1960
*Nov. 10
1961
Jan. 24

JAVEX COMPANY LIMITED, CONSUMERS GLASS COMPANY LTD., DOMINION GLASS COMPANY LTD. ..... APPELLANTS;

AND

MRS. AMY OPPENHEIMER, MISS RUTH OPPENHEIMER, MRS. EDITH KRIEGER, DAVID OPPENHEIMER, ERNEST KRIEGER AND LESLIE McDONALD, carrying on business together in partnership at Vancouver, British Columbia, under the style of Oppenheimer Bros. & Company

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Revenue—Decision of Tariff Board that "Clorox" is properly classifiable under tariff item 219a—Earlier decision that product not so classifiable—Whether estoppel per rem judicatam—Product used as a bleach and as a disinfectant—Customs Act, R.S.C. 1952, c. 58, ss. 44(3), 46(1)(2).

The Tariff Board found that Clorox, a product consisting of sodium hypochlorite in solution and imported into Canada by the respondent, Oppenheimer Brothers & Company, was properly classifiable under

*PRESENT: Taschereau, Locke, Fauteux, Martland and Ritchie JJ.

Tariff Item 219*a*. An appeal from this decision was dismissed by the Exchequer Court, and the appellants then appealed to this Court. In both Courts the question of law considered was whether the Tariff Board erred in holding that the product known under the trade mark "Clorox" imported into Canada was properly classifiable for tariff purposes under Tariff Item 219*a*.

Appellants contended that the opinion of the Tariff Board in a former appeal (No. 363) that Clorox was not properly classifiable under Tariff Item 219*a*, formed an estoppel *per rem judicatam* to a consideration of the same issue in the present appeal (No. 398). They also argued that the principal and chief use of the product should be considered in determining whether the product could qualify as a preparation for disinfecting under Tariff Item 219*a* and that, as the principal use of Clorox was for bleaching and not for disinfecting, it did not so qualify.

Held: The appeal should be dismissed.

The opinion expressed by the Tariff Board in Appeal No. 363 could not be said to be a judgment determining the status of a person or of a thing. When the *Customs Act* states that an order, finding or declaration of the Tariff Board shall be final and conclusive, subject to further appeal, it does not mean anything more than that it shall be final and conclusive in relation to the appeal which is before the Board. It does not mean that a decision rendered on one appeal can preclude some other person, not a party to that appeal, from appealing a decision of the Deputy Minister made in relation to an importation of specific goods by him, nor does it preclude the Board from dealing with such an appeal upon its merits. The Board does not have a jurisdiction under the Act to decide general questions as to the status of goods or of persons with that finality which is necessary to set up an estoppel by a judgment *in rem*. *Society of Medical Officers v. Hope*, [1960] 1 All E.R. 317, referred to.

Therefore the opinion given by the Board to the Minister could not be regarded as being final and conclusive in relation to the appeal taken by the present respondents, who were not parties in Appeal No. 363. The principle of *res judicata* was not applicable in this case.

In deciding under which item Clorox should be classified, the choice was between Tariff Item 219*a*, which refers specifically to preparations "for disinfecting", and the so-called "basket item" 711, which contains no reference whatever to goods for bleaching or for disinfecting. Upon the facts found by the Tariff Board, as between these two items, the goods in question fell within Tariff Item 219*a*, the definition of which was properly applicable to them.

APPEAL from a judgment of Cameron J. in the Exchequer Court of Canada[1], dismissing an appeal from the Tariff Board. Appeal dismissed.

André Forget, Q.C., Miss Joan Clark and *A. S. Hyndman,* for the appellants.

Gordon F. Henderson, Q.C. and *R. H. McKercher,* for the respondents.

[1] [1959] Ex. C.R 439.

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J. D. Lambert, for the Deputy Minister of National Revenue for Customs and Excise.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Exchequer Court[1] which dismissed an appeal from the Tariff Board. The question of law considered in the Exchequer Court and in this Court was:

> Did the Tariff Board err, as a matter of law, in holding that the product known under the trade mark "Clorox", imported under Vancouver Entries Nos. 68405 of January 12th, 1956, 67200 of January 6th, 1956, 71357 and 71295 of January 26th, 1956, 70238, 70264 and 70292 of January 23rd, 1956, is properly classifiable for tariff purposes under Tariff Item No. 219*a*?

The Deputy Minister of National Revenue for Customs and Excise had decided that the product in question was dutiable under Tariff Item 711 and from that decision the respondents appealed to the Tariff Board, the appeal being numbered 398.

The relevant provisions of Tariff Items 219*a* and 711 are as follows:

		British Preferential Tariff.	*Most-Favoured-Nation Tariff.*	*General Tariff.*
219a	Non-alcoholic preparations or chemicals for disinfecting, or for preventing, destroying, repelling, or mitigating fungi, weeds, insects, rodents, or other plant or animal pests, n.o.p.:—			
	(i) When in packages not exceeding three pounds each, gross weight..	Free	20 p.c.	25 p.c.
	(ii) Otherwise	Free	7½ p.c.	15 p.c.

		British Preferential Tariff.	*Most-Favoured-Nation Tariff.*	*General Tariff.*
711	All goods not enumerated in this schedule as subject to any other rate of duty, and not otherwise declared free of duty, and not being goods the importation whereof is by law prohibited	15 p.c.	25 p.c.	25 p.c.

[1] [1959] Ex. C.R. 439.

Prior to the hearing by the Tariff Board of Appeal No. 398, the Board had considered, in Appeal No. 363, whether "Clorox" was properly classified under Tariff Item 219a and had expressed the opinion that it was not.

Appeal No. 363 arose as a reference by the Deputy Minister to the Tariff Board for an opinion as provided in s. 46 of the *Customs Act*, R.S.C. 1952, c. 58, which then provided:

46. (1) The Deputy Minister may refer to the Tariff Board for its opinion any question relating to the valuation or tariff classification of any goods or class of goods.

(2) For the purpose of section 44 a reference pursuant to this section shall be deemed to be an appeal.

The reference was in the form of a letter written by the Deputy Minister to the Tariff Board, dated July 29, 1955, as follows:

H. B. McKinnon,
Chairman, The Tariff Board,
Sussex and George Street,
Ottawa.

Dear Sir,

The Department has had for consideration a number of materials sold under different trade marked names, consisting of Sodium Hypochlorite in Solution. These products are generally described as bleaches, deodorizers, disinfectants and stain removers. They all have had an available chlorine strength of over 5% and they have been uniformly classified as non-alcoholic disinfectants under tariff item 219*a*.

This practice enables the manufacturers of similar products in Canada to import free of Customs duty under tariff item 791 "materials of all kinds" for use in producing or manufacturing their products in Canada. In this connection, a ruling has been made allowing empty glass bottles for use as containers for "Javex", a product manufactured in Canada by Javex Company Limited, under this tariff item.

The Canadian manufacturers of glass bottles who are affected by these rulings are disturbed thereby. I attach hereto a copy of a letter from Mr. Arthur May, Ottawa, acting on behalf of Dominion Glass Company Limited of Montreal.

I have reviewed the Department's rulings and I concur with them, but I am placing the issue before the Tariff Board as an appeal under Section 46 of the Customs Act.

(Signed) D. Sim
Deputy Minister for Customs and Excise

A hearing took place as a result of this reference, of which notice was published in the *Canada Gazette*. No specific notice was given to the respondents, who are importers of

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Clorox, or to Clorox Chemical Co. of Oakland, California, the manufacturer of Clorox, and they were not represented at the hearing.

Following this hearing the Tariff Board expressed the following opinion:

> The material involved in this reference is sodium hypochlorite having an available chlorine strength of not less than 5 per cent. It was admitted by all parties that such material is, *inter alia*, a disinfectant. It is non-alcoholic and is therefore, in appropriate circumstances, admissible under Tariff Item 219*a*, i.e., when used "for disinfecting".
>
> As regards imports of this material in relatively small packages for general distribution, a reasonable presumption as to end use may be obtained by an examination of the description and recommendations attached to or accompanying the containers.
>
> Of the two imported brands submitted by the Deputy Minister, viz. "Klenzade" and "Clorox": the former is plainly aiming primarily at a commercial or agricultural market and the only use indicated is as a disinfectant; the latter product is for general distribution to the householder as a bleach, deodorizer or disinfectant.
>
> It is therefore a very proper assumption that "Klenzade" is a "non-alcoholic preparation or chemical for disinfecting"; but no such assumption would be warranted in the case of "Clorox". On the contrary, such evidence as was adduced at the hearing in the matter suggests that "Clorox" is *rarely used* in such circumstances as would warrant classification under Tariff Item 219*a*.
>
> Accordingly, we are of opinion that "Klenzade" is properly classified under Tariff Item 219*a* and that "Clorox" is not.

The solicitors for Clorox Chemical Co., on February 21, 1956, wrote to the Tariff Board, pointing out that that company was affected by the opinion, that it had not had notice of the hearing and that it was seeking a re-hearing where it might have an opportunity to adduce evidence which would have an effect on the issue. Ultimately the respondents made an importation of Clorox which was classified by the Deputy Minister under Tariff Item 711, from which decision an appeal was taken to the Tariff Board as No. 398.

After the hearing of the appeal the Board made a majority decision, which concluded as follows:

> In the matter of the product "Clorox", which is at issue here, we believe the evidence establishes that it is ordinarily and regularly used in the family wash primarily as a bleach and, secondarily, as a disinfectant. Hence the appraiser must conclude that Clorox is, *inter alia*, "for disinfecting". Does the fact that it also bleaches have a bearing on its right to admissibility under tariff item 219*a*? There are no words in tariff item 219*a* which would warrant its exclusion on that ground. If it is a "non-alcoholic preparation for disinfecting", Clorox is admissible under tariff item 219*a*

even though it may perform an additional function at the same time and—unless more specifically provided for elsewhere in the tariff—is classifiable under tariff item 219*a*. There being no more specific provision for the product Clorox than under tariff item 219*a*, it is properly classifiable thereunder.

Two points were argued before the Exchequer Court. First it was contended that the opinion of the Tariff Board in Appeal No. 363 formed an estoppel *per rem judicatam* to a consideration of the same issue in Appeal No. 398. Second it was argued that the principal and chief use of the product should be considered in determining whether the product could qualify as a preparation for disinfecting under Tariff Item 219*a* and that, as the principal use of Clorox was for bleaching and not for disinfecting, it did not so qualify.

Cameron J. decided both points in favour of the respondents and I am in agreement with his conclusions.

The first argument is based upon the provision contained in subs. (2) of s. 46 of the *Customs Act* above quoted, which states that for the purposes of s. 44 a reference pursuant to s. 46 shall be "deemed to be an appeal", and upon subs. (3) of s. 44, which provides:

> 44. (3) On any appeal under subsection (1), the Tariff Board may make such order or finding as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare
>
> (*a*) what rate of duty is applicable to the specific goods or the class of goods with respect to which the appeal was taken,
>
> (*b*) the value for duty of the specific goods or class of goods, or
>
> (*c*) that such goods are exempt from duty,
>
> and an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in section 45.

Reliance is placed upon the words "an order, finding or declaration of the Tariff Board is final and conclusive . . ."

The appellants contend that an opinion expressed by the Tariff Board pursuant to s. 46, as also any order, finding or declaration made on any appeal under s. 44, is final and conclusive, not only in relation to the parties who are before the Board on the appeal, but as against everyone. The Board's decision, it is said, is a judgment *in rem* and not merely a judgment *inter partes*.

Halsbury, 3rd ed., vol. 15, p. 178, para. 351, defines a judgment *in rem* as follows:

> A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a

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party to the litigation). Apart from the application of the term to persons, it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.

In my view the opinion expressed by the Tariff Board in Appeal No. 363 cannot be said to be a judgment determining the status of a person or of a thing. The *Customs Act* makes provision for appeals to the Board with respect to decisions made by the Deputy Minister in the administration of that Act. It confers a right of appeal on a person who deems himself to be aggrieved by such a decision in relation to certain specified matters and on such an appeal the Board may make an order, finding or declaration. When the Act states that such an order, finding or declaration shall be final and conclusive, subject to further appeal, I do not interpret it as meaning anything more than that it shall be final and conclusive in relation to the appeal which is before it. It does not mean that a decision rendered on one appeal can preclude some other person, not a party to that appeal, from appealing a decision of the Deputy Minister made in relation to an importation of specific goods by him, nor does it preclude the Board from dealing with such an appeal upon its merits. The Board does not have a jurisdiction under the Act to decide general questions as to the status of goods or of persons with that finality which is necessary to set up an estoppel by a judgment *in rem*. See *Society of Medical Officers of Health v. Hope*[1].

I do not think, therefore, that the opinion given by the Board to the Minister can be regarded as being final and conclusive in relation to the appeal taken by the respondents, who were not parties in Appeal No. 363. In my view the principle of *res judicata* is not applicable in this case.

The next question involves the merits in law of the actual decision made by the Tariff Board in Appeal No. 398. That decision is based upon an express finding of fact made by the Board that

> In the matter of the product "Clorox", which is at issue here, we believe the evidence establishes that it is ordinarily and regularly used in the family wash primarily as a bleach and, secondarily, as a disinfectant.

[1] [1960] A.C. 551, 1 All E.R. 317.

The issue is whether a product ordinarily and regularly used as a disinfectant, which otherwise meets the requirements of Tariff Item 219a, does not fall within it because that is a secondary and not its primary use.

I agree with Cameron J. that, if there had been some other tariff item applicable specifically to preparations for bleaching, the Board would have had to consider the primary use as a bleach in deciding whether Clorox should be classified under that item or under 219a. Here, however, the choice is between Tariff Item 219a, which refers specifically to preparations "for disinfecting", and the so-called "basket item" 711, which contains no reference whatever to goods for bleaching or for disinfecting. It seems to me that, upon the facts found by the Tariff Board, as between these two items, the goods in question here fall within Tariff Item 219a, the definition of which is properly applicable to them.

In my opinion, therefore, the Tariff Board did not err on a matter of law in making the classification which it did and the appeal should be dismissed. The appellants should pay the costs of the respondents other than the Deputy Minister of National Revenue for Customs and Excise. There should be no order as to the costs of that respondent.

Appeal dismissed with costs.

Solicitors for the appellants, Javex Company Ltd. and Dominion Glass Company Ltd.: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for the appellant, Consumers Glass Company Ltd.: Holden, Hutchison, Cliff, McMaster, Meighen & Minnion, Montreal.

Solicitors for the respondents, Mrs. Amy Oppenheimer et al.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for The Deputy Minister of National Revenue for Customs and Excise: C. R. O. Munro, Ottawa.