; that is,

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it was not argued that the cordials were non-alcoholic beverages consisting wholly of juices of Australian fruits. It was not disputed that the liquids sold were cordials and, accordingly, questions as to the nature of a cordial such as were discussed in *Collins Arden Products, Ltd.* v. *Barking Corporation* (1) and *Broughton* v. *Whittaker* (2) did not arise for consideration. Nor was it disputed that the liquids were cordials for the making of non-alcoholic beverages or that they contained substantial quantities of juices of Australian fruits. They did not consist wholly of such juices. The only controversy was as to whether they consisted principally of juices of Australian fruits.

The evidence showed that there were various kinds of cordials, some of which were not fruit juice cordials, e.g., peppermint cordials, but that all fruit juice cordials consisted of water, sugar, and fruit juice, with generally some preservative. The evidence showed that the lemon cordial manufactured and sold by the defendant company contained 29 per cent of Australian fruit juice by volume, 26.4 per cent by weight, and that the raspberry balm cordial contained 13.4 per cent of Australian fruit juice by volume and 11.44 per cent by weight. Thus, according to any quantitative standard, the cordials did not consist principally of fruit juices of Australian fruits.

State legislation prescribes standards for fruit juice cordials which require a minimum quantity by weight of fruit juice in the case of orange, lemon, lime and raspberry cordials, varying from 12.5 per cent to 20 per cent, and of sugar varying from 25 per cent to 33 per cent. No evidence was given that any fruit juice cordial which was actually marketed contained more than 50 per cent of fruit juice, but the witnesses for the appellant conceded in evidence that they had heard of such cordials though they had not actually seen them or analysed them.

It is the fruit juice in a fruit juice cordial which gives it a distinctive quality. *Rich* J. held that the words "consisting . . . principally of juices of Australian fruits" refer to the characteristic feature of the cordial—to what his Honour described as the element giving it its name and nature, its essential properties.

The difficulty which this view meets is found in the words "consisting of". The reference is not to the principal characteristic of the cordial considered as a cordial, but to the content of the cordial. In the phrase "consisting wholly or principally of juice of Australian fruits" the word "wholly" necessarily requires the application of a quantitative standard. The word "principally"

(1) (1943) K.B. 419. (2) (1944) 60 T.L.R. 247.

must, in my opinion, be similarly construed. Words might have been used which would have given the exemption to any fruit juice cordial in which the whole or larger part of the fruit juice used was juice of Australian fruits. So also an exemption might have been given to all cordials in which any flavouring of Australian fruit juice was contained. Possibly some such provision would represent the result which Parliament intended to achieve. But the court cannot speculate upon such a matter. It must construe the words actually used. The word " consisting " refers to the physical components of the cordial, and the questions to be asked in determining whether the exemption is applicable are (1) Does this cordial consist wholly of juices of Australian fruits ? In the present case the answer to this question must be—No : (2) Does it consist principally of juices of Australian fruits ? The answer to this question must also, in my opinion, be—No, because the words " consisting principally of " must be read as referring to quantity expressed in terms of either volume or weight of the substance of the cordial and cannot be read as referring to that constituent of the cordial, whatever its proportionate quantity, which gives to the cordial its distinctive flavour as a cordial.

In my opinion, therefore, the appeal should be allowed and judgment should be entered for the plaintiff for the amount claimed with costs of the action and of the appeal.

WEBB J. The cordials in question are labelled " Lemon Cordial " and " Raspberry Balm Cordial ". The proportion of Australian fruit juice in the lemon cordial is 29 per cent by volume and 26.4 per cent by weight. In the raspberry cordial the proportion is 13.4 per cent by volume and 11.44 per cent by weight. It is not contested that both commodities are cordials within the ordinary meaning of the term and as defined by the Food and Drug Regulations of the States.

Item 36 (3) of the First Schedule to the *Sales Tax (Exemptions and Classifications) Act* 1935-1948 provides for the exemption from sales tax of :—

(1) essences, concentrates and cordials, consisting wholly or principally of the juices of Australian fruits ; and

(2) non-alcoholic beverages consisting wholly of such fruits.

It is not claimed that either cordial is of the nature of an essence, concentrate, extract, or residue of Australian fruit juice.

If the two cordials are suitable for consumption undiluted they are beverages. But to gain exemption from sales tax beverages must consist wholly of fruit juice. Unless the language of item 36 (3)

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requires it, we should not impute inconsistency to the legislature by holding that any cordial which happens to be a beverage is also exempt. But if the cordial is not suitable for consumption undiluted this would be due to the presence of an ingredient other than the fruit juice, and it is unlikely that the legislature attached the exemption to such a circumstance.

The context in which " cordial " appears suggests that to be exempt a cordial must be something in the nature of an extract or residue of Australian fruit juice, something made from a larger quantity of that juice. The context appears to warrant that conclusion, which also avoids imputing inconsistency or absurdity to the legislature. If this is the proper construction of item 36 (3) it may be that the word " principally " does not impose a test of weight or volume, but a test of order of importance, as *Rich* J. thought. There would be some reason for giving exemption to cordials in the nature of extracts or residues, as being the products of larger quantities of juice, although in making them it may be necessary to include materials of greater weight or volume than the juice content.

But there may be no cordial in the nature of an extract or residue of Australian fruit juice. If so, the legislature is not to be taken to provide exemption from sales tax for something that does not exist. However, if there is no such cordial I can see no sound reason for holding that the word " principally " imposes a test of order of importance, and not of weight or volume. If " essence " and " concentrate " appeared alone in the provision and not with " cordial ", " principally " might be taken to refer to " the chief thing concerned " ; but the phrase " consisting wholly or principally of the juice of Australian fruit " is also predicated of " cordial ", and inconsistency must not readily be imputed to the legislature in dealing with cordials of the kind in question here, on the one hand, and beverages on the other. As " principally " in that phrase cannot have two different meanings, a choice must be made. As its primary meanings include " chiefly " and " mainly ", and, as quantity is twice indicated by the use of the word " wholly " and, further, as inconsistency should not, as already stated, be imputed to the legislature unless that is unavoidable, I think quantity—weight or volume—should be taken to be the only test provided by item 36 (3). There might be greater difficulty in coming to this conclusion if the exemption were of things which " wholly or as to a principal part thereof " consisted of Australian fruit juices.

In my opinion then these two cordials are not within item 36 (3).

I would allow the appeal.

FULLAGAR J. By the combined effect of s. 5 (1) and item 36 (3) in the First Schedule of the *Sales Tax (Exemptions and Classifications) Act* 1935-1948 the following are exempt from tax under the *Sales Tax Assessment Acts Nos.* 1 to 4 and 9 :—" Essences, concentrates and cordials, consisting wholly or principally of juices of Australian fruits, for the making of non-alcoholic beverages; non-alcoholic beverages consisting wholly of juices of Australian fruits." The respondent manufactures and sells two preparations under the respective names of " Lemon Squash Cordial " and " Raspberry Balm Cordial ". On sales of these the Commissioner claims that sales tax is payable. The respondent maintains that they fall within the exemption as being " cordials consisting . . . principally of juices of Australian fruits for the making of non-alcoholic beverages ". *Rich* J. has held that the contention of the respondent is correct, and from his decision this appeal is brought.

It was stated, and accepted as common ground, that the respondent's lemon cordial contained, by volume, 29 per cent of fruit juice and 71 per cent of other constituents, and, by weight, 26.4 per cent of fruit juice and 73.6 per cent of other constituents, and that its raspberry cordial contained, by volume, 13.4 per cent of fruit juice and 86.6 per cent of other constituents, and, by weight, 11.44 per cent of fruit juice and 88.56 per cent of other constituents. The fruit juice was Australian fruit juice. The main constituents apart from fruit juice were sugar and water, the percentages of other ingredients being trifling.

Item 36 (3) seems to me extremely difficult to understand. I should have thought that, whatever else a " cordial " may be, the common understanding of it is that it is a beverage, and this view is supported by the dictionaries. But there is no escape from the plain fact that the Schedule treats it not as a beverage but as an ingredient of a beverage. It distinguishes in the plainest way between a " cordial for the making of a non-alcoholic beverage " on the one hand and " a non-alcoholic beverage " on the other hand.

In order to be exempt from tax, a cordial must be a cordial " for the making of a non-alcoholic beverage ". The respondent's products can only be brought within these words by virtue of a fact which was not given in evidence but was stated by counsel before us at the very end of the argument and not contradicted. That fact seems to be (though it was not stated precisely in these terms) that each of the respondent's products is intended and adapted to be drunk not in its neat state but only after being

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mixed with water or some other diluent such as soda water. On this basis the relevant " making " of the " non-alcoholic beverage " is the act of the ultimate consumer. This seems to me to be a strange view in itself. It may very well be that the respondent's products, though not normally drunk without dilution, are quite capable of being drunk without dilution, as are whisky and brandy. At least there is no evidence that they are not. Are we to say that the question whether a liquid is " for the making of beverages " is to be answered by reference to the probability of dilution before consumption or to the intention or belief of the manufacturer that there will be dilution before consumption ? But, if the view stated above is strange in itself, it becomes even stranger when we look at the context in which the word " cordial " is found. The Schedule exempts " essences, concentrates and cordials . . . for the making of non-alcoholic beverages ". The witness Phillips defined an " essence " as an " alcoholic solution of an oil ". That, no doubt, is its specific meaning in pharmacy, but that meaning is clearly excluded here because only things which are non-alcoholic are included in item 36 (3). The Oxford Dictionary gives as the pharmaceutical meaning the meaning given by Phillips, but it gives the general meaning of the word as " an extract obtained by distillation or otherwise from a plant or from a medicinal odoriferous or alimentary substance and containing its characteristic properties in a concentrated form ". The same dictionary gives the relevant meaning of " concentrate " as " the product of concentration ", which is near enough to that given by Phillips, " a substance, the volume of which has been reduced either by evaporation or by sublimation ". In connection with the preparation of food and drinks the general idea conveyed by both words is, I think, that of a flavouring substance in concentrated form, and that is what I am of opinion that the words mean here. Essences and concentrates (which may or may not be liquid) are, one would suppose, substances which would normally be used as ingredients in non-alcoholic beverages and could, and perhaps normally would, be used by the manufacturer in the making of a non-alcoholic beverage. It is difficult to believe that it was intended to place on the same footing a product which can only be said to be " for the making of non-alcoholic beverages " in the sense that it could, and probably would, be diluted by the consumer before he drank it.

It seems to have been assumed throughout this case that the respondent's products were " cordials for the making of non-alcoholic beverages ", and the only question to which attention has been directed is the question whether they " consisted princi-

pally of the juices of Australian fruits ". But the considerations which I have mentioned lead me to doubt whether the assumption is well founded. It may well be that the intention of item 36 (3) is to exempt the three classes of products mentioned if, but only if, they are for use as ingredients in the manufacture of non-alcoholic beverages for sale. On this view the first limb of item 36 (3) would cover ingredients in manufacture, and the second limb the completely manufactured product, the ingredient being exempt if it consists wholly or principally of Australian fruit juice, the completely manufactured beverage only if it consists wholly of Australian fruit juice. The respondent's products would then be " beverages " within the meaning of item 36 (3), and, as such, not exempt, because they do not consist wholly of the juices of Australian fruits.

I have thought it proper to call attention to the considerations outlined above, and I think that I should have been prepared to decide this case on the basis indicated. I am very conscious of the fact that the view which I have suggested might be affected by evidence, but the burden of proof rested on the respondent, and it was for the respondent to adduce the evidence. However, since I have formed a clear opinion on the question actually argued, I think it more satisfactory to decide the case on that question. That question is whether the respondent's products " consist principally of fruit juice ". *Rich* J. has held that they do.

I am, with great respect, quite unable to agree with his Honour's view. I feel in some doubt as to the basis on which that view really rests. His Honour says that " the word ' principally ' is not used entirely as a quantitative expression. It refers to the dominant element in the cordial ". But the word " principally " must be used either as a quantitative expression or as some other kind of expression. It cannot be used partly as a quantitative expression and partly as some other kind of expression. It does not seem to me, in any case, to be possible to say on the evidence that sugar is not the dominant element in the respondent's products. But, in my opinion, the word in question refers to quantity or proportion, not to " dominance " or relative importance. The view accepted by his Honour, that what is required is that Australian fruit juice shall be " the essence or characteristic constituent which gives a substance its essential properties " means that quantity is of no importance whatever. An extremely small percentage of a highly concentrated essence could be the " characteristic constituent ", as is shown by his Honour's example of the potassium chlorate gargle. But the truth is that the " characteristic constituent " of a substance or a liquid may be

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something entirely different from that of which the substance or liquid principally consists. It could hardly be seriously suggested that beer did not " consist principally " of water, though it is quite impossible to say that water gives it its essential characteristics. The words which purport to interpret really substitute an expression which has a very different meaning. The natural meaning of the words " consist . . . principally " is emphasized in item 36 (3) by the presence of the words " wholly or ". The reference must be to quantity. And, if we read the words in the Schedule in a quantitative sense, the proportions of sugar and water were such as to make it impossible to say that it was proved that the respondent's products consisted principally of the juices of Australian fruits.

In my opinion the appeal should be allowed with costs and the judgment below set aside. In lieu thereof judgment should be entered for the plaintiff in the action for the amount claimed with costs.

Appeal allowed with costs. Order of Rich J. discharged. In lieu thereof judgment for plaintiff for amount claimed and costs of action.

Solicitor for the appellant, *George A. Watson*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Ward, Mollison, Litchfield & Ward.*

B. H.