

PRIVY COUNCIL

Vacuum Oil Company

Vs.

Secretary of State (PC)

P.C.A.No.46 of 1931

(Lords Blanesburgh J. Tomlin and Sir Lancelot Sanderson. JJ.)

21.04.1932

JUDGMENT

LORD BLANESBURGH. J.

1. The appellants an American company, with headquarters in New York, are engaged in the manufacture of various grades of oil used in the lubrication of machinery. One of their specialities is an oil known as "mobiloil" specially manufactured for the lubricating of motor oars. Large quantities of "mobiloil" are imported into India and are sold by the appellants to retailers in one gallon tins. No question however, is in these proceedings raised as to any oils so imported and sold. They were the subject of another suit to be referred to later. This case is concerned only with the import duties on the appellants' machinery lubricating oils, including incidentally ' Mobiloil" in drums or barrels, which are imported into India through the Port of Bombay and are thereafter sold by the appellants direct to consumers. The dispute is as to the proper basis upon which these imported oils are assessable to duty under the Sea Customs Act.1878. Since such an issue must ultimately depend upon the true effect of that Act as applied to the oils in question, it will be convenient to set forth at once the material provisions of the sections in point. They are numbered 29 and 30, and are as follows:

"Section 29. On the importation into.... any customs port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill-of-entry.... state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

2. In case of doubt, the Customs-Collector may require any such owner or any other person in possession of any invoice, broker's note policy of insurance or other

document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. and thereupon such person shall produce such document and furnish such information....

Section 30. For the purposes of this Act the real value shall be deemed to be (a) the wholesale cash price, less trade-discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation... without any abatement or deduction whatever, except... of the amount of the duties payable on the importation thereof : or (b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

3. Now oil is amongst the "goods subject to duty," the amount of the duty to be charged being made dependent as above appears upon the "real value" of the oil imported. and the contention of Government has been and is that in terms of the Act "the real value" of the appellants' oil is its "wholesale cash price" referred to in Section 30(a), a price ascertainable, so it is said, without difficulty. To this the answer of the appellants is, that in view of the unique character of their machinery oil and of the invariable course of business pursued by them in relation to its sale, a "wholesale cash price" for that oil has never existed and is not ascertainable and that accordingly its real value must, for the purpose of duty, be determined in accordance with Section 30(b) of the Act involving a result relatively favorable to themselves.

4. Before 1923 these oils of the appellants had always been assessed at Bombay on the principle so contended for by them. In 1923, however the Customs authorities claimed, as their right under the Act, to assess the oils on the basis of their "wholesale cash price," and in due course the action out of which this appeal arises was brought by the appellants to test the validity of that claim. In the proceedings the appellants' complaint has been that on this new and erroneous principle they have been charged with and have been compelled to pay duty in excess of what was lawful. Their claim has been to recover the excess so paid. At the trial the appellants' view prevailed with Blackwell, J., who sitting as a Judge of first instance in the High Court of Judicature at Bombay, gave judgment for the appellants by a decree of 5th April 1929. His decree however was, on 5th. August 1930, reversed on appeal by the same High Court, which then dismissed the action. By their present appeal, the appellants seek to have the decree and judgment of Blackwell, J., restored.

5. Now, as a first step to the solution of the question so at issue, it would be natural to ascertain what, as matter of construction, the statutory expression in debate, "the wholesale cash price" really means or connotes. Only then can it be determined whether it is a price ascertainable in relation to the appellants' imported machinery oils. But the ambiguities of the sections, such as they are, which must ultimately be resolved, will be best exposed if attention is, in the first instance, directed to the position of these oils of the appellants in the Bombay market and to the course of business pursued by them after importation in their sale and disposition.

6. The facts relating to these matters were carefully found and stated in detail by the learned trial Judge, and as found by him were accepted by the High Court on appeal and by both sides before the Board. And, first, with reference to the position of the oils in the Bombay market the outstanding fact is that, imported as they are under the trade description of "Gargoyle," of no other oils can it be said, in Bombay, that, using the language of the Act, they are of "the like kind and quality." Accordingly, the relevant "wholesale cash price" for the appellants' lubricating oils, if any there be, must be found in the actual sales of these oils in Bombay by the appellants themselves. Have there been any such sales ? It was to the facts in relation to this question that at the trial the learned Judge mainly directed his attention, arriving at conclusions which may be summarised as follows : The appellants have a worldwide organization. In Great Britain, South Africa and Australia they carry on their business through subsidiary companies. In Egypt, India, and the Far East through branches. They have five branches in India; their principal branch is at Bombay. No oil of theirs is introduced into India except through one or other of these five branches. The oil is consigned from American headquarters upon invoices charging the importing branch with the cost price of the oil f.o.b. New York, plus a small manufacturing profit. This is the basis upon which the appellants' oils are shipped to their subsidiary companies and branches all over the world. The assertion in their plaint that their oils are invoiced on the same basis to independent purchasers outside America was scarcely borne out in evidence, and is not directly pronounced upon by the learned Judge. It may be inferred that he was not satisfied on this point. But the question need not now detain their Lordships, although it will be again referred to. It has not remained a decisive factor in the decision of the appeal.

7. The oil of the appellants is imported in barrels, drums and cases : the bulk of it in 42-gallon barrels and drums : only a small quantity in cases of two four-gallon tins. In their bills of entry for Bombay the oil is invariably valued by the appellants at its

invoice price (arrived at as already stated), plus freight insurance and landing charges. This was the basis of value accepted by the Customs up to March 1923. It was for the restoration of this basis, and of their assessment on that footing, that the appellants contended in the action.

8. Upon importation all the oils are transferred to the appellants' warehouses in Bombay. Largo stocks are necessary, as their sales from Bombay alone average many million gallons a year. All contracts for sale are made with reference to stocks, and all deliveries are made from stocks replenished from time to time by shipments. No oils are sold ex-ship. All oils are disposed of direct to consumers, and never to dealers, whether for purposes of resale or otherwise. There is a good reason for this practice. It eliminates or reduces the danger of the oils being adulterated before use and so serves to maintain their reputation for quality. The appellants themselves discharge all the functions of retailers of their oil as so sold. They maintain warehouses, offices and staffs, employ salesmen to canvass consumers, advertise, insure their stock, and bear the risk of bad debts. The selling price to consumers is about 70 per cent above entry price, the selling price being swollen by the appellants' retailing profit and by due provision for these charges in respect of matters subsequent to importation and in character just indicated.

9. Orders are obtained direct from consumers : the smallest quantity supplied is a case of eight gallons. The selling price is the same whatever be the quantity, large or small, purchased by the consumer. But if a consumer enters into a contract to take all his requirements from the appellants for a year, he is entitled to a discount of from 2½ to 15 per cent according to the quantity purchased in the year. Thirty days' credit is conceded from date of invoice, but a special discount for cash payment within ten days is allowed. The appellants' oils are delivered by them to buyers in the is land of Bombay, or in other cases free on rail at the station nearest the appellants' warehouse from which they are supplied. The cost of such delivery is included in the sale price.

10. The appellants are the largest importers into Bombay of lubricating oils. The preponderating quantity so imported is contained and sold in barrels of 42-gallon or drums of 45-gallon capacity. The amounts purchased by individual consumers are in some cases very large indeed. Further it may be added that although the oils are bought by buyers for their own consumption and are sold on that footing, it does not appear that any enforceable obligation on a buyer results to that effect. It would seem from the evidence however that the Understanding between the parties on this subject is, in fact, respected and observed.

11. Such being the appellants' invariable course of business with reference to these imported oils of theirs, the question now to be determined is whether the price charged and received by them therefore, is, within the meaning of the words in Section 30 to give them again in their completeness

" a wholesale cash priceless trade discount for which goods of the like kind and quality are sold or are capable of being sold at the time and place of importation."

12. The learned trial Judge held that it was not. In his view the word " wholesale " used as it is in connexion with the words "trade discount" and " cash price" indicates a sale to persons in the trade for resale and not a sale to a consumer direct : nor, as he thought, do the words " cash price " cover the appellants' sales which are credit sales.

13. The High Court, on appeal, took a different view of the Act. The learned Chief Justice of Bombay, who gave the leading judgment, discussing the words of the section separately, hold that the preferable meaning to be attached to the term "wholesale price " as therein found was that of a price paid on a sale of substantial quantity of goods rather than of a price in contrast with a retail price ; and when regard was had to the enormous quantities of oil represented by the appellants' sales, and the substantial amount involved in even the smallest of them, he thought their sales might properly be regarded as " wholesale." He held further that while the appellants' sales were normally made on a credit of 30 days, there was no difficulty in ascertaining the cash price by deducting from the credit price a discount at the ordinary current rate, and that while the expression " trade discount " did import a discount allowed to the trade, he thought that the Crown was justified in conceding as a deduction from the appellants' list prices an average discount of 12½ per cent., fairly representing the actual discount allowed by the appellants to their customers in their annual accounts. The alternative in the learned Chief Justice's view was to hold not that there being no room for a " trade " discount in the transaction the sale was not one for a wholesale price in terms of the Act at all, but that no discount whatever should be allowed to the appellants who would then be left chargeable with duty on their imported oils at their current list prices less only a discount for credit given. In his view accordingly the contentions of Government were well founded and the action failed. and in all this Baker, J., concurred, although he found in the reported case later to be referred to a further reason for the same conclusion.

14. Their Lordships are unable to subscribe to these views of the learned Chief Justice. He has only, as they think, been able to reach them by dealing separately with

the terms of an enactment which is in its nature composite. He has not availed himself, as an aid to construction of the light thrown upon each of its expressions by the presence within it of the others. Further in his construction of the words he has, they think, hardly had sufficient regard to the setting in which they are found. In these respects, in their Lordships' view, the method of analysis adopted by the learned Chief Justice is or principle open to objection, and it has resulted in a 'meaning being attributed to the enactment which is not us they think otherwise obtainable.

15. Sections 29 and 30 are sections of a taxing Act not to be pressed against the taxpayer beyond their plain intendment, and taken as a whole, as their Lordships read them, they seem to disclose on the part of the legislature when describing the price which is to represent the " real value" of the goods to be taxed a definite purpose to define a price-conservative in its every aspect and free in particular from any loading for any post importation charges incurred in relation to the goods. The price is to be a price for goods, as they are both at the "time " and "place" of importation. It is to be a " cash price " that is to say, a price free from any augmentation for credit or other advantage allowed to a buyer ; it is to be a net price, that is to say, it is a price "less trade discount." and this last expression, supplemented by these other indications confirms in their Lordships' view the conclusion that the words " wholesale..... price" are used in the section in contradistinction to a " retail price ' and that not only on the ground that such is a well-recognized meaning of the words but because their association with the words " trade discount ' indicates that sales to the trade are those in contemplation, and also because only by attaching that meaning to the word is the " wholesale " price relieved of the loading representing post importation expenses, which, as a matter of business, must always be charged to the consumer, and which in the other words of the section already alluded to, are so carefully eliminated. If the question of construction had to be determined solely by reason of the presence of the word " cash " in the definition their Lordships would have been in agreement with the Chief Justice. But that is by no means the case.

16. Their Lordships accordingly reach the conclusion that in no sense can the price charged to consumers for the machinery oils imported by the appellants be regarded as such ' a wholesale cash price " as is described in the Act, nor is it in their judgment possible by further inquiry to extract any such price from any other available material, indeed the Act as their Lordships read it does not invite any such further inquiry. The wholesale cash price primarily in view is, they cannot doubt, that price current for staple articles, the amount of which, if not a subject of daily publication in the press, is

easily ascertainable in appropriate trade circles. Their Lordships do not find in the section any sufficient indication that the alternative basis of assessment indicated in Section 30(b) is only to be a "dernier resort." For the great bulk of dutiable goods in their infinite variety it must, they feel satisfied, be the only available basis. and in their Lordships' judgment it is the basis on which these oils of the appellants must be charged to duty.

17. This conclusion really disposes of the appeal. For any proved overcharge of duty alleged in the plaint liability is admitted, and while, if the appellants' oils are to be assessed under Section 30(b), the bills of entry value, for reasons already indicated, may not be fully adequate, no other basis of value has on this footing been put forward, and to it no objection can in this action be taken. None, indeed, was taken to the acceptance by the learned trial Judge of that basis of value as the foundation of the relief to the appellants which he decreed and it was the basis accepted by the authorities themselves for many years.

18. Their Lordships were informed that as a result of some change of procedure, operative as from 1st April 1926, the question at issue on this appeal cannot again arise with reference to imports subsequent to that date. But the nature of the change was not explained in detail, and their Lordships have accordingly been careful in terms to confine their judgment to the respondent's liability for the actual overpayments alleged by the appellants in their plaint.

19. Their Lordships would only further observe that the case of *Vacuum Oil Co. v. Secretary of State* which related to the duty on the "Mobiloil" of the appellants imported and sold to the trade, and upon which such great reliance was placed by the High Court, Baker, J., regarding it as decisive does not, when properly appreciated, cover the broad question now raised. It is unnecessary therefore further to consider it on this occasion. For these reasons their Lordships are of opinion that the appeal should be allowed ; that the decree of 5th August 1930, should be discharged, and that of 5th April 1929 restored. and they will humbly advise His Majesty accordingly. The respondent must pay the appellant's costs of the appeal to the High Court and of this appeal.

Appeal allowed.

Cases Referred.

AIR 1922 Bombay 12=67 IC 267=47 Bom. 174,