BETWEEN:

1955
May 24, 25
May 30

THE GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LIMITED, FIRESTONE TIRE AND RUBBER COMPANY OF CANADA LIMITED AND B. F. GOODRICH COMPANY OF CANADA LIMITED .... APPELLANTS;

AND

THE T. EATON CO., LIMITED, SIMPSON - SEARS LIMITED, ATLAS SUPPLY COMPANY OF CANADA LIMITED, GENERAL TIRE AND RUBBER COMPANY OF CANADA LIMITED AND THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... RESPONDENTS.

Revenue—Customs and Excise—"Special brand" automobile tires—The Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(a) (ii), 23 (1) (a), 30 (1) (a) (i), 57, 58—Meaning of "manufacturer or producer"—Jurisdiction of Tariff Board to determine whether person is manufacturer or

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producer—Relationship between Eaton's and its supplier that of purchaser and vendor—Only one set of costs against unsuccessful appellant—Costs payable to respondent carrying burden of case.

On a reference to the Tariff Board by the Deputy Minister of National Revenue for Customs and Excise the Tariff Board declared that The T. Eaton Co., Limited was not the producer or manufacturer of the "special brand" automobile tires sold by it under the names "Bulldog" and "Trojan" and not liable for excise tax or sales tax on the sales of such tires. From this declaration the appellants appealed with leave on a question of law.

Held: That the Tariff Board had jurisdiction to determine whether Eaton's was the manufacturer or producer of the special brand tires sold by it.

2. That since the statutory definition of a "manufacturer or producer" involves a departure from its ordinary meaning and since the liability to tax of a person, firm or corporation depends on whether he or it comes within its meaning it must be established in the case of a person, firm or corporation who is not a manufacturer or producer in the ordinary meaning of the term that before he is held to be a manufacturer or producer within the statutory meaning all the conditions requisite to the applicability of the statutory meaning are present. If any of them are absent the statutory meaning is not applicable and must give way to the ordinary meaning.
3. That the relationship between Eaton's and its supplier was that of purchaser and vendor of the tires.
4. That the appellants have failed to show that Eaton's held or used or claimed a sales or other right to the tires at any stage in their manufacture by its supplier.
5. That the unsuccessful appellant should be charged with only one set of costs and that these are payable to the respondent carrying the burden of the case.

APPEAL with leave on a question of law from a declaration of the Tariff Board.

The appeal was heard before the President of the Court at Ottawa.

Hon. S. A. Hayden, Q.C., K. E. Kennedy and *J. B. Lawson* for appellants.

G. F. Henderson, Q.C. for respondent The T. Eaton Co., Limited.

B. M. Sedgewick for respondent Simpson-Sears Limited.

A. S. Pattillo, Q.C. for respondent Atlas Supply Company of Canada Limited.

S. Thom for respondent General Tire and Rubber Company of Canada Limited.

K. E. Eaton for respondent Deputy Minister of National Revenue for Customs and Excise.

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

THE PRESIDENT now (May 30, 1955) delivered the following judgment:

This is an appeal on a question of law from a declaration of the Tariff Board, dated December 7, 1954, made after a hearing by the Board of a reference by the Deputy Minister of National Revenue for Customs and Excise relating to "special brand" automobile tires. The reference was by a letter from the Deputy Minister to the Chairman of the Board, dated August 19, 1954, the essential paragraphs reading as follows:

For some years certain Canadian rubber companies have been manufacturing "special brand" automobile tires for sale to various retail corporations as well as to other rubber companies. These tires bear the names of the purchasers and the treads are molded with special markings which are not sold to others. The former companies have been regarded by the Department as the manufacturers or producers of the tires for the purposes of the Excise Tax Act.

However, competing manufacturers of automobile tires object to our ruling and contend that the "special brand" customs should be treated as the manufacturers or producers of the tires within the meaning of Section 2(*a*)(ii) of the Excise Tax Act and subjected to sales and excise taxes on their sales.

I am therefore referring this case to the Board in accordance with Section 57 of the Excise Tax Act for a declaration as to the correctness or otherwise of the Department's ruling.

The reference was made under section 57 of the Excise Tax, R.S.C. 1952, Chapter 100, the relevant portion reading as follows:

57. (1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the *Tariff Board Act* may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

When the reference came up for hearing it was in the general terms set out in the letter but during the course of the hearing it was decided to deal with the question as it affected The T. Eaton Co., Limited, hereinafter called Eaton's, and the Board proceeded to determine whether it was liable to excise tax and sales tax on the sale price of the tires sold by it carrying its registered trade marks "Bulldog" and "Trojan" which had been manufactured by Dominion Rubber Company Limited, hereinafter called

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the supplier, and sold by it to Eaton's. At the hearing counsel for the appellants herein sought to establish that Eaton's was the manufacturer or producer of the said tires within the meaning of the term "manufacturer or producer", as set out in paragraph 2(*a*)(ii) of the Excise Tax Act, and as such subject to excise tax under section 23(1)(*a*) of the Act and sales tax under section 30(1)(*a*)(i). The Board found that Eaton's was not the producer or manufacturer of the tires and consequently not liable for tax on the sales of such tires. It also held that other sellers of "special brand" tires whose position was similar to that of Eaton's were likewise not subject to tax on the sales of their "special brand" tires.

From this declaration the appellants sought leave to appeal under section 58 of the Excise Tax Act and leave was granted by Cameron J. (*ante* page 98) to appeal on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that the T. Eaton Co. Ltd. was not the producer or manufacturer of the special brand tires "Bulldog" and "Trojan" and was not liable for tax on sales of such tires and that, in so far as any other "special brand" customer may have a relationship with his supplier which parallels that of the T. Eaton Co. Ltd., he is not liable to account for tax on the sale of such "special brand" tires?

Before I deal with the question of law on the merits I must consider the submission made by counsel for the respondent Atlas Supply Company of Canada Limited and counsel for the respondent General Tire and Rubber Company of Canada Limited that the Board did not have jurisdiction to deal with the matter referred to it and that, consequently, its declaration was a nullity. This submission was based on the language of section 57(1) of the Excise Tax Act which I have already quoted. It was contended that this section applies only in cases where there is doubt whether any tax is payable on an article or what rate of tax is payable on it and that in the present case neither of these doubts exists since it is clear that in the case of rubber tires the rate of excise tax that is payable is 10 per cent. It was submitted that the section did not give the Board jurisdiction to decide who should pay the tax in respect of which there was no doubt either of its incidence or of its rate. Put somewhat differently, the submission was that the purpose of the Act is to impose a tax on a person who is the manufacturer or producer of goods on the sale of such

goods by him, that the determination of this raises two questions, the first being whether the person is a manufacturer or producer of the goods and the second whether the goods are subject to tax and, if so, what rate of tax is applicable and that section 57 gives the Board jurisdiction to deal with the second question but not with the first. It was urged that the question of who should pay the tax is exclusively a matter for the Court to decide and that the Board does not have jurisdiction to deal with it.

While the language of section 57(1) is not as apt as desirable I am of the view that there is no substance in the submission put forward. There is a simple answer. Section 23(1)(*a*) of the Act, which is the charging section in respect of excise tax, reads:

23. (1) Whenever goods mentioned in Schedules I and II are . . . manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned.

(*a*) in Schedule I, at the rate set opposite to each item in the said Schedule computed on . . . the sale price, . . .;

The rate applicable to rubber tires as fixed by Schedule I, as amended by section 14 of Chapter 56 of the Statutes of Canada 1953-54, is 10 per cent. This section makes it clear that the tax is exigible when the goods are manufactured or produced and delivered to a purchaser thereof. Section 30(1)(*a*)(i), which is the charging section in respect of sales tax, is somewhat more clear. The relevant portion 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

(i) payable, . . . by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, . . .

Thus it is manifest that sales tax is exigible when the goods have been produced or manufactured and are delivered to the purchaser or at the time when the property in the goods passes and that the sales tax is payable by the producer or manufacturer at such time. It is clear, therefore, that although section 57 speaks of the tax as being payable on an article, the reality is that the tax, whether excise tax or sales tax, is payable by the producer or manufacturer of an article in respect of it. That the tax is imposed on a person

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in respect of an article and not on the article itself, notwithstanding the wording of section 57, seems clear: *vide* such cases as *Provincial Treasurer of Alberta* v. *Kerr* (1); *Kerr* v. *Superintendent of Income Tax and Attorney-General for Alberta* (2); *Smith* v. *Vermillion Hills Rural Council* (3). The articles that were the subject of the reference were "special brand" automobile tires. As the hearing developed the specific articles before the Board were the special brand "Bulldog" and "Trojan" tires sold by Eaton's. Since there was difference or doubt whether Eaton's was the manufacturer or producer of the tires there was difference or doubt whether tax was payable on them on their sale by Eaton's. The Board could not determine such difference or doubt and decide whether tax was payable on the tires or whether they were exempt from tax on their sale by Eaton's without deciding whether Eaton's was the manufacturer or producer of them. Failure to recognize this basic fact was the fallacy in the submission of lack of jurisdiction. Since there was difference or doubt whether any tax was payable on the "Bulldog" and "Trojan" tires on their sale by Eaton's the Board had jurisdiction to resolve such doubt or difference. And since the Board could not resolve such doubt or difference without deciding whether Eaton's was the manufacturer or producer of the tires it follows, as a matter of course, that it had jurisdiction to decide that question. The submission that it did not have such jurisdiction is, therefore, rejected.

Before I deal with the contentions of counsel for the appellant I should set out the Board's statement of the relationship between Eaton's and its supplier, as outlined before the Board by counsel then appearing for Eaton's. It is set out in the Board's decision in quotation marks as follows:

Tires and tubes are merchandised under the Companys' own private brand names, "Bulldog" and "Trojan" . . .

Under these two brands there is carried a wide variety of tires for cars, also for commercial and farm vehicles . . .

The intricacies involved in the manufacturing of tires are not known to the Company. Tires are made for the Company by Dominion Rubber Co. Limited. They provide all the know-how, manufacturing skill, specifications, molds, designs, raw material, etc. required.

There is no written agreement with the supplier other than contained in orders.

(1) [1933] A.C. 710. (2) [1942] S.C.R. 435.
(3) [1916] 2 A.C. 569.

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Dealings with this supplier have continued over a period of twenty-five years. During that time they have confined to Eaton's use certain tread designs which they originated and own. They supply the molds and have continued to own the molds from which these treads are made.

The T. Eaton Co. Limited do not set down any manufacturing specifications for these tires except that they must be equal to or better than the supplier's own standard first-line and second-line tires respectively. The Eaton Company do not own any patents, designs, formulae, etc. pertaining to these tires, except the Trade Marks, nor does the Company supervise in any way their manufacture.

The tires are entirely at the risk of Dominion Rubber Company until they are shipped and invoiced to Eaton's.

The question of rejects and substandards is the responsibility of the manufacturer and they remain the property of the manufacturer.

Eaton's do not finance any inventory for the supplier nor has it any financial interest in Dominion Rubber Company.

The relationship with the supplier is strictly one of buyer and seller and these tires are bought strictly for re-sale at retail or for use on Eaton's own trucks.

These tires are advertised not as something Eaton's manufacture but as a line of merchandise that is exclusive with the Company. This is a normal merchandising practice applying to many lines of merchandise.

In addition there is the following paragraph:

It was further asserted that Dominion Rubber Company Limited make "Bulldog" and "Trojan" tires in advance of orders and supply Eaton's from stock. In this connection it was stated in argument that Eaton's gives no undertaking to buy any, let alone a specified quantity of, tires, and that the tires made for stock were entirely at the risk of the Dominion Rubber.

These statements are referred to by the Board as facts. They must, therefore, be regarded as findings of facts by the Board. As such they are not open to question in these proceedings for there is no right of appeal from the Board's findings of fact.

Counsel for the appellants sought to show that Eaton's was the manufacturer or producer of its "Bulldog" and "Trojan" tires within the statutory meaning of the term "manufacturer or producer", as set out in section 2(*a*)(ii) of the Act, which, so far as relevant here, reads as follows:

2. In this Act,

(*a*) "manufacturer or producer" includes

(ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not.

Counsel had to bring Eaton's within this statutory meaning if the appellants were to succeed in the appeal, for it is

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obvious that it was not the manufacturer or producer of the tires within its ordinary meaning. In an effort to do so counsel contended that Eaton's owned or held a sales right in the tires that were being manufactured for it by its supplier and was, consequently, a manufacturer or producer of them within the statutory meaning of the term and that the Board had erred in finding that such was not the case. He relied upon statements in Eaton's advertising, samples of which were before the Board, to the effect, *inter alia,* that the tires were being manufactured exclusively and specially for it with special features which had been decided upon by it as proof that the tires were being manufactured for it by its supplier. This was stressed with a view to showing that the relationship between Eaton's and its supplier was not exclusively that of purchaser and vendor but that the supplier was manufacturing the tires for Eaton's in the sense that Eaton's was the manufacturer within the statutory meaning of the term and the supplier the instrument which it used. The submission was then made that since the supplier was making the tires for Eaton's it held or used a sales right to the tires being so manufactured for it.

Counsel also referred to the evidence bearing on the stages of manufacture of the tires. One of these was the working of Eaton's trade mark and name into the molds and curing them into the tires. It was submitted that when Eaton's trade mark was worked into the tire it could not be sold to anyone other than Eaton's without its consent and that the sales right to the tire then belonged to it. The argument was that the only person who can have a sales right to goods on which a trade mark is put is the owner of the trade mark. Thus the submission was that since the tires were being manufactured for Eaton's and since its trade mark was worked into them it could prevent their sale to anyone else and, that being so, it held or used a sales right to them.

In support of his submission counsel relied upon the decision of Cameron J. in *The King* v. *Shore* (1). Put briefly, his submission was that the relationship between the defendant in that case and the manufacturer there

(1) [1949] Ex. C.R. 225.

referred to was not materially different from the relationship between Eaton's and its supplier in the present case and that as in that case the defendant was held liable to tax as being the manufacturer or producer of the articles within the meaning of the statutory definition there should have been a similar finding by the Board as to Eaton's.

In my judgment, there is no substance in the submissions thus made on behalf of the appellants. Since the statutory definition of a "manufacturer or producer" involves a departure from its ordinary meaning and since the liability to tax of a person, firm or corporation depends on whether he or it comes within its meaning it must be established in the case of a person, firm or corporation who is not a manufacturer or producer in the ordinary meaning of the term that before he is held to be a manufacturer or producer within the statutory meaning all the conditions requisite to the applicability of the statutory meaning are present. If any of them are absent the statutory meaning is not applicable and must give way to the ordinary meaning. That is the situation in the present case.

That facts of the relationship between Eaton's and its supplier, as found by the Board, establish that it was that of purchaser and vendor of the tires. It was not a case of the supplier manufacturing the tires for Eaton's in the sense that it was working for Eaton's as its instrument or *alter ego* in their manufacture and that Eaton's was in reality the manufacturer of them. There was no relationship of principal and agent or master and servant between them. The supplier was the manufacturer of the tires and the vendor of them to Eaton's after they had been manufactured. There was no prior commitment by Eaton's that it would buy them and if it could be said that the supplier manufactured the tires for Eaton's it was only in the sense that it did so in the expectation that after their manufacture it would be able to sell them to Eaton's. Eaton's became the purchaser of the tires only after it had ordered them and the supplier had filled the order by delivering them to Eaton's. Up to that time Eaton's did not have any sales or other right to the tires. There was no overriding contract or agreement between Eaton's and its

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supplier, such as suggested by counsel for the appellants, whereby Eaton's acquired any sales or other right to the tires prior to their delivery to it nor did Eaton's have any such right by any rule of law It is not open to the appellants to question the findings of fact made by the Board for there is no right of appeal from them. It is clear from these facts that the only relationship between Eaton's and its supplier was that of purchaser and vendor. There was no other relationship and no collateral or subsidiary contract or agreement or rule of law whereby Eaton's had any right to the tires at any stage of their manufacture or prior to their delivery to it.

Nor did the putting of Eaton's trade marks into the molds and curing them into the tires give Eaton's any sales or other right to them. It is not established that the supplier could not sell the tires to some one else if Eaton's did not buy. It could have buffed off Eaton's trade mark and name and sold the tires. Indeed, the evidence shows that the supplier did sell rejected and sub-standard tires with Eaton's trade mark and name on them. But even if Eaton's had a cause of action against the supplier for infringement of its trade mark if it sold the tires to some one else without its consent and obtained an injunction restraining the supplier from selling the tires with its trade mark on them it does not follow that it had any sales or other right to the tires. Even if Eaton's could have put an impediment in the way of the supplier selling the tires carrying its trade mark this did not give Eaton's any right in the tires. The owner of a trade mark has the exclusive right to its use and may prevent others from using it on their goods but he has no right to the goods on which his trade marks have been unlawfully used. This proposition is an elementary one.

And there is no merit in the contention put forward by counsel for the appellants that Eaton's claimed a sales right in the tires that were being manufactured. He submitted that the word "claims" in section 2(*a*) (ii) means only "asserts" and that Eaton's had asserted a sales right to the tires when its name was cured into them and in the course of its advertising. I do not agree. It is not necessary, in my opinion, to decide what the word "claims" means for even if counsel's suggestion as to its meaning is

accepted there is no evidence that Eaton's asserted any sales or other right to the tires that were being manufactured. The putting of Eaton's name on them was not an assertion by Eaton's of anything. The supplier put the name on the tires in the expectation of selling them to Eaton's and in order that they would be ready to deliver to Eaton's if it sent in an order for them. And I am unable to find anything in the advertising that could be construed as an assertion that it had a sales or other right to the tires while they were being manufactured.

In view of my conclusion that the appellants have failed to show that Eaton's held or used or claimed a sales or other right to the tires at any stage in their manufacture by its supplier it is not necessary in this case to consider the interpretation of other terms in section 2(*a*) (ii), such as the meaning of the word "for".

And I have no hesitation in finding that the decision in *Shore* v. *The King* (*supra*) is not applicable to the facts of this case. The relationship of the defendant and the manufacturer in that case was so essentially different from that of Eaton's and its supplier in this one that the decision has no bearing on it.

It follows from what I have said that the appellants have failed to show that Eaton's was a manufacturer or producer of its "Bulldog" and "Trojan" tires within the statutory meaning of the term and liable to excise tax and sales tax on their sale to its customers.

There is another aspect of the matter. The facts show beyond dispute that the supplier was the manufacturer of the "Bulldog" and "Trojan" tires which it subsequently sold to Eaton's. That being so, the charging sections of the Act, section 23 for excise tax and section 30 for sales tax, make it clear in each case that the tax is to be paid at the time of the sale by the producer or manufacturer to the purchaser. Only one excise tax and only one sales tax are exigible on the same article. Each tax was payable by the supplier when it sold the tires to Eaton's. That being so it could not be payable by Eaton's when it sold them to its purchasers.

Under the circumstances, I am unable to see how it could reasonably be said that the Board erred as a matter of law

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in deciding that Eaton's was not the producer or manufacturer of its special brand "Bulldog" and "Trojan" tires and not liable for tax on the sales of such tires. There must also be a negative answer to the second portion of the question of law under consideration.

There remains only the matter of costs. In the case of *General Supply Company of Canada Limited* v. *Deputy Minister of National Revenue for Customs and Excise et al* (1), I had occasion to consider the question of costs in a case where an appeal from the Tariff Board was dismissed and there were several respondents. After hearing argument I came to the conclusion that it would be oppressive to order the unsuccessful appellant to pay costs to each of the respondents and that such appellant should be charged with only one set of costs. It was my view that this decision was in line with the run of decisions on the subject as set out by Angers J. in *The King* v. *Fraser et al* (2) where the subject was carefully considered. I referred particularly to the statement of Lindley L.J., in delivering the judgment of the Court of Appeal, in *Harbin* v. *Masterman* (3) in which he said:

> In these cases there is always a discretion in the Court of Appeal as to the orders it ought to make with reference to the question of costs; and the Court is bound to see that its orders are not necessarily oppressive. It appears to me that in this case there really was no sensible reason for all parties appearing by separate solicitors. It is well known that only two counsel in the same interest can be heard here. I think it would be oppressive to allow more than one set of costs. What we are prepared to do is to exercise our discretion on this occasion, and give the costs to the party who has the conduct of the cause. There will be one set of costs to be paid by the appellant, and the others must pay their own costs. They are perfectly justified in employing their own solicitors if they like; but this is not a case where it was necessary for four sets of counsel to be instructed in order to protect the rights of the residuary legatees.

and applied the principles of the statement to the case before me. Counsel for the respondent Deputy Minister contended that he had carried the burden of the respondent's case and submitted that the Deputy Minister was entitled to the full amount of the costs which the unsuccessful appellant was ordered to pay. I agreed with this submission. The result was that the appellant was required to pay only one set of costs, namely, those of the

(1) (December 23, 1954, unreported). (2) [1944] Ex. C.R. 97.
(3) [1896] 1 Ch. 351 at 364.

Deputy Minister and that the other respondents had to pay their own costs. There should be a similar disposition of costs in the present case. Counsel for Eaton's had the main conduct of the case against the appellants. The appellants will, therefore, be required to pay only one set of costs and these are payable to Eaton's. The respondents other than Eaton's will pay their own costs.

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The result is that the appeal herein will be dismissed with costs payable as stated.

Judgment accordingly.