

1928

June 22.

July 9.

HIS MAJESTY THE KING..... PLAINTIFF;

AND

THE DOMINION DISTILLERY PRO- }
DUCTS CO., LTD. ET AL..... } DEFENDANTS.*Revenue—Sales Tax—Excise Duty—Specially denatured alcohol—Excise Act, Sections 154, 155 and 369*

The defendant Corporations imported liquor in bulk in Canada and later diluted and bottled the same in a bonded warehouse, and then in this form sold the same to the consumer. They also manufactured denatured spirits of grade known as “specially denatured” alcohol, (grade 1-F) and procured release thereof from bond without the payment of excise duty, which duty is claimed by this action.

Held, that where goods imported are so changed before taking them out of the bonded warehouse for consumption that they take on a form altogether different from that in which they were imported, the sales tax, under the Special War Revenue Act, 1915, should be calculated on the sale price of the goods after such change, and not upon the duty paid value thereof as imported in bulk.

2. That specially denatured alcohol is not “distilled spirits” within the meaning of Sections 154 and 155 of the Excise Act, and is not subject to the payment of the excise duty provided for in said sections.

INFORMATION by the Crown to recover certain amounts alleged to be due as excise duty.

The action was tried before The Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

R. L. Calder, K.C. for plaintiff.

John D. Kearney for defendants.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (July 9, 1928), delivered judgment.

In this action the defendant corporations are sued upon three separate claims. The first is for \$27,720.33, being an amount alleged to be due to the plaintiff under the provisions of the Special War Revenue Act, for the consumption or sales tax upon spirits and other alcoholic liquors sold by such defendants. The second claim is for \$16,289.10 for customs or excise duties alleged to be due the plaintiff on alcoholic liquors sold by the defendant corporations. It was conceded at the trial that in any event, some deduc-

tions should be made upon these two claims, and it was agreed that counsel should confer upon these matters, and that I should later be informed as to the deductions agreed upon. It was intimated at the trial also, that if judgment were pronounced upon the third claim, being one for excise duty upon certain denatured alcohol, that an agreement might be reached by counsel upon the amount of the sales tax payable under the first claim, and the amount of the customs or excise duty payable upon the second claim. For the present therefore I reserve judgment upon the question of the liability of the defendant corporations upon the first two claims, with the exception of one point to which I shall next refer; if counsel are unable in the end to entirely agree upon the amounts payable to the plaintiff upon each of these two claims, the same will be disposed of by me later, and after I am advised of the deductions or adjustments which have been agreed upon.

In connection with the first claim, a point was raised upon which perhaps I should presently pronounce, as it may assist counsel in reaching an agreement upon the amount of sales tax payable to the plaintiff by the defendant corporations.

On all goods produced or manufactured in Canada, there is payable to the Crown a consumption or sales tax of five per cent on the sale price of all such goods, except when exported. In the case of imported goods it is of course necessary to impose the like tax, and if nothing more were done to the imported goods before they were sold for consumption, the sales tax would be calculated upon the duty paid value of the goods. The defendant corporations imported certain liquors in bulk, and later diluted and bottled the same in bond or in a bonded warehouse and in this form they were sold. The defendant corporations claim that the consumption or sales tax should be calculated upon the duty paid value of the goods as imported in bulk, while the plaintiff claims it should be calculated upon the selling price of the goods after being diluted and put in bottles. The section of the statute upon which the defendants' advance their claim in the latter part of sec. 19 BBB (1) which reads as follows:—

and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes

1928
 THE KING
 v.
 THE
 DOMINION
 DISTILLERY
 PRODUCTS
 Co., LTD.
 Maclean J.

1928

THE KING
v.THE
DOMINION
DISTILLERY
PRODUCTS
Co., LTD.

Maclean J.

the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

I do not think the defendants' contention should prevail. If goods imported are subsequently so changed before taking them out of bond or warehouse for consumption that they take on a form altogether different from that in which they were imported, and so that the basis of the selling price becomes altered or enhanced, then in my opinion they are not the same goods as imported. The Canadian manufacturer or producer of excise duty paid bulk spirits would be discriminated against, if he were obliged to pay as well the sales tax upon the sale price of such spirits after being diluted and bottled, while the importer paid sales tax only upon the duty paid value of the bulk goods. It seems clear I think from the provisions of Part IV of the Act that the consumption or sales tax was in all cases to be payable upon the selling price received by the manufacturer, producer, importer or transferee. The selling price for consumption is the basis of taxation under the statute. The tax being primarily one upon consumption, one must inquire what was the selling price when it went into consumption. In this case it was not the imported bulk goods, but the diluted and bottled goods, that went into consumption, and these goods I think were, for the purposes of the Act, another class of goods altogether from that imported.

I think it is clear that the latter part of section 19 BBB (1) of the Special War Revenue Act, which I have quoted, means that the sales tax upon the duty paid value of imported goods has reference only to goods taken out of bond or warehouse for consumption at the time the goods are imported, or if later, then also in the condition in which they were imported. Therefore I am of the opinion that the contention of the plaintiff is the correct one, and if in any such case any sales tax is in fact or in law payable, it is to be calculated upon the selling price of the goods in the form in which they were sold for consumption, and not upon the duty paid value of the goods as imported in bulk.

The third claim is the largest in amount, and is now to be considered. The information pleads that between November 1, 1925, and January 31, 1926, the defendant corporations, or one of them, manufactured 82,989.59 proof

gallons of denatured spirits of the grade known as specially denatured alcohol, grade 1-F; that such defendants procured the release of this specially denatured alcohol from bond without payment of the excise duty payable thereon; and further, that the defendant corporations intended to sell and did in fact sell the specially denatured alcohol for potable purposes in Canada and not for export, and in violation of the provisions of the Excise Act. The plaintiff claims that there is due as excise duty upon this specially denatured alcohol, the sum of \$749,386.09. The specially denatured alcohol in question was entered out of warehouse for export by the defendant corporations, and they had the leave of the Department of Customs and Excise to export the same subject to certain regulations as to their transportation, and upon furnishing a bond to be cancelled upon production of a certificate of the Collector of Customs at the port of exit, that the goods had been cleared for export at such port. The required bond was furnished and later cancelled, at all times material here. The plaintiff claiming that the goods were not exported but sold in the domestic market, asserts they are now subject to excise duty in the amount mentioned. In my view of the case, I think I need not enlarge upon a discussion of the facts alleged by the plaintiff and defendants respectively in this connection, as I do not think they are of importance in so far as the claim for excise duty is concerned.

It is Part X of the Excise Act that is applicable to the article or commodity upon which the excise duty is claimed. Part X seems to deal with non-potable alcohol, sec. 371 (3) enacting that no alcohol shall be manufactured or sold under the provisions of Part X for beverage purposes. There is no definition of "alcohol" and nothing to indicate wherein it differs from "distilled spirits" referred to in previous Parts of the Act, but denatured alcohol and specially denatured alcohol, are defined. Sec. 368 is as follows:—

- (a) "denatured alcohol" means alcohol in suitable admixture with such denaturants as to render it in the judgment of the Minister non-potable and to prevent recovery of the ethyl alcohol;
- (b) "specially denatured alcohol" means alcohol in suitable admixture with special denaturants as have been approved by the Minister;

1928
 THE KING
 v.
 THE
 DOMINION
 DISTILLERY
 PRODUCTS
 Co., LTD.
 Maclean J.

1928
 THE KING
 v.
 THE
 DOMINION
 DISTILLERY
 PRODUCTS
 Co., LTD.

Maclean J.

Subject to limitations, as to their uses, denatured and specially denatured alcohol, may be manufactured in Canada free from excise duty. Sec. 369 enacts that:—

Denatured alcohol and specially denatured alcohol as defined in the next preceding section which is intended for use in the arts and industries, or for fuel, light, or power, or for any mechanical purpose, may be manufactured in Canada free from excise duty.

Section 370 provides that no alcohol shall be manufactured, denatured or recovered in Canada, except in licensed distilleries. The sale of specially denatured alcohol is limited by the terms of sec. 371 (2) and its transportation is subject to such conditions as the Minister may by regulation prescribe. That provision is as follows:—

Specially denatured alcohol shall only be sold or delivered under a departmental permit to dealers and manufacturers to be used in the arts and industries in cases where denatured alcohol would be unsuitable, and shall only be moved or transported under such conditions as the Minister may by regulations prescribe.

It is not claimed that the alcohol in question was not specially denatured when sold and removed from the distillery of the defendant corporations. There was not granted on account of its sale, any departmental permit to any proposed purchasing dealer or manufacturer, it being for export. Sec. 371 (2) does not appear applicable to the matter of the export of specially denatured alcohol, and accordingly a special regulation was made permitting the export of specially denatured alcohol subject to the conditions already stated. It is difficult to see why this was necessary, as the Customs Act would seem to contain every provision necessary to govern any export. There is no evidence that the ethyl alcohol was ever recovered by any person, in fact one of the shipments of specially denatured alcohol was examined while in transit and was found to be as represented. Part X of the Act provides a penalty for selling specially denatured alcohol, except as provided in this Part.

Sec. 373 (2) is as follows:

Except as herein otherwise provided, any person who holds in possession, sells, exchanges or delivers any alcohol or specially denatured alcohol contrary to the provisions of this Part shall be liable upon summary conviction to a penalty of not less than two hundred dollars and not exceeding five hundred dollars.

When the specially denatured alcohol in question was manufactured, it was not subject to excise duty; the statute specially states it to be free from excise duty. As denatured, it was in practice released from the dutiable list of warehoused commodities, and placed in the non-dutiable list. The only limitation upon its sale was, that it could only be sold and delivered under a Departmental permit to certain users, and could only be moved or transported under such regulation as the Minister might prescribe. The statute does not suggest that if sold contrary to such conditions, the alcohol became subject to an excise duty. If it was sold contrary to the provisions of Part X, the offender was liable upon summary conviction to a money penalty, and so far as I can see this would be the only offence under the statute. It is charged that the specially denatured alcohol was sold in Canada, and was never in any sense exported by the defendants. That in itself might be an offence if sold without a permit, or if transported contrary to the regulations prescribed therefor by the Minister. It would not in my opinion be ground for making it liable to an excise duty. It could not well be an offence to fail to pay an excise duty, when there was no such duty payable. Failure to pay an excise duty, if the alcohol was sold in Canada, is not the essence of the offence, if any, committed by the defendants. If the alcohol was sold in Canada contrary to the provisions of Part X of the Act, this did not have such legislative effect as to make a manufactured specially denatured alcohol subject to excise duty.

It is under sections 154 and 155 of Part III of the Act, that a claim for excise duty is now made upon this specially denatured alcohol. Sec. 154 states that an excise duty shall be imposed on distilled spirits, and that duty varies slightly in amount according to the material used in the manufacture of such spirits. The method of the computation of the excise duty is elaborately set forth in sections 155 and 156 of this Part of the Act. I cannot see how specially denatured alcohol can be brought under these sections of the statute and become liable to excise duty, even under the state of facts alleged by the plaintiff. Sec. 154 was never intended to apply to any denatured alcohol, it is applicable to another class of goods. If specially denatured alcohol is sold in or out of Canada contrary to the

1928
 THE KING
 v.
 THE
 DOMINION
 DISTILLERY
 PRODUCTS
 Co., LTD.
 Maclean J.

1928
 THE KING
 v.
 THE
 DOMINION
 DISTILLERY
 PRODUCTS
 Co., LTD.
 Maclean J.

statute, it does not follow that it automatically becomes another thing, and subject to an excise duty that was intended to apply to another article altogether; it cannot be exciseable under sec. 154 and free from excise under sec. 369.

Inasmuch as the manufacture of specially denatured alcohol can only be carried on in a licensed distillery, sold or delivered in the domestic market under a departmental permit to a limited class of users, and moved or transported only under such conditions as the Minister may by regulation prescribe, it seems to me that the only offence that the statute could reasonably be expected to create or provide, would be that of selling without a departmental permit, or moving and transporting it contrary to the regulations. For that offence the statute prescribes a certain penalty. I assume that it was because this commodity is so strictly regulated in production, sale and transportation by the statute, and by excise officers in whose control it is, that the creation of any other offence or liability was considered unnecessary by the legislature. I cannot reach the conclusion that the offence of the defendant corporations was, at the most, more than a sale of specially denatured alcohol in Canada without a permit to the purchaser as by statute required. If this were all conceded, it seems to me that it would not warrant the conclusion that the alcohol thereby changed from a commodity made non-exciseable by the statute, to an exciseable commodity. There is nothing in the statute in my opinion in support of that view, and it would be a strange excess of caution I think, if the legislature enacted a provision of such a nature. If that was intended it was not expressed, and one may at least very safely say that it is not so clear as to justify the finding that the goods in question are subject to the excise duty prescribed by sec. 154. Altogether I think this claim is without ground whatever. If the goods were exported the question of excise duty does not arise.

A portion of the specially denatured alcohol was manufactured from alcohol purchased by the defendant corporations, from the Department of Customs and Excise, and it is not asserted that such alcohol was manufactured in a licensed distillery in Canada. Excise duty under sec. 154 is payable, it seems, only upon spirits distilled in Canada.

I think it is quite clear, that no excise duty was payable upon the alcohol purchased from the Department. This is only important in that it would affect the total amount alleged to be due under this claim by these defendants, if my opinion in regard to the liability of the specially denatured alcohol for excise duty, is found by another Court, to be erroneous.

1928
 THE KING
 v.
 THE
 DOMINION
 DISTILLERY
 PRODUCTS
 Co., LTD.
 Maclean J.

In the view I take of this matter it is not necessary for me to decide whether the regulations made by the Minister or the Department to export specially denatured alcohol was authorized or not, or whether the same was necessary, or whether the alcohol in question was exported or not.

I am of the opinion therefore that the plaintiff's claim in respect of the excise duty claimed upon the specially denatured alcohol must fail.

The defendants in this action comprise some five individuals who are sued in their personal capacity, in addition to the defendant corporations. It is alleged that those defendants controlled the defendant corporations, they being the shareholders and directors thereof. In the Information it is pleaded that it was the defendant corporations which failed to pay the sales tax, the customs and excise duties, and which made misleading, false and fraudulent returns in this connection to the plaintiff. It is pleaded that it was the defendant corporations, or one of them, that procured the release of the denatured alcohol from bond without payment of the excise duty claimed to be payable thereon. It is also pleaded in the Information that the individual defendants conspired to procure the defendant corporations to commit the acts complained of whereby His Majesty's revenue was defrauded; that they conspired to receive and retain the proceeds of the transactions mentioned in the three claims; that they received and retained the proceeds of these transactions for their own use, and that the defendant corporations never did receive the said proceeds and were thereby unable to pay the duties and taxes lawfully payable by them in connection with such transactions. It is claimed that the individual defendants are severally and jointly liable along with the defendant corporations for the total amount claimed. I do not think that there is any substance whatever in this

1928

THE KING

v.

THE

DOMINION

DISTILLERY

PRODUCTS

Co., LTD.

Maclean J.

claim against the individual defendants, and there are no facts before me to sustain it. This claim is based upon an alleged conspiracy entered into by such defendants as pleaded, but it can hardly be said that any serious attempt was made to establish any facts upon which to base such a claim. It cannot succeed upon pure inference. The individual defendants or some of them, may have for one reason or another conducted the company's affairs in a somewhat irregular way, but this is a matter I think which concerns alone the defendant corporations and its shareholders. All the transactions in question here were carried on in the name of the defendant corporations, or one of them, and the plaintiff knew no one else but such defendants. I do not think there is anything in fact or in law to sustain this claim against the five named individual defendants, and this part of the Information is therefore dismissed.

I reserve for the present question of costs upon all the issues herein disposed of.

Judgment accordingly.