Brisbane .... June & July 1952

REGINA.

V.

CANADIAN PACIFIC TOBACCO CO.

REASONS FOR JUDGMENT

CORAM:

WEBB J.

DELIVERED. Sydney 1.8.52

REGINA.

v.

THE CANADIAN PACIFIC TOBACCO COY. LTD.

JUDGMENT. FEB 1.

R E G I N A.

V.

THE CANADIAN PACIFIC TOBACCO COY. LTD.

JUDGMENT. WEBB J.

This action was commenced by specially endorsed writ claiming £12329.12.6 excise duty at the rate of 13/9 per lb demanded pursuant to the Excise Tariff Validation Act 1951 and Excise Tariff Proposals No. 2 on a deficiency of 17934 lbs of tobacco leaf not accounted for to the satisfaction of the Collector of Customs. Tobacco leaf had been proclaimed a material for the purpose of the Excise Act 1901 - 1942. However, in April 1952, after the issue of the writ a re-weighing of the tobacco leaf revealed that certain clerical errors had been made at the preceding weighing and other slight discrepancies appeared; and so the Crown, taking this weighing in April 1952 as correct, applied at the commencement of the trial for leave to amend the endorsement by claiming £12124.1.3 excise duty at the rate of 13/9 per lb. on 17635 lbs of tobacco leaf. Leave was granted and the amendment made.

The claim for duty is made under S. 105 of the Excise Act 1901 - 1942. S. 105 has been in the Act since its enactment in 1901. Counsel could not say from whence it was derived; but it is not improbable that it was to be found in the excise legislation of one or more of the Australian colonies. However, counsel did not know, nor do I, of any case in this Court, or in a State Supreme Court, in which the meaning of S. 105, or of a similar section was considered, although Mr. Moynahan of Counsel for the Crown said that S. 105 had often been implemented.

S. 105 reads:-

"An officer may at any time check the stock of material of any producer or dealer, and if any deficiency is found which cannot be accounted for to the satisfaction of the Collector the producer or dealer shall pay duty on the amount of material found to be deficient as if it had been manufactured into excisable goods".

Counsel raised the following questions on this section :

(1) What is the meaning and effect of the words "cannot be accounted for"?

(2) Is any particular person required to give the account? If so, then

(3) By whom, in particular, is the account to be given?

(4) Is the particular person required to account to be called upon to do so before the duty is sought to be recovered? If so, in what form?

(5) To what extent can a court review the dissatisfaction of the Collector?

(6) If the material in which the deficiency is found can be manufactured into more than one kind of excisable goods, and different rates of excise duty are payable in respect of each kind, what rate of duty can be claimed by the Crown on the deficiency?

As to (1): I do not think that the liability to pay the duty on the deficiency arises only when the circumstances are such that it is impossible for anybody at any time to account for the deficiency. If that were intended it would be unnecessary to make the dissatisfaction of the Collector in particular the condition of liability.

It seems to me that the words "cannot be accounted for" do not mean a permanent or perpetual disability to account, but only a disability to account at the time by the person required to make the account. See Regina v. Heyop (8 Q.B. 546; 115 E.R. 981 per Coleridge J. at 986).

As to (2) and (3): I think the account must be given by the dealer, or by some person acting for him. I do not think that if he fails to give an account within a reasonable time after being called upon so to do it is still the duty of the Collector to satisfy himself as to the cause of the deficiency, which ordinarily would be a matter peculiarly within the knowledge of the dealer or person in control of the material. It is not to be readily supposed that the Collector would have imposed on him an independant duty in that regard.

As to (4): The dealer or person acting for him must be given an opportunity to account for the deficiency before the duty is demanded. No particular form is required to be followed in calling upon him to account. It is sufficient if it appears from the communication by the Collector to the dealer or that other person that S. 105 is being implemented.

As to (5): It is the failure to satisfy the Collector that finally determines the liability to pay the duty on the deficiency. It is the Collector's want of satisfaction, and not a court's, that is made the test of liability by S. 105. The court must, however, examine the material which was before the Collector to see whether there could have been any reasonable ground for the dissatisfaction of the Collector. But unless the court finds that his want of satisfaction was not honest, or was arbitrary or capricious, or against sound and fundamental principle, or based on some fundamental error, or illegal it cannot

interfere. See Harward v. Hackney Union and Anor. (14 T.L.R. 306 per A.L.Smith L.J. at 307); Fletcher v. Ilkstone Corporation 96 J.P. 7 per Sleesser L.J. at 26); Moreau v. Federal Commissioner of Taxation (39 C.L.R. 65 per Isaacs J. at 67); The Australian Scale Co. v. Commissioner of Taxation of Queensland (53 C.L.R. 554 per Rich and Dixon JJ. 555); Minister of National Revenue v. Wrights' Canadian Ropes Ltd. (1947 A.C. 109 at 122); D. R. Fraser & Co. Ltd. v. Minister of National Revenue (1949 A.C. 24 at 36); [illegible]; and Denver Chemical Manufacturing Co. v. Commissioner of Taxation (79 C.L.R. 296 per Dixon J. at 313 and Williams J. at 317). In the Wrights' Canadian Ropes Case supra at page 123 the Judicial Committee said:-

> " The Court is always entitled to examine the facts which are shown by the evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one .... ."

Again in Fraser's Case supra at p. 36 their lordships said:

> " ... . if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations, and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise."

In the Commissioner of Stamp Duties of Queensland v. Beak (46 C.L.R. 585), and in Commissioner of Stamp Duties v. Pearce (1951 A.L.R. 654), [illegible], this Court took a broader view of its power to review the Commissioner's

opinion; but that was because of the unlimited scope of the appeal provided for in the particular Queensland and New South Wales Statutes.

As to (6): The rate of duty recoverable under S. 105 is, I think, the highest provided for under the Act unless it is proved by the person liable to pay the duty that the missing material could have been converted into excisable goods at a lower rate, when the lower rate would be recoverable. Where the deficiency cannot be accounted for to the satisfaction of the Collector it is probably because the material has been dealt with surreptitiously, and so there should be no presumption in favour of a lower duty. To hold otherwise would be to place a premium on fraudulent practices and provide an incentive for them.

Then as to the facts: briefly they are that in 1948 the Hillman Tobacco Co. Pty. Ltd., which was registered as a dealer under Part III of the Excise Act in respect of tobacco leaf, had a large quantity of leaf in its store at Meeandah near Brisbane. On the 20th August 1948 a customs and excise officer completed a weighing of the leaf in the store. Now registered dealers are required by the Act, and Regulation 10 of the Excise Regulations 1925 made thereunder, to make quarterly returns of the weight of material in store at the commencement of each quarter; and also of the weight of material received into and taken out of the store during the quarter. The Hillman Tobacco Co. made such returns for the quarters ended 30th September and 31st December 1948; and in the December return disclosed the transfer of the tobacco leaf in the Meeandah store to the defendant company on 1st December 1948. Thereafter the defendant

company, which was also a registered dealer in tobacco leaf as well as a licensed manufacturer of tobacco with its factory at Bulimba in Brisbane, made the quarterly returns of tobacco leaf in the Meeandah Store. Over three years later, on 19th December 1951, the tobacco leaf in that store was transferred to the factory at Bulimba, and on arrival there was weighed and its moisture content tested and recorded. It was on that weighing that the deficiency was found, after allowing for the quantity of tobacco leaf that had been received into and taken out of the Meeandah store since the first weighing in August 1948, and for 983 lbs destroyed under supervision. In April 1952 a further weighing of the same material was made when the clerical errors already referred to were discovered, and other slight differences appeared.

Meanwhile the Collector, on the 4th January 1952 wrote the following letter to the defendant company, omitting formal parts:-

"I have to advise you that the recent transfer of tobacco leaf from your registered dealer's store at Meeandah to the licensed factory disclosed a loss of 17934 lbs in respect of the dealer's store over a period of approximately three years".

"A review of the returns submitted by you in respect of the dealer's store discloses the following position:-

1/12/48	Stock transferred from Hillman Tobacco Coy.	192288 lbs.	1/12/48 4/12/51	Transferred to factory	272335 lbs
1/12/48 4/12/51	leaf received	192581	7/12/51	do	93617
				Destroyed under supervision	983
				Leaf not accounted for.	17934
		384869.			384869.

"In this connection your attention is invited to

"S. 105 of the Excise Act 1901 - 1949 which reads as follows:-

(The letter set out S. 105 in full).

"Before giving the matter further consideration I shall be glad to receive, in writing, any explanation you may wish to offer in regard to this matter."

I think this letter conveyed a clear intimation that the Collector intended to implement S. 105, in the absence of any explanation of the deficiency to his satisfaction, and that the defendant company was being called upon by the letter to account for the deficiency.

The defendant company replied on the 7th January as follows, omitting formal and immaterial parts:-

"Your letter ... referring to the alleged shortages in Free Store. We refer you once again to the stock-taking of Free Store in 1947 when it was found by your Excise Dept. Officers that the raw leaf was heavily loaded with moisture due to circumstances well known to your Dept.

It was found necessary on that occasion to write off over 82000 lbs weight of leaf as unfit for manufacture, it was also recorded that the remaining leaf in Free Store was also very moist in content. It was also recorded that considerable loss after manufacturing this leaf had occurred. It was also recorded that a loss more than 82000 lbs and 9800 lbs in July 1949 taken by your Sydney officers was a reasonable loss. Under all circumstances the loss of approximately 8000 lbs odd since 1949 is a reasonable one as our stores must be taken as a whole since the large bulk first came into existence in 1931, and the fact that the driest period on record had occurred in Queensland during the past twelve months, and

"during removal and taking of Stock.

The fact that the Dept bringing a Regulation into force in January 1952, as per copy of letter dated 27th Dec. 1951 proves that our submission must be accepted from the point of view outlined. The moisture alone in old and new stocks would cover any loss as per your Regulation of recent date.

We now respectfully require an adjustment of the alledged loss disclosed by the recent check up and a Credit be recorded accordingly".

After considering the defendant company's reply the Collector, on the 29th January 1952, sent the following rejoinder, omitting formal and immaterial parts:-

"..... I am unable to accept the explanation ... for the shortage of 17934 pounds ..... found upon the occasion of the check of your stock of material in December 1951 ....

The deficiency .... has not therefore been accounted for to my satisfaction and in accordance with S. 105 of the Excise Act you are liable to pay duty upon the amount of 17934 pounds of material .... calculated at the rate of 13/9 per pound.

I therefore demand .... £12329 .19.6."

The deficiency of 17934 lbs was a difference between weighings made after the allegged losses of 82000 lbs and 9800 lbs were recorded, assuming they were incurred. This must have been obvious to the defendant company from the Collector's letter to which it was replying. The Collector might then have regarded the defendant company as having failed to account for the deficiency and proceeded to demand excise duty. But out of fairness to the defendant company he decided, without any obligation so to do, to consider moisture content of the defendant company's tobacco leaf during the relevant period, so far as such

content was known to him. This moisture content did not support the contention that evaporation of moisture in the tobacco leaf was the cause of the deficiency. But he proceeded to consider also the moisture content of the tobacco leaf of other registered dealer s during the relevant period, and to apply the highest of them to the defendant company's leaf, except in one case when the average was applied. But these tests of other dealers' leaf also provided no support for the defendant company's contention. It is true that the moisture content of other registered dealers' tobacco leaf might not have been a reliable test, as there were no particulars, among others relevant, of the classes and types of leaf, the places and times, where and when the leaf was grown or stored, or of the conditions of weather, climate or otherwise, prevailing when and where it was weighed. But even if the moisture content of other dealers' tobacco leaf was not reliable, still it was employed only as a check of the results following a consideration of the moisture content of the tobacco leaf at the Meeandah store, on which the Collector might properly have acted without making any check. In fact I think the Collector need not have considered the moisture content of any tobacco leaf, whether the company's or other dealers' leaf, but could have relied on the defendant company's failure to account for the deficiency in the reply of the 4th January 1952.

The defendant company produced no evidence to show that the Collector acted on unreliable data. However, counsel for the company submitted, having regard to information obtained from Crown witnesses on cross-examination, that the moisture content was in all cases an unreliable guide; that of other dealers' tobacco leaf for the reasons indicated above, and that of the company's tobacco leaf,

because it might not have been representative of the whole stock of material in the Meeandah store, as it was confined to material removed from time to time from the store to the factory, where moisture content was tested and recorded. But, it is important to note here that the Collector knew the moisture content of about half of the tobacco leaf in the Meeandah store.

I have not found it necessary to set out the details of the data employed in the moisture tests, as it is, I understand, only their application that is seriously challenged by the defendant company, although some question was raised as to the disdegard by the Collector of quantities in ascertaining percentages. A question was raised as to the correctness of the three weighings and of the recorded weights. However, I am satisfied the scales were properly tested; that responsible officers of the defendant company were present at all weighings; and that they were satisfied with the weighings and the records made of them.

In examining the Collector's want of satisfaction I have considered only the matters which were before him and not the fact - and I find it to be the fact - that one of the defendant company's officers had admitted to an excise officer that he had in the absence of the excise officers forced open a door which had been under Crown lock and key, and closed it again. That admission was made some months after the Collector had decided to claim duty on the deficiency. However it is unlikely that the locked door was forced open for no particular purpose. There was evidence that the door while under Crown lock and key had been forced open more than once. It is more likely than not that it was forced open from time to time to take materials into and out of the room - called the stemmery - in the course of evading excise duty.

There was on the 24th January 1952 a demand for the duty sufficient to meet the requirements of the Excise

Tariff Validation Act 1951. The demand was for 13/9 per pound of the deficiency, and so was good to the extent of the actual deficiency, although the deficiency was overstated in the demand.

Accordingly I give judgment for the Crown for £12,124:1:3 with costs.
