M.F.F. EQUITIES LIMITED .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1969

*Mar. 11

Apr. 22

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Sales tax—Margarine made in part from fish oil—Whether exempt from tax as a product of fish—Trade designation—Construction by reference to subsequent amendment rejected—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30(1), 32(1), and Schedule III.*

In the manufacturing of margarine, the appellant company used as the main component a fish oil in a proportion varying between 48 per cent and 90 per cent. The company claimed that its product was exempt from sales tax as being an edible product of fish within the meaning of Schedule III of the *Excise Tax Act*. The petition of right by which it sought to recover the sum of $355,412.48 it had paid under protest as sales tax during the period April 7, 1963 to February 8, 1964, was dismissed by the Exchequer Court. It was held that the fish oil, and the fish from which it was extracted, had become so obscured by the manufacturing processes and the addition of other ingredients that the resultant margarine could not be considered as a product of fish. The company appealed to this Court.

*Held:* The appeal should be dismissed.

The trade designation of "fish or marine oil margarine" was in such limited use that it could not be considered as of substantial weight in ascertaining the proper description of the goods for the purposes of the Act. The trial judge was fully justified in reaching the conclusion that according to the common understanding margarine was not a product of fish, even when in specialized trading circles a particular kind was known as fish oil margarine. The refined, bleached and deodorized oil was hydrogenated, a process altering its chemical nature to such extent that it was no longer a fish oil, but a derivative of fish oil.

The new Schedule III substituted in 1966 by s. 8 of 14-15 Eliz. II, c. 40, could not affect the construction of the schedule as it stood at the material time.

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*Revenu—Taxe de vente—Margarine fabriquée en partie avec de l'huile de poisson—Est-elle exempte de la taxe comme produit de poisson—Désignation commerciale—Loi subséquente sans effet sur interprétation—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, art. 30(1), 32(1), et Annexe III.*

La compagnie appelante utilisait comme ingrédient principal dans la fabrication de la margarine une huile de poisson dans une proportion variant de 48 pour cent à 90 pour cent. La compagnie prétend que son produit est exempt de la taxe de vente à titre de produit comestible de poisson au sens de l'Annexe III de la *Loi sur la taxe d'accise*. La pétition de droit en vertu de laquelle elle a cherché à recouvrer la somme de $355,412.48 qu'elle avait payée sous protêt

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*PRESENT: Cartwright C.J. and Abbott, Ritchie, Hall and Pigeon JJ.

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comme taxe de vente durant la période du 7 avril 1963 au 8 février 1964, a été rejetée par la Cour de l'Échiquier. Il a été statué que l'huile de poisson, et le poisson dont elle est extraite, étaient devenus tellement modifiés par les procédés de manufacture et l'addition d'ingrédients supplémentaires que la margarine en résultant ne pouvait pas être considérée comme un produit de poisson. La compagnie en appela à cette Cour.

*Arrêt:* L'appel doit être rejeté.

L'usage de la désignation commerciale «margarine d'huile de poisson» ou «d'huile marine» est tellement limité qu'on ne peut pas le considérer pour vérifier la description appropriée de la marchandise pour les fins de la loi. Le juge au procès était amplement justifié de conclure que généralement on ne considère pas la margarine comme un produit de poisson, même lorsque dans les groupes commerciaux spécialisés une espèce particulière est connue comme margarine d'huile de poisson. L'huile raffinée, décolorée et déodorisée est hydrogénée, un procédé qui a pour effet de changer sa nature chimique à un tel point qu'elle n'est plus une huile de poisson, mais un dérivé d'huile de poisson.

La nouvelle Annexe III qui a été substituée en 1966 par l'art. 8 du Statut 14-15 Eliz. II, c. 40, ne peut influer sur l'interprétation de l'annexe telle qu'elle existait à l'époque en question.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière de taxe de vente. Appel rejeté.

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APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in a matter of sales tax. Appeal dismissed.

*Gordon F. Henderson, Q.C.,* and *John D. Richard,* for the appellant.

*D. H. Aylen* and *John E. Smith,* for the respondent.

The judgment of the Court was delivered by

PIGEON J.:—In 1963 and 1964 appellant, then known as Monarch Fine Foods Limited, was manufacturing margarine. By its petition of right it seeks to recover the sum of $355,412.48 paid under protest for sales tax in respect of the sale of this product between April 7, 1963 and February 8, 1964. The claim for exemption is based on the contention that because a substantial proportion, varying between 48 per cent and 90 per cent, of the oil used as the

[1] [1969] C.T.C. 29, 69, D.T.C. 5039.

main component in the manufacture of this butter substitute was herring oil, it is to be considered as an edible product of fish within the meaning of the following item of Schedule III of the *Excise Tax Act* under the heading "Foodstuffs":

Fish and edible products thereof;

Cattanach J. dismissed the petition saying:

In my view, in order to determine whether a particular product falls within an expression such as "Fish and edible products thereof;" resort must be had to the common understanding of such words when used in relation to articles of commerce. The question here is, therefore, whether, in the ordinary use of words, margarine may be fairly regarded as falling within the words, "Fish and edible products thereof;" or more specifically, applying such a test: is margarine a product of fish?

I do not think that, in common parlance, the words "product of fish" can be considered as comprehending margarine, even though it contains fish oil as one of its principal ingredients. Margarine is itself a well known article of commerce and is neither marketed, purchased, nor thought of by the consumer as a product of fish.

It seems to me that the fish from which oil has been extracted and which is used in the manufacture of margarine, which is by no means the sole ingredient of the end product, has become so obscured by the processes to which it and the oil thereof has been subjected and by the oil being intermingled with substantial amounts of other ingredients from other sources, the whole of which is again the subject of an extensive manufacturing process, that the resultant margarine cannot be considered as a product of fish, even though the fish oil content may make the margarine a fish oil margarine and the labels thereon disclose the fish oil content.

Counsel for the appellant pointed out that before reaching the above stated conclusion, the trial judge had made a finding "that any margarine 40 per cent or over of the total oil content of which is fish oil is referred to in the trade as a fish or marine oil margarine". It must be noted however that this designation does not appear to be used in connection with retail sales. Fish or marine oil margarine is not sold to consumers as a fish product and is almost invariably sold with dairy products in the same way as vegetable oil margarine. A trade designation in such limited use cannot be considered as of substantial weight in ascertaining the proper description of the goods for the purposes with which we are concerned.

Reference was made to the decision of this Court in *Townsend v. Northern Crown Bank*[2]. In that case, the

[2] (1914), 49 S.C.R. 394, 20 D.L.R. 77.

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question was whether sawn lumber was a "product of the forest" within the meaning of s. 88 of the *Bank Act*. Duff J. (as he then was) said (at p. 398):

> This is only one example of the class of cases in which the court being loath and refusing to attempt to draw an abstract line, finds itself compelled to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits. In this particular case I prefer to say that according to the common understanding the articles in question would fairly be comprised within the description "products of the forest", and I think they are within the contemplation of the enactment we have to interpret.

In my view, the trial judge applying this test was fully justified in reaching the conclusion that according to the common understanding margarine was not a product of fish, even when in specialized trading circles a particular kind was known as fish oil margarine.

Furthermore, although in some cases fish oil was the main raw material, in other cases and for a very substantial quantity it was only approximately one half the main raw material, it being mixed with an equal or nearly equal quantity of vegetable oil. Also, it was shown that all the fish oil used was treated to remove any odour or colour identifying it with fish so that, for the consumer, the product would be undistinguishable from margarine made from vegetable oil only. Finally, the refined, bleached and deodorized oil was hydrogenated, a process altering its chemical nature to such extent that, as Dr. Sims said, it was "no longer a fish oil, but a derivative of fish oil".

In his argument in support of the judgment of the Exchequer Court, counsel for the respondent made reference to the new Schedule III of the *Excise Tax Act* substituted for the former one by s. 8 of 14-15 Eliz. II, c. 40 (assented to July 11, 1966). One of the new items is the following:

> 20. Oleomargarine and margarine for consumption in the Province of Newfoundland.

It was contended that this amendment of the statute could be considered in construing the former text on the same basis as this Court did consider an amendment of a zoning by-law in construing its original provisions in *Wilson v. Jones*[3]. I must point out that the two situations are

[3] [1968] S.C.R. 554, 68 D.L.R. (2d) 273.

entirely different. In the *Wilson* case, the amending by-law had been adopted long before the application for the building permit sought to be enjoined. Therefore, the amending by-law was to be considered as making one enactment together with the original by-law. In the present case, however, the tax sought to be recovered was paid in 1963 and 1964 and the petition of right filed in March 1964, long before the amending statute was enacted. In the absence of any declaratory provisions, the 1966 statute cannot have any retrospective operation and the construction of the schedule as it stood at the material time can, in no way, be affected by the later amendment.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.*

*Solicitor for the respondent: D. S. Maxwell, Ottawa.*