BETWEEN:

1957
Sept. 18
1958
Feb. 27

W. T. HAWKINS LIMITED .....APPELLANT;

AND

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

Revenue—Excise—Sales tax—Claim to exemption for foodstuff composed of three tax exempt ingredients—"Seeds or grains in their natural state"—"Salt"—"Shortening"—The Excise Tax Act, R.S.C. 1952, c. 100, ss. 30(1)(a), 32(1), Schedule III.

The *Excise Tax Act* R.S.C. 1952, c. 100, s. 30 provides that a sales tax shall be imposed on the sale price of all goods produced or manufactured in Canada. Section 32(1) exempts from the tax the articles mentioned in Schedule III to the Act. The Appellant which packages and sells a product called "Magic-Pop" and which consists of popping corn and a small quantity of salt placed in a solidified block of shortening, claimed its product was entitled to exemption as it fell within Schedule III under the heading "Grains or seeds in their natural state". The Assistant Deputy Minister of Excise having ruled against the contention, the appellant appealed to the Tariff Board. The Board dismissed the appeal and the appellant pursuant to leave granted appealed to this Court on the question of law: "Did the Tariff Board err as a matter of law in deciding that a product called 'Magic-Pop' . . . is not exempt from sales tax imposed by the *Excise Tax Act*?"

It was admitted that the three components entering into this product were each individually within Schedule III, salt and shortening being mentioned *eo nomine* under the heading "Foodstuffs" and popping corn within the classification "Grains or seeds in their natural state" under the heading "Farm and Forest". The evidence established that in the course of the appellant's process no chemical interaction resulted and that each component retained its identity or fundamental nature and that the popping corn remained in the same natural state it was in prior to its inclusion and would therefore classify as a grain or seed in its natural state.

The appellant's submission was: (a) that as Parliament in Schedule III had used as one of its headings the word "Foodstuffs" it was to be inferred that Parliament's intention was to include all foodstuffs; (b) that the appellant did not manufacture a new product but merely packaged three tax exempt articles in a form ready for convenient use by the purchaser; (c) that as "Magic-Pop" was composed of three ingredients all of which were exempt from tax, the new article was

therefore exempt; (d) that the article sold by the appellant was popping corn, a grain or seed in its natural state.

Held: That it was not to be inferred that as Parliament had used the word "Foodstuffs" as one of the headings in Schedule III, its intention was to include all foodstuffs. Had such been its intention it would have been unnecessary for it to use anything but that word itself. Under that heading were included a large number of specified articles used for food, but clearly the list did not include all foodstuffs but only the specified articles which, to use the language of s. 32(1), are "the articles mentioned in Schedule III".

2. That the headings were merely for use as a guide to the reader and did not themselves constitute "the articles mentioned in Schedule III".

3. That the question of whether an article was exempt from tax was to be determined as of the date of sale. The question to be answered: "Is the article on the date of sale included in the articles specified in Schedule III?" The basic question was what is being sold? Here it could not be said what was being sold was salt, or shortening or popping corn but an entirely new product differing in appearance, form and function from those of the three original ingredients, which new product was not mentioned or included in any of the articles specified in Schedule III.

4. That s. 32(1), the exemption section, refers to the *articles* mentioned in Schedule III and does not contain any such words as "or any combination of the articles mentioned in Schedule III". It was to be noted from the provisions of the schedule that when Parliament intended to extend the exemption to articles beyond those specifically listed, it used such phrases as "or other similar articles", "and similar goods" or "materials for use exclusively in its manufacture". Had it intended to extend the exemption to articles or products consisting of a number of tax exempt articles, it would have been a simple matter to have so provided.

5. That the article sold by the appellant was not popping corn—a grain or seed in its natural state—but a slab of shortening filled with popping corn and with salt added.

6. That there was no general authority in the taxing section or in the Schedule to the Act for classifying an article according to its main ingredient. If Parliament had intended that articles generally should be so classified, it would have made provision accordingly.

APPEAL under the *Excise Tax Act* from a decision of the Tariff Board.

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

J. W. G. Hunter, Q.C. for appellant.

R. W. McKimm for respondent.

CAMERON J. now (February 27, 1958) delivered the following judgment:

This is an appeal from a decision of the Tariff Board dated February 27, 1957 (Appeal 395). On May 15, 1957,

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the appellant was granted leave to appeal on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that a product called "Magic-Pop", sold by W. T. Hawkins Ltd. of Tweed, Ontario, is not exempt from sales tax imposed by the *Excise Tax Act*?

The sales tax is imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, which in part reads as follows:

> 30. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent. on the sale price of all goods
>
> (*a*) produced or manufactured in Canada.

Counsel for the appellant admits quite properly that that section is of general application and that the appellant is liable to payment of such sales tax in respect of the production or manufacture of its product called "Magic-Pop" unless, on a proper interpretation of the Act, such product is exempted therefrom by reason of the provisions of s. 32(1), which is as follows:

> 32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

There is but little dispute as to the facts. The appellant packages and sells a product called "Magic-Pop" which consists of popping corn placed in a block of solidified shortening, wrapped and packaged for the retail trade. Exhibit A-1 is a sample thereof wrapped in a cellophane container and weighing about three ounces. As sold it is a "ready-mix" preparation and to produce popcorn therefrom it is necessary only to squeeze the contents into a pot and apply heat as directed.

Apart from colouring matter, the ingredients consist of (*a*) popping corn which is about 68 per cent. of the total weight; (*b*) shortening (usually palm kernel oil), which is about 27 per cent.; and (*c*) a small quantity of salt. The corn represents about 40 per cent. of the cost of the materials and shortening and salt about 60 per cent. The three components individually are within Schedule III, salt and shortening being mentioned *eo nomine* under the heading "Foodstuffs", and popping corn being admittedly within the classification "Grains or seeds in their natural state" under the heading "Farm and Forest". If sold or imported separately, therefore, each would be exempt from sales tax.

The appellant's process was described by the president, Mr. Hawkins, as follows: The ingredients are purchased separately and until the packaging process begins they remain in the same state as when purchased, except that

the shortening is maintained at a temperature which renders it flowable. As a result of extensive tests carried out by the appellant, the precise proportion of each ingredient has been established. The appellant also developed a machine for pouring the ingredients into the container or bag and then sealing it. Three spouts lead into a funnel and through each is conveyed the proper proportion of one ingredient (electronically controlled). From the funnel the mixed ingredients drop into the bag or wrapper which is then sealed. In about five minutes the shortening hardens and the article is then in the form of Exhibit A-1 and ready for sale. No mixing is done by the machine itself and such mixing of the ingredients as does take place is brought about by the mere fact that the ingredients are placed in one container.

The evidence establishes that in the process I have described, no chemical interaction results, the whole remaining as a mixture only; the salt does not dissolve in the shortening. The evidence of an analyst also shows that when the components of "Magic-Pop" (except colour) were segregated by mechanical means, and each isolated component then compared with the individual submitted components, all isolated components were substantially identical to the original constituents prior to packaging. Each component, it was stated, had retained its identity or fundamental nature, although in intimate association with the other ingredients. Further, the analyst stated specifically that the popping corn is in the same natural state in "Magic-Pop" as it was prior to its inclusion therein and that he would therefore classify it as "Grain or seed in its natural state".

The Assistant Deputy Minister for Excise ruled that the appellant's contention that the product "Magic-Pop" was entitled to exemption as "Grains or seeds in their natural state" could not be maintained. An appeal was taken from that ruling to the Tariff Board, the latter's decision being as follows:

> The Appellant, in the words of his counsel, "packages a *product* called 'Magic Pop' which consists of popping corn placed in a block of solidified shortening wrapped and packaged for the retail trade". (Our italic.)
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> The question at issue is whether this product falls within Schedule III to the Excise Tax Act.
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> The case for the Appellant amounted to a denial that "Magic Pop" is a product in the ordinary sense at all. It was contended that "Magic Pop"

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ought to be regarded simply as salt, shortening, and grains or seeds in their natural state. Since each of these products (or constituents) is exempt, it was argued that "Magic Pop" therefore is exempt.

However, is the mixture of these ingredients, as sold by the producer, three products or one product? Is the vendor selling shortening, salt, and corn, or is he selling a new product, in effect, a carefully prepared recipe? We think the answer to these questions is clear.

The exemption for shortening, salt, and grains or seeds in their natural state applies to these materials when sold as such, but does not apply to them when they are simply components or ingredients of another product, even though this product is capable of being separated into its original constituents.

Accordingly, the Appeal is dismissed.

Two submissions made by counsel for the appellant may be disposed of at once. The first is that as Parliament in Schedule III used as one of the headings the word "Foodstuffs", it may be inferred that there was an intention to include all foodstuffs, or at least that the schedule should be interpreted liberally. I cannot agree that that is so. If it had been the intention to include all foodstuffs, it would have been unnecessary to use anything but that word itself. Under that heading there are included a large number of specified articles which are used for food, but clearly the list does not include all foodstuffs. It is the specified articles only which—to use the language of s. 32(1)—are "the articles mentioned in Schedule III". The headings such as "Foodstuffs", "Farm and Forest", "Marine and Fisheries", "Religious, Charitable, Health, etc.", are merely for use as a guide in assisting the reader to ascertain whether the article with which he is concerned is or is not listed thereunder. The headings themselves do not constitute "the articles mentioned in Schedule III".

Counsel for the appellant also referred to certain other "mixtures" of individual articles specified in Schedule III (but which "mixtures" themselves are not specified therein) and which were said to have been declared exempt from sales tax by departmental rulings. It would therefore be inconsistent, he says, if these "mixtures" were exempt from sales tax and the mixture "Magic-Pop" was declared to be taxable. The single question now before me is whether the Tariff Board erred as a matter of law in deciding that "Magic-Pop" is not exempt from sales tax. I do not propose, therefore, to explore the validity or otherwise of departmental rulings made in other matters, or whether the decision of the Tariff Board in this case might be inconsistent with such rulings.

Three main contentions are advanced on behalf of the appellant. I shall consider first the submission that the appellant does not manufacture a new product, but merely packages three tax exempt articles in a form convenient for ready use by the purchaser.

It seems to me that the question as to whether an article is exempt from tax is to be determined as of the date of sale. The question to be answered is this: "Is the article on the date of sale included in the articles specified in Schedule III?" If it is, the article is exempt from sales tax. The basic question is therefore—what is being sold? If it is salt that is being sold, the article is exempt from tax as salt is named in the schedule. The same result, of course, follows if shortening is sold or if grains and seeds in their natural state are sold.

In this case, it cannot be said that the appellant was selling salt or that it was selling shortening, or that it was selling popping corn. What it sold was a single article composed of three ingredients in carefully selected proportions and to which it had given the name "Magic-Pop". It was an entirely new product differing in appearance, form and function from those of the three original ingredients. The evidence clearly indicates that both skill and experience were used in the making of the product. It is stated on the wrapper of Exhibit A-1, under the heading "Moisture Control", that "Magic-Pop exclusive scientific process combining corn and shortening in one package prevents moisture loss in the corn and guarantees perfect popping results and eating pleasure. Stays 'fresh' without refrigeration." At the hearing of the appeal, an attempt was made to show that this statement to a substantial extent was mere "puffing" in order to attract consumers. Nevertheless, it was a matter which the appellant considered of some importance and took into consideration in planning its manufacturing process.

In my opinion, the appellant was producing an entirely new article—an article which contained within itself all the ingredients necessary for a householder to use in the preparation of popcorn—in effect a "ready-mix" article. The mere fact that it was named "Magic-Pop" did not by itself result in the making of the new product for any such fancy name could be given to any article without changing

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its nature. Whether it be named "Magic-Pop" or something else, the new product is not mentioned or included in any of the articles specified in Schedule III.

The second submission is that, as "Magic-Pop" is composed of three ingredients, all of which are exempt from tax, the new article is therefore also exempt. The exempting section (s. 32(1)) refers to the *articles* mentioned in Schedule III and does not contain any such words as "or any combination of the articles mentioned in Schedule III". It is to be noted from the provisions of the schedule that when Parliament intended to extend the exemption to articles beyond those specifically listed, it used such phrases as "or other similar articles", "and similar goods", or "materials for use exclusively in its manufacture". If Parliament had intended to extend the exemption to articles or products consisting of a number of tax exempt articles, it would have been a simple matter to have so provided. I am unable to agree with this submission.

Finally, it is submitted that the article sold by the appellant is popping corn—a grain or seed in its natural state. I cannot think that such is the case. If I attended at a store to purchase popping corn, I would expect to receive popping corn alone and not such an article as Exhibit 1-A—a slab of shortening filled with popping corn and with salt added. It is submitted, also, that as popping corn is the main ingredient of "Magic-Pop", the article produced by the appellant should be classified as popping corn. There is no general authority in the taxing section or in the schedule for classifying an article according to its main ingredient. I find in the schedule one instance only in which the exemption from tax is based on the main content of the article, namely, "fruit juices which consist of at least 95 per cent. of pure juice of the fruit". If Parliament had intended that articles generally should be classified according to their main ingredient, it would have made provision accordingly.

For these reasons, my answer to the question submitted is "No".

Accordingly, the appeal will be dismissed with costs.

Judgment accordingly.