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BETWEEN:

THE DEPUTY MINISTER OF NATIONAL REVENUE
 FOR CUSTOMS AND EXCISE APPELLANT,

AND

NATIONAL COUNCIL OF THE BAKING
 INDUSTRY RESPONDENT.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32, 57, 58 and Schedule III—Customs Tariff, R.S.C. 1952, c. 60, Item 710 of Schedule A—“Usual coverings” used to cover exempt foodstuffs—Whether metal or wire bread-handling and delivery trays are “usual coverings”—Appeal from decision of Tariff Board allowed.

The *Excise Tax Act* exempts from sales tax certain items of foodstuffs including bread and also “usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax and materials to be used exclusively in the manufacture of such coverings”. The Department of National Revenue ruled that metal bread carriers or trays imported into Canada from the manufacturers in California, U.S.A. were subject to sales tax as not being within the exception of “usual coverings” as set out in Schedule III of the Act, and that wire delivery trays for bread supplied principally by a Montreal manufacturer were also subject to sales tax for the same reason. Respondent, the recognized trade association of the Canadian baking industry, appealed from these rulings to the Tariff Board which unanimously allowed its appeal. Leave was granted to appeal from that decision to this Court on the question of whether the Tariff Board had erred in law in reaching its finding.

Held: That “usual coverings” were to be construed as understood in ordinary language and that trays are not articles which “cover” bread within the dictionary meaning.

2. That the Tariff Board erred as a matter of law in deciding that the trays in question were “usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax” and in so doing erred in construing terms used in the *Excise Tax Act* according to meanings given to the relevant terms under the *Customs Tariff Act*.

Appeal from a decision of the Tariff Board.

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

D. H. Aylen for appellant.

G. F. Henderson, Q.C. and *R. H. McKercher* for respondent.

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

CAMERON J. now (November 20, 1962) delivered the following judgment:

This is an appeal taken under s. 58 of the *Excise Tax Act* R.S.C. 1952, c. 100., as amended, from a declaration of the Tariff Board dated March 31, 1959 (Appeal No. 496). Section 30 of the Act levies a consumption or sales tax on the sale price of, *inter alia*, all goods (a) produced or manufactured in Canada, and (b) imported into Canada. Section 32 provides that the tax so imposed does not apply to the sale or importation of the articles mentioned in Schedule III thereof. "Bread" is mentioned in that schedule under the heading "Foodstuffs" and it is therefore exempt from sales tax. Schedule III also contains the following clause under the heading "Coverings":

Usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax and materials to be used exclusively in the manufacture of such coverings;

On April 1, 1958, the Department of National Revenue (Excise) ruled that metal bread carriers called "Del-Tras" (Exhibit NCB-1) imported into Canada from the manufacturers, Del-Tra Company of Oakland, California, were subject to sales tax as they were not within the exception of "usual coverings" as set out in Schedule III. On April 22, 1958, the Department ruled that wire delivery trays for bread (Exhibit NCB-2), the principal supplier of which was Cogan Wire and Metal Products of Montreal, were subject to sales tax for the same reason.

From these rulings the respondent herein, which is the recognized trade association of the Canadian baking industry, appealed under s. 57 to the Tariff Board. The Board's unanimous conclusion was stated as follows:

As receptacles or containers used exclusively for holding bread, a tax exempt food, the Board is of opinion that the bread trays in question fall within the ambit of the exemption for "usual coverings".

Accordingly, the appeal was allowed.

Leave to appeal from that decision was granted to the appellant by my Order dated May 12, 1959, on the following question of law:

Did the Tariff Board err as a matter of law in deciding that wire delivery trays for bread manufactured by Cogan Wire and Metal Products Ltd. and "Del-Tra" metal bread carriers are "usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax" within the meaning of Schedule III of the Excise Tax Act?

That is the only question before me and I need not therefore consider whether the goods here in question are "materials to be used exclusively in the manufacture of such

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coverings" or whether they fall within another exempt item under "Foodstuffs" in Schedule III, "Materials to be used exclusively in the manufacture or production of the foregoing foodstuffs" (i.e., bread).

Counsel for the respondent submits that the appeal should be dismissed on the ground, *inter alia*, that no question of law is involved. I am of the opinion, however, that the construction of a statutory enactment is a question of law. Reference may be made to the following cases: *Deputy Minister of National Revenue for Customs & Excise v. Rediffusion Inc.*¹; *General Supply Co. of Canada, Ltd. v. Deputy Minister of National Revenue, et al.*²; *W. T. Hawkins, Ltd. v. Deputy Minister of National Revenue for Customs and Excise*³; and to *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*⁴.

In its decision the Board found the following facts:

The bread trays in question are undoubtedly receptacles for bread, used in the following manner:

As the bread is wrapped it is packed in the trays either for immediate shipment or for a short period of storage and subsequent shipment. In the case of unwrapped bread, it is packed in the trays when taken from the baking pans. When the bread is delivered to the point of sale the bread is removed from the container, placed on shelves, and the container is returned to the bakery.

These trays are used in lieu of ordinary corrugated paper cartons, which were largely used for this same purpose in the past. Indeed, they continue to be used to some extent. It was admitted that these trays delivered the product in better condition than corrugated cartons and generally do so at a lower cost having regard to the extended life of the containers at issue.

These findings of fact must, of course, be accepted.

It will be convenient to describe in some detail the exact nature of the "trays" so referred to. As stated by the Tariff Board, both are undoubtedly trays. Exhibit NCB-1, called a "Del-Tra", is depicted in the six photographs comprising Exhibit NCB-5. Its main framework consists of strips of durable sheet metal with V-shaped metal corners to support the upper edges. While it may vary somewhat in size, the exhibit itself is 24" x 22" and 6" in height. The metal framework is open on all sides as well as on the bottom and top. To support the loaves of bread when placed in the tray, a removable flat cardboard bottom is inserted as shown

¹ [1953] Ex. C.R. 221.

² [1957] Ex. C.R. 206.

³ [1953] Ex. C.R. 185.

⁴ [1956] 1 D.L.R. 497.

in the photographs, but in the Exhibit NCB-1, the cardboard filler consists not only of the flat base, but of side pieces about 4" high, thus further assisting to keep the loaves in place in the tray. The trays are so constructed that they may be conveniently stacked either at the bakery or in a delivery truck, but except when so stacked, the top of the tray is always open.

The delivery tray made by Cogan Wire and Metal Products, Ltd., of Montreal, (Exhibit NCB-2) is about 26" x 22", is 7" in height and is made of wire. The bottom consists of 21 lengths of wire placed about one inch apart and therefore no cardboard insert is needed or used. The top of the tray is not enclosed or covered in any way. In both trays the loaves are packed horizontally.

The Tariff Board's declaration indicates that its members were of the opinion that the words "usual coverings" should be construed in a broad way and that they were influenced to a substantial extent by the use of the word "coverings" in Item 710 of Schedule A to the *Customs Tariff Act*, as shown by the following extract from the Board's declaration:

The meaning to be given to the words "usual coverings", as they appear in the context of the above-quoted section, is not, in the opinion of the Board, perfectly obvious. Do these words impart the notion of entirely surrounding the exterior surfaces of the article? Do they suggest covering at least the top surface of the article? Or are these words used in a broad or general sense to include a wrapping, package, or a container?

The Board believes these words are used in this latter sense and that the exemption is intended to apply to those coverings, wrappings or packages in which goods are packed or contained, *inter alia*, for convenience of handling, for protection during transportation, or in which they are made available for sale.

We are more inclined to accept this meaning for the word "covering" when we examine the use of this word in Tariff Item 710 of Schedule A to the Customs Tariff Act. It is apparent from this tariff item (a) that "coverings" need not cover the outside of goods; (b) that coverings include such coverings as hold as opposed to otherwise covering goods; and (c) that, in particular, coverings include receptacles.

In construing the meaning of "coverings" in the *Excise Tax Act* by reference to the definition of "coverings" as found in Item 710 of Schedule A to the *Customs Act*, I

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think the Board was clearly wrong. In *Miln-Bingham Printing Co. Ltd. v. The King*¹, Duff J. (as he then was) in delivering the judgment of the Court, said at p. 283:

No doubt, for the purpose of ascertaining the meaning of any given word in a statute, the usage of that word in other statutes may be looked at, especially if the other statutes happen to be *in pari materia*, but it is altogether a fallacy to suppose that because two statutes are *in pari materia*, a definition clause in one can be bodily transferred to the other.

In Tariff Item 710, the term "coverings" includes those inside and outside, used in covering *or holding* goods imported therewith; and by para. (f) thereof includes a multiplicity of things such as packing boxes, crates, wrapping, sacks, rope or twine used in covering *or holding* goods imported therewith.

What, then, in the absence of any definition is the proper construction to be put upon the words "usual coverings" as used in the schedule? In my view, they are general words not applied to any particular science or art and they are therefore to be construed as they are understood in common language. I considered this matter in two cases in which the meaning of certain words also contained in Schedule III were in question. Reference may be made to *The King v. Planters Nut and Chocolate Co. Ltd.*² and to the cases therein cited; an appeal from that decision was dismissed by the Supreme Court of Canada on November 21, 1951, but is not reported. Reference may also be made to *The King v. Planters Nut and Chocolate Co. Ltd.*³

The word "coverings" is not defined in the Act or in the Schedule, and it would be inadvisable for me to attempt a definition, particularly in view of the very large number of "goods" not subject to tax, and as enumerated in Schedule III. It is clear, however, that to fall within the exemption here claimed the trays must be "a usual covering to be used exclusively for covering bread". Now I am fully satisfied that no one would refer to them as a "covering for bread" or as a "bread covering". It is significant to note that in the record of the proceedings before the Board, neither of the respondent's witnesses (namely, Mr. Riddell, president of the respondent and of Western Bakeries, and Mr. McKendry, general manager of another large bakery, Morrison-Lamothe of Ottawa) stated that even in the trade they were called "coverings for bread", or known as such.

¹[1930] S.C.R. 282.²[1951] Ex. C.R. 122.³[1952] Ex. C.R. 91.

Indeed, the respondent's representative before the Board referred to them at various times as "containers", "bread shipping carriers", "delivery containers", "wire shipping containers", "wire delivery trays", and "bread shipping containers." The evidence indicates quite clearly that they were developed for the purpose of enabling bakery employees, particularly delivery men, to carry or handle a large number of loaves at one time, thereby saving time and money. Its primary purpose, therefore, is for handling bread in quantities as was made clear by Mr. McKendry when he said:

Yes we have found the wire tray in our own case to be the best method of handling bread, whether it is in or out of the shop, convenient units.

Mr. Riddell also stated that both are used for the same purpose, namely, for delivering bread from the wrapping machines to the grocery store.

Bread wrappers, such as the usual cellophane or wax paper wrappers would, I think, be included in "usual coverings". But these trays are, of course, not used as wrappers. Mr. Riddell explained that the bread is wrapped when it comes from the wrapping machine and that it is then as fully wrapped as it ever will be.

The standard dictionaries indicate that "covering" and "cover" have a great number of meanings. In the context of the exempting clause now under consideration, it seems to me that the following definitions are the most appropriate.

In the *Oxford New English Dictionary on Historical Principles* (later known as the *Oxford English Dictionary*), 1893, Vol. II, the following definitions are given:

Covering. 1. The action of the verb cover in various senses.

2. That which covers or is adapted to cover, whether for protection, shelter, concealment or adornment; a cover; a cloth to spread over; clothing; the outer cover or integument.

Cover. 1. To put on or lay something over (an object) with the effect of hiding from view, protecting or enclosing; to overlay, overspread with.

2. To put a covering of some specified kind on; the addition or accession of the covering, rather than the condition of the object covered, is the prominent notion.

3. To clothe (the body), to wrap, wrap up, invest, envelop.

Cover. That which covers; anything that is put or laid over or that naturally overlies or overspreads an object with the effect of hiding, sheltering or enclosing it; often a thing designed or appropriated for the purpose.

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In the Third Edition of the *Shorter Oxford English Dictionary*:

Covering. 1. The action of the verb cover.

2. That which covers or serves to cover.

Cover. To overlay, overspread with something so as to hide or protect.

Cover. That which covers, anything that is put or laid over, or that overlies or overspreads, an object so as to hide, shelter or enclose it.

In *Webster's Third New International Dictionary*, 1961, the following definitions appear:

Covering. Something that covers or conceals.

Cover. To put, lay or spread something over, on or before, as for protection, enclosing or masking. To lie over; spread over; be placed on or often over the whole surface of.

In the exempting section, "covering" is used first as a noun and as so used I think it must refer to that which covers or is adapted to cover—a thing designed or appropriated for the purpose of covering—an exempted article; something which is placed on or perhaps over the whole surface of that article. Secondly, it is used in the phrase "for covering goods" which I think means the action of putting something on or laying over an object, with the effect of shielding, protecting or enclosing. In my view, the evidence clearly establishes that the trays are not articles which cover or are adapted to cover bread and their use does not involve the action of putting or laying them over bread. The trays, being open, are without any top, the bread is not protected, shielded or enclosed by a covering of any sort. The trays are not put over the bread, but the loaves are placed for a temporary purpose in the trays, when conceivably one of the results may be that they are protected from damage.

In my opinion, the trays in question are similar in design and purpose to baskets or receptacles or containers. On a proper construction of the exempting provision, it should be found that they are not "usual coverings" since they do not cover and likewise they are not exclusively used for covering bread since nothing is put, laid or spread over the bread.

I think that if Parliament in enacting that exempting clause had intended to include containers or receptacles as such, it would have used appropriate words such as "usual coverings, containers or receptacles used exclusively for covering, containing or holding goods not subject to

the consumption or sales tax". In amending the *Excise Tax Act* by s. 6 of c. 56, Statutes of Canada, 1953-54, the word "container" was used twice in the phrase, "the wrapper, package, box, bottle or other container."

I find, therefore, that the Tariff Board erred as a matter of law in deciding that wire delivery trays for bread manufactured by Cogan Wire and Metal Products Ltd. and "Del-Tra" metal bread carriers are "usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax", within the meaning of Schedule III of the *Excise Tax Act* and accordingly the question submitted to the Court will be answered in the affirmative, the appeal allowed, the decision of the Tariff Board set aside, and the rulings made by the Department affirmed. The appellant is entitled to its costs after taxation.

It may be noted here that by s. 2 of c. 30, Statutes of Canada, 1960, the former Schedule III to the Act was repealed and a new Schedule III substituted therefor, which substitution includes an exemption under the heading "Coverings" which is markedly different from the one here under consideration.

Judgment accordingly.

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