1963
Mar. 4
Mar. 15

BETWEEN:

W. B. ELLIOTT ..... APPELLANT;

AND

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE ..... RESPONDENT.

Revenue—Customs and Excise—Goods subject to duty—Reloading tool shipped in U.S.A.—Duty—Jurisdiction of Tariff Board—Customs Act R.S.C. 1952, c. 58, s. 45 and s. 44 as enacted by S. of C. 1958, c. 56, s. 2—Customs Tariff Act R.S.C. 1952, c. 60, s. 35(2)(3)—Appeal dismissed and cross-appeal allowed.

Appellant, a resident of Ontario, received a tool designed to reload used cartridge shells, in Niagara Falls, New York State, whence he imported it into Canada. The article was shipped to appellant, charges of $5.59 prepaid, by a firm in California, U.S.A. As a method of advertising the California firm gave away each year as free samples, several of these tools and shipped them, charges prepaid, to selected recipients. The imported tool was such a sample, no monetary consideration being given or required of appellant who placed the tool on display and felt bound not to use it for any purpose except display or demonstration. The price at which like goods were sold by the California firm was $237.50 less a discount of 20% f.o.b. without prepayment or allowance of any delivery charges. The evidence is clear that the goods were shipped to Canada from Niagara Falls, N.Y. and not from California. The tool was entered under item 427*a* of the *Customs Tariff Act* which imposes a customs duty of 7½ per cent *ad valorem*. Before the Tariff Board and in this appeal the appellant submitted that while no monetary consideration had been paid by him, nevertheless the transaction was a sale within the meaning of "comparable conditions of sale" under s. 35(2) of the Act, and the value for duty should be determined in accord with that subsection and as comparable free transactions had been carried on in the U.S.A. the value for duty should be 7½ per cent of zero dollars. The Tariff Board dismissed the appeal to it on the ground that the transaction was not a sale but a gift without monetary consideration and that the value for duty is $190.00 plus $5.59 transportation charges. Appellant appealed to this Court, contending that the transportation charges should not be included on the ground that the tool was shipped to him from California and not from Niagara Falls. The respondent cross-appealed contending that the decision of the Tariff Board should be varied, as the Board had not jurisdiction to order that its declaration should not be construed to confer upon the respondent the right to levy upon the appellant's imported article customs duties in excess of those payable under the Deputy Minister's original decision.

Held: That the appeal be dismissed.

2. That the goods were shipped to Canada from Niagara Falls.

3. That the Board was justified in deciding that the fair market value of the goods "at the time when and place from which the goods were

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shipped to Canada" included the sum representing the prepaid freight charges to Niagara Falls.

4. That the cross-appeal be allowed.

5. That the Board had increased the value for duty by $6.00 beyond that fixed by respondent and respondent was specifically given the right under the *Customs Act* to re-appraise the value for duty of any goods at any time to give effect to a decision of the Board, and the Board erred in law to its ruling in this regard.

APPEAL and CROSS-APPEAL under the *Customs Act*.

The appeal was heard before the Honourable Mr. Justice Cameron at Ottawa.

W. B. Elliott on his own behalf.

J. D. Lambert for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (March 15, 1963) delivered the following judgment:

This is an appeal taken under the provisions of s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, as amended, from a declaration of the Tariff Board dated May 16, 1962, in Appeal No. A-541, dismissing the appellant's appeal from the ruling of the respondent as to the value for duty of an article imported by the appellant under Niagara Falls Entry No. 6553, dated June 6, 1958, and called "Hollywood Super-Turret Reloading Tool", a tool which is designed to reload used cartridge shells.

At the hearing of the appeal in this Court, two additional exhibits were filed by consent to complete the record, namely,

(1) Exhibit D-9, a copy of a letter from the respondent to the appellant dated January 20, 1960, in which in response to the appellant's request that the respondent make a ruling so that the appellant should take an appeal to the Tariff Board, it is stated: "The case has been reviewed and my decision is that the lowest value which may be accepted for duty purposes in this instance is $185 Canadian funds.

(2) Exhibit D-10, a letter from the appellant to the Tariff Board dated February 9, 1960, in which the

appellant appealed from that ruling of the respondent to the Tariff Board.

Section 45 of the *Customs Act* as enacted by s. 2 of c. 26, Statutes of 1958, and relating to appeals from the Tariff Board, was in force at the time the appellant appealed to this Court. While it is not now necessary to first obtain leave to appeal from this Court or a Judge thereof, the right of appeal so given is "upon any question of law". As stated by the President of this Court in *The Dentists' Supply Company of New York v. The Deputy Minister of National Revenue (Customs and Excise)*, an unreported judgment dated June 16, 1960:

> Thus to the extent that the declaration of the Tariff Board in the present case was a finding of fact this Court has no right to interfere with it unless it was so unreasonable as to amount to error as a matter of law.

The Board's declaration contains the following clauses which I think I may accept as its findings of fact:

> The appellant is a resident of St. Catharines, Ont., Canada but, for convenience, the reloading tool was shipped to, and received by him in Niagara Falls, N.Y. in the United States of America, whence he imported it into Canada in April, 1958; the relevant Customs Entry for Home Consumption is dated June, 1958. The article was shipped to the appellant, charges of $5.59 prepaid, by the Hollywood Gun Shop located in Hollywood, California, in the United States of America.
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> The documents entered as Exhibits A-1 and A-6 support the oral evidence of the appellant that, as a method of advertising, the Hollywood Gun Shop followed the practice of giving away each year as free samples, several reloading tools and of shipping them, charges prepaid, to selected recipients, that the imported tool was such a sample, that no monetary consideration was given by or required from him, but that he had placed the tool on display and that he felt bound not to use it for any purposes except display or demonstration.
>
> The respondent introduced evidence to show that the price at which like goods were sold in single units by the Hollywood Gun Shop, was $237.50, less a discount of 20%, f.o.b. Hollywood, without prepayment or allowance of any delivery charges. It was not disputed that the transportation charges on the article delivered to the appellant in Niagara Falls, New York were $5.59. It is clear from the evidence that the goods were shipped to Canada not from Hollywood, California but from Niagara Falls, New York.

The reloading tool in question was entered under Item 427*a* of the *Customs Tariff Act* and no appeal has been taken from that classification. Under that item, a customs duty of 7½ per cent. *ad valorem* is imposed. Accordingly, it was necessary to apply the provisions of s. 35, the

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relevant portions of which at the date of entry were as follows:

35. (1) Whenever duty *ad valorem* is imposed on goods imported into Canada, the value for duty shall be determined in accordance with the provisions of this section.

(2) The value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale.

(3) When the value for duty cannot be determined under subsection (2) for the reason that like goods are not sold under comparable conditions of sale, the value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions.

Before the Tariff Board and in this appeal, the appellant submitted that while no monetary consideration had been paid by him to Hollywood Gun Shop for the reloading tool, nevertheless the transaction was a "sale" within the meaning of that word as used in the phrase "comparable conditions of sale" in s-s. (2) of s. 35; that accordingly, the value for duty should be determined in accordance with that subsection; and that as there was evidence that Hollywood Gun Shop had on some occasions had similar transactions with parties in the United States of America in which there was no monetary consideration, the value for duty should be 7½ per cent. of 0 dollars—that is, nothing.

For the respondent it was submitted before the Tariff Board and in this Court that the transaction by which the appellant became the owner of the reloading tool was not a sale, but a gift without monetary consideration; that the words "under comparable conditions of sale" as found in s-s. (2) could not be applied to the acquisition and importation of this reloading tool; and that, consequently, the value for duty could not be determined under that subsection. It was therefore submitted that the value for duty should be determined under the provisions of s-s. (3).

The conclusions of the Board were stated as follows:

In the opinion of the Board the transfer of ownership without monetary consideration is not a sale within the meaning of that word in subsection (2) of section 35.

The Board agrees with the respondent that the provisions of subsection (3) of section 35 are applicable and finds that the value for duty is

$190.00 plus the $5.59 transportation charges from Hollywood to Niagara Falls, New York, the place from which the goods were imported to Canada; however, this declaration should not be construed to confer upon the respondent the right to levy upon the appellant's imported article, customs duties in excess of those payable under the Deputy Minister's original decision.

Accordingly the appeal is dismissed.

The evidence of the appellant before the Board clearly shows that the Hollywood Gun Shop advised him that it was sending him a gift, the nature of which he did not know until it was received; that he did not know why it was being sent to him; and that he gave no consideration of any kind for the tool.

In *Deputy Minister of National Revenue for Customs and Excise v. Parke, Davis and Company, Limited*[1], the President of this Court said at p. 15:

> It is, I think, sound to say that, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning.

The word "sale" has a variety of meanings, but the following dictionary definitions would seem to be most relevant.

The Shorter Oxford English Dictionary: The exchange of a commodity for money or other valuable consideration. Also disposal of goods for money.

Funk and Wagnall's New Practical Standard Dictionary: The act of selling; the exchange or transfer of property for money or its equivalent.

Webster's New International Dictionary: A contract whereby the absolute or general ownership of property is transferred from one person to another for a price or sum of money, or loosely, for any consideration.

Further reference may also be made to the following. In *Halsbury's Laws of England*, Third Ed., Vol. 34, at p. 5, sale is defined as the transfer, by mutual assent of the ownership of a thing from one person to another for a

[1] [1954] Ex. C.R. 1.

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money price. And in *Benjamin on Sale*, 8th Ed., p. 2, it states:

> By the common law a *sale* of personal property was usually termed a "bargain and sale of goods." It may be defined to be a transfer of the *absolute* or *general* property in a thing for a price in *money*. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.:
>
> (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised.

And at p. 3:

> So in relation to the element of price. It must be *money*, paid or promised, according as the agreement may be for a cash or a credit sale; but, if the consideration given be something other than money, it is not a sale.

I am in full agreement with the conclusion of the Board that to constitute a "sale" within the meaning of that word in s-s. (2), there must be a monetary consideration. In the present case, there was no monetary or any other consideration and consequently the Board was right in reaching the conclusion that in determining the value for duty, that subsection was inapplicable. It is to be noted, also, that the subsection declares that the value for duty shall be *"the fair market value"* determined as therein provided, and "in respect of like goods when sold . . . *in the ordinary course of trade under fully competitive conditions"*. The use of the phrases which I have emphasized would seem to preclude the possibility of establishing the value for duty by reference to gifts made without consideration.

It is not disputed that if the value for duty of the reloading tool should not be determined under s-s. (2), it should be made under s-s. (3). But the appellant objects to the inclusion of $5.59 transportation charges which the Board added to the value of the goods, on the ground that the goods were "shipped" from Hollywood, California, and not from Niagara Falls, New York. It will be noted that the valuation for duty under s-s. (3) is "the fair market value at the time when and place from which goods were *shipped to Canada . . .*"

It is admitted that the Hollywood Gun Shop prepaid transportation charges of $5.59 for transferring the tool from Hollywood, California, to Niagara Falls, New York;

that the tool was consigned to the appellant at Niagara Falls, New York, instead of to his home address at St. Catharines, Ontario, at his request; and that he himself picked up the tool at Niagara Falls, New York, and caused it to be transported into Canada at Niagara Falls, Ontario, Port of Entry, and thence to St. Catharines.

The word "ship" also has a large number of meanings. As used in the subsection, I am of the opinion that one of the definitions given in *Funk and Wagnall's New Practical Standard Dictionary* is here applicable, namely, "to send by any established mode of transportation, as, by rail". No doubt Hollywood Gun Shop shipped the tool from Hollywood to Niagara Falls, New York, but it was from Niagara Falls, New York, that the goods were shipped to Canada. Accordingly, the Board was fully justified in deciding on the evidence that the fair market value of the goods "at the time when and place from which the goods were shipped to Canada" included the sum of $5.59, representing the pre-paid freight charges to Niagara Falls, New York.

For these reasons, I am of the opinion that the Tariff Board in so far as the appellant's appeal is concerned, did not err upon any question of law and that accordingly the appellant's appeal should be dismissed, with costs.

I should note here that the appellant was not represented by counsel at the hearing of the appeal, but conducted his own case. For that reason the errors in law which he attempted to establish were not clearly defined, and accordingly I have reached my conclusions on the assumption (but without so deciding) that the matters I have dealt with involved errors in law on the part of the Board. Reference may usefully be made to the decision of the President of this Court in the case of *The Dentists' Supply Company of New York* (*supra*) in which he points out the limitations imposed on this Court in hearing appeals from the Tariff Board.

I turn now to the cross-appeal taken by the respondent under the provisions of s. 45(10) of the *Customs Act* as enacted by s. 2(1) of c. 26, Statutes of 1958:

Take notice that the respondent intends to contend that the decision of the Tariff Board should be varied by an Order of this Honourable Court that the Tariff Board erred in law and had no jurisdiction to order that the declaration of the Board should not be construed to confer upon the respondent the right to levy upon the appellant's imported articles, cus-

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toms duties in excess of those payable under the Deputy Minister's original decision.

In the cross-appeal, the respondent relies on the *Customs Act* as amended and particularly on s. 44 thereof, and on the *Customs Tariff Act* R.S.C. 1952, c. 60., and in particular on s. 3 thereof.

The ruling of the Deputy Minister from which an appeal was taken to the Tariff Board was that "the lowest value which may be accepted for duty purposes in this instance is $185 Canadian funds"; the appellant submitted that the value for duty should be 0 dollars and the Board found that the proper value for duty was $195.59 which, while not so stated, must, I think, have been in U.S. dollars as its constituent parts were both in that currency. It was agreed that at the date of entry, $195.59 U. S. currency was the equivalent of $191 Canadian currency. By its decision, therefore, the Board increased the value for duty by $6 beyond that fixed by the ruling of the respondent.

The appeal taken to the Board was made under s. 44(1)(*a*) of the *Customs Act* as to "value for duty". Under s-s (3), the Board is empowered to make

> such order or finding as the nature of the matter may require, and without limiting the generality of the foregoing, may declare
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> * * *
>
> (*b*) the value for duty of the specific goods or class of goods
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> and an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in s. 45.

Now if the Board had merely intended to intimate to the appellant that its decision was not a re-appraisal, no serious objection could be taken, as the right of reappraisal following a decision of the Board is in the respondent. But it seems to me that the language used goes much further than that and in effect purports to deny to the respondent the right of re-appraisal following the Board's decision.

Were it not for the special provisions of s-ss. (4) and (5) of s. 43 of the *Customs Act* (as amended by s. 3 of c. 32, Statutes of Canada, 1955), it might perhaps be argued that as the appeal to the Tariff Board was made by the appellant from a re-appraisal made by the respondent, the latter was in some way bound by that re-appraisal or ruling and could not for the advantage

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of the National Revenue and to the detriment of the importer, levy or collect any tax in excess of that resulting from the re-appraisal which was the subject of the appeal to the Board. Those subsections are as follows:

(4) The Deputy Minister may re-determine the tariff classification or re-appraise the value for duty of any goods

(*a*) in accordance with a request made pursuant to subsection (3),

(*b*) at any time, if the importer has made any misrepresentation or committed any fraud in making the entry of those goods,

(*c*) at any time, to give effect to a decision of the Tariff Board, the Exchequer Court of Canada or the Supreme Court of Canada with respect to those goods, and

(*d*) in any other case where he deems it advisable, within two years of the date of entry of those goods.

(5) Where the tariff classification of goods has been re-determined or the value for duty of goods has been re-appraised under this section

(*a*) the importer shall pay any additional duties or taxes payable with respect to the goods, or

(*b*) a refund shall be made of the whole or a part of any duties or taxes paid with respect to the goods,

in accordance with the re-determination or re-appraisal.

It will be observed that Parliament by s-s. (4)(*b*) has specifically given to the respondent the right to re-appraise the value for duty of any goods at any time to give effect to a decision of the Tariff Board, of this Court or of the Supreme Court of Canada, with respect to those goods; and by s-s. (5)(*a*) has directed that the importer shall pay any additional duties or taxes payable with regard to the goods when the value for duty has been re-appraised under s. 43, including, of course, the re-appraisal made under s-s. (4)(*c*). In view of these statutory provisions and of s. 3 of the *Customs Tariff Act*, R.S.C. 1952, c. 60, I am satisfied that the Tariff Board erred as a matter of law and had no jurisdiction to order that its declaration should not be construed so as to confer upon the respondent the right to levy upon the appellant's imported article, customs duties in excess of those payable under the Deputy Minister's original decision.

Accordingly, the cross-appeal will be allowed, but without costs.

Judgment accordingly.