BETWEEN:

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANT;

1964
June 22
June 25

AND

J. M. E. FORTIN, INC. ..... RESPONDENT.

Revenue—Customs Tariff—Customs Act, R.S.C. 1952, c. 58, as amended, s. 45—Tariff items 409m(1) and 427a—Whether Tariff Board erred in law.

This is an appeal from a declaration of the Tariff Board that a machine described as a tree crusher be classified as a tractor under tariff item 409m(1) and not a specialized machine under tariff item 427a.

Held: That reasonable men, properly understanding the applicable law, could reasonably come to different conclusions in this matter.

2. That while a different conclusion of fact might have been reached because of the greater weight that could have been given to the evidence of the actual use of the machine as opposed to the evidence of its possible uses, the Board did not have to come irresistibly to a different conclusion or determination than it did.

3 That the appeal is dismissed.

APPEAL from a decision of the Tariff Board.

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v.
J. M. E. FORTIN INC.

The appeal was heard by the Honourable Mr. Justice Gibson at Ottawa.

G. W. Ainslie and *R. A. Wedge* for appellant.

D. G. Blair for respondent.

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

GIBSON J. now (June 24, 1964) delivered the following judgment:

This is an appeal pursuant to s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, as amended, from the Declaration of the Tariff Board in this matter, dated December 10, 1963, allowing an appeal by the respondent from a decision of the appellant dated July 3, 1962, wherein a machine described as a "LeTourneau Model G-40 Tree Crusher" was declared to be classified under tariff item 409*m*(1) and not under tariff item 427*a*.

It is the contention of the appellant on this appeal that this machine should be classified under said tariff item 427*a*. These tariff items are as follows:

> 427*a*—All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada, complete parts of the foregoing;
>
> 409*m* (1)—Internal combustion tractors other than highway truck-tractors; accessories for such tractors, n.o.p.; parts of all the foregoing.

Exhibit A-1 filed on the appeal before the Tariff Board is a document prepared by the manufacturer of the machine, R. G. LeTourneau, Inc., Longview, Texas, on which is a picture of the machine, and in which there is set out certain of the specifications of it. The machine is therein described as a "tree crusher", 39'10" in length, 15'2" in overall height to top of cab, powered by a Model 12V71 G.M.C. Diesel engine, driving LeTourneau A.C. Generator and LeTourneau D.C. Generator direct coupled inline with engine, and as having other features, as for example, being constructed so that all major components can be assembled and disassembled quickly.

The contention of the appellant is that this machine is a specialized machine and not a "tractor" within its legal meaning; or, more specifically, that this machine was a land clearing machine and not a tractor.

A definition of "tractor" relied on by the appellant in support of this contention was to the effect that to be a "tractor" a machine must be used especially for drawing agricultural or other implements or for bearing or propelling such implements.

The objective criterion, or test, selected by the Tariff Board in its adjudication of this matter resulting in the categorizing of this machine as coming under tariff item 409*m*(1), was the "versatility" of this machine.

The majority of the Tariff Board in their decision held that:

> Although the tree crusher does not have the versatility of some standard tractors, the Board finds that it conforms in so many respects to the concept of tractor that it is more specifically described in tariff item 409*m* (1) than in the broad, general language of tariff item 427*a*

The dissenting opinion of the Tariff Board held that:

> It is clear that the imported tree crusher has some qualities in common with "tractors" in the broad meaning of dictionary and other definitions However, from all the evidence it appears to me that the tree crusher was designed and built for use in toppling trees and clearing land

Counsel for the appellant conceded that the Tariff Board in this matter properly instructed itself as to the applicable law.

The sole issue between the appellant and the respondent on this appeal was whether the Tariff Board, after properly instructing itself as to the law, acted judicially in coming to the conclusion that it did on the evidence adduced before it.

It was the submission of counsel for appellant that the Tariff Board did not act judicially in reaching the conclusion it did on the evidence that was before it, but on the contrary, it should have been led irresistibly to a contrary conclusion.

Counsel for the respondent, on the other hand, submitted that the evidence was such that the Tariff Board could have reached the conclusion that it did and whether or not a different or another Court would have reached the same conclusion was not in issue.

The appellant's submission in support of its contention concerning the evidence was that on the whole of the evidence there was only proved to be two demonstrated uses of this machine (i.e. land clearing in the hydro Carillon project in Ontario and another substantial land clearing

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project in New Brunswick) which did not establish an adequate "versatility" for this machine to permit the Board reasonably to come to the conclusion that it should be categorized as a "tractor", but that, on the contrary, this evidence proved that it was a specialized machine and therefore the Board should have categorized it under tariff item 427*a*.

The appellant contended that the other evidence adduced by the witnesses of the respondent (viz. Mr. J. M. E. Fortin of the respondent Company and Professor R. Doré of Montreal, P.Q.) was evidence merely of possible uses of the machine, and did not establish that it could be put to these uses, and that the evidence of Mr. Fortin as to other possible uses for this machine not only was not corroborated by Professor Doré but was contradicted by the only other witness, Mr. W. McGraw, who was called by the appellant.

The respondent contended that the Board in fact found that evidence of Mr. Fortin and Professor Doré was legal proof of the versatility of this machine; that it preferred the evidence of these two witnesses where it conflicted with the evidence of the other witness, Mr. McGraw; and that upon reasonable reading of the whole of the evidence there was sufficient proof in law to have enabled the Tariff Board to have made the findings of fact that it did, which findings the respondent cited, namely:

> The tree crusher has many characteristics associated with the current usage of the word tractor: self-propulsion, locomotion on rough ground, great power, great weight, huge rollers for flotation and traction; capacity to push or pull with enormous force, adequate manoeuverability, locomotion on solid surfaces if equipped with rubber tire wheels, etc.; the presence of the bumper, which can be removed, and the use of the tree crusher to push down or tow away big trees do not exclude it from the tractor category, nor does its relative inefficiency in certain given functions And while the trade literature that has been filed refers to a tree crusher and not a tractor, the witness Fortin testified that the tree crusher bears a plate that says "Tree crusher tractor No. . . . "

Having considered the whole of the evidence adduced, I am of opinion that reasonable men, properly understanding the applicable law, could reasonably come to different conclusions in this matter.

There was legal evidence adduced to support the findings of fact made by the majority of the Tariff Board.

While in my view a different conclusion of fact might have been reached because of the greater weight that could have been given to the evidence of the actual use of this

machine as opposed to the evidence of its possible uses, I am not of the opinion that the Board irresistibly had to come to a different conclusion or determination than it did.

In the result, therefore, in my opinion, there was no error in law made by the Board in this matter. *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[1]; *Edwards v. Bairstow*[2]; *B. P. Refinery (Kent) Ltd. v. Walker*[3].

The appeal is therefore dismissed with costs.

Judgment accordingly.

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