Ottawa
1967
Feb. 2

BETWEEN:

RESEARCH-COTTRELL (CANADA) LIMITED ..... APPELLANT;

AND

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

AND

JOY MANUFACTURING COMPANY (CANADA) LIMITED .. RESPONDENTS.

Customs duty—Claim for drawback of duty—Imported and domestic materials assembled into precipitators in Canada—Whether "manufacture" in Canada.

In 1961 appellant company in carrying out a contract with a Canadian mining company imported certain components made in the U.S.A., and these together with other components made in Canada were assembled by various operations, *viz* cutting, fitting, welding, wiring, joining, bolting and fabricating, into electrostatic precipitators at Copper Cliff, Ontario. The Tariff Board affirmed the decision of the Deputy Minister of Customs and Excise refusing a drawback of duty on the imported materials under Customs Tariff Schedule B items 1056 and 1059 on the ground that the work done at Copper Cliff was assembly and erection rather than manufacture.

Held, allowing the appeal, inasmuch as the precipitators did not exist before their assembly and erection at Copper Cliff the Tariff Board erred in law in concluding that what was done at Copper Cliff was not manufacture in Canada.

Customs Act, R.S.C. 1952, c. 58, amended 1958, c. 26, s. 2; *Customs Tariff*, R.S.C. 1952, c. 60, s. 11(1) Schedule A, tariff item 410*z*; Schedule B, tariff items 1056 and 1059.

APPEAL from Tariff Board.

Gordon F. Henderson, Q.C. and *A. de Lobe Panet* for appellant.

C. R. O. Munro, Q.C. and *André Garneau* for respondent Deputy Minister of National Revenue for Customs and Excise and *John M. Coyne, Q.C.* for respondent Joy Manufacturing Company (Canada) Ltd.

CATTANACH J.:—This is an appeal from a declaration of the Tariff Board, dated November 23, 1965 in appeal No. 790, pursuant to section 45 of the *Customs Act*, R.S.C.

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1952, chapter 58, as amended by S. of C. 1958, chapter 26, section 2, whereby a decision of the Deputy Minister that duty paid by the appellant on goods and materials imported by it under tariff item 410*z* (now item 41062-1) of Schedule A to the *Customs Tariff*, R.S.C. 1952, chapter 60, as amended, was not subject to drawback under tariff item 1056 or 1059 (now items 97056-1 and 97059-1) of Schedule B to that Act, was confirmed. For purposes of convenience I shall refer to the tariff items by their former numbers which were applicable when this cause arose.

Section 3(1) of the *Customs Tariff* provides:

3. (1) Subject to the provisions of this Act and of the *Customs Act*, there shall be levied, collected and paid upon all goods enumerated, or referred to as not enumerated, in Schedule A, when such goods are imported into Canada or taken out of warehouse for consumption therein, the several rates of duties of Customs, if any, set opposite to each item respectively or charged on goods as not enumerated, in the column of the tariff applicable to the goods, subject to the conditions specified in this section.

Tariff item 410*z* of Schedule "A" to the *Customs Tariff* reads as follows:

GOODS SUBJECT TO DUTY AND FREE GOODS

Tariff Item		British Preferential Tariff	Most-Favoured-Nation Tariff	General Tariff
410*z*	Machinery and apparatus, n.o.p. and parts thereof, for the recovery of solid or liquid particles from flue or other waste gases at metallurgical or industrial plants, not to include motive power, tanks for gas, nor pipes and valves 10½ inches or less in diameter.....	5 p.c.	10 p.c.	12½ p.c.

It is common ground among the parties that the machinery, apparatus and parts imported by the appellant, fell within the foregoing item 410*z*. Duty was paid in accordance with that item on such goods which are described as electrostatic "precipitators".

Section 11(1) of the *Customs Tariff* provides:

11. (1) On the materials set forth in Schedule B, when used for consumption in Canada for the purpose specified in that Schedule, there may be paid, out of the Consolidated Revenue Fund, the several rates of drawback of Customs duties set opposite to each item respectively in that Schedule, under regulations by the Governor in Council.

The problem herein arises upon the appellant claiming payments by way of drawback by virtue of section 11(1),

under tariff item 1056 or 1059 of Schedule B of the *Customs Tariff*. Those items read as follows:

GOODS SUBJECT TO DRAWBACK FOR HOME CONSUMPTION

Item No.	Goods	When Subject to Drawback	Portion of Duty Payable as Drawback
1056	Materials, including all parts, wholly or in chief part of metal, of a class or kind not made in Canada.	When used in the manufacture of goods entitled to entry under tariff items 410*z*.....	99 p.c.
1059	Materials	When used in the manufacture of articles entitled to entry under tariff items 410*b* and 410*z*, when such articles are used as specified in said items	70 p.c.

The distinction between items 1056 and 1059 is that to fall in item 1056 the materials must be "of a class or kind not made in Canada" whereas that is not a requirement of item 1059.

By agreement among the parties, the hearing before the Tariff Board was conducted on the issue as to whether, on the facts of the case, the materials imported by the appellant were "used in the manufacture of" the ultimate product, within the meaning of those words as used in items 1056 and 1059. Depending on the disposition of that issue the appellant and the Deputy Minister undertook to review the numerous items imported and conclude whether the respective items fell within tariff item 1056 or 1059 or neither.

The present appeal was conducted on a like basis by agreement among the parties. Under section 45 of the *Customs Act* a party to an appeal from a decision of the Deputy Minister has an appeal, as of right, to this Court upon any question of law. The right of appeal conferred by section 45 is, therefore, limited to a question of law. If the decision of the Tariff Board was a finding of fact, and there was material before it on which it could reasonably have based its finding, it is not within the competence of this Court to interfere with that finding, no matter what the conclusion of this Court might have been if a right of appeal "*de plano*" had been conferred. Therefore my function is to determine whether the Tariff Board erred as a matter of law in finding as it did.

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The appeal was argued before me, and as nearly as I can ascertain before the Tariff Board, on the basis that the "precipitators" when they had been duly erected in accordance with the contract between the appellant and the purchaser, were chattels.

Neither was there any suggestion, either before me or before the Tariff Board, that a "precipitator" was not an object in itself but merely a collection of a number of segregated parts functioning as such. It was assumed that such parts were merged into a new entity which was referred to as a precipitator.

The only question in respect of which any attack was made on the Board's decision was whether "assembly and erection" of the articles, some of which were imported and some of which were not, constituted "manufacture" of the precipitators within the meaning of that word in tariff items 1056 and 1059 of the *Customs Tariff*.

As I have indicated, none of the parties took the position that such "assembly and erection" constituted an improvement to the land on which the "assembly and erection" took place, nor that a "precipitator" is but a collection together of a number of parts not merged into a distinct new entity. Accordingly I do not have to consider the difficult problems that might have arisen if such positions had been taken.

The Tariff Board, after hearing several witnesses and receiving documentary evidence delivered a reasoned judgment reading as follows:

> In the spring of 1961 the appellant, Research-Cottrell (Canada) Limited contracted to *design, furnish and erect* eight electrical precipitators designed for the recovery of iron ore particles from flue gases for the International Nickel of Canada Limited.
>
> The precipitators are large and relatively complex equipment which together, installed, cost $1,000,000. Each may be roughly described as a group of rectangular, metal gas-passages with wires suspended between the wall plates of the passages; by the introduction of direct current negative voltage in the wires, an electrical field is created which ionizes the fine particles in the flue gases thereby attracting them to the positively charged gas-passage walls; from these walls the particles are dislodged by rapping or vibration and fall into hoppers at the base of the equipment. In addition, there are controls, meters, switches, transformers, rectifiers, heat insulation, safety devices and other ancillary equipment.
>
> The precipitators were designed in the United States of America by Research Cottrell Inc., the parent company of the appellant company. Some of the components of the precipitators were made in the United States by Research Cottrell Inc, some were made in the United States by others and some were made in Canada. Purchase orders covering most, if

not all, of the components were placed by Research Cottrell Inc. These components were shipped to Copper Cliff, Ontario, where by operations described by the appellant as, "cutting, fitting, welding, wiring, joining, bolting and fabricating", they were assembled into precipitators on the site.

When the precipitators were completed the appellant claimed drawback of customs duty under drawback items 1056 and 1059.

> 1056—Materials, including all parts, wholly or in chief part of metal, of a class or kind not made in Canada, when used in the manufacture of goods entitled to entry under tariff items 410*a* (iii), 410*g*, 410*l*, 410*m*, 410*o*, 410*p*, 410*q*, 410*s*, 410*t*, 410*v*, 410*w*, 410*x*, 410*z*, 411, 411*a*, 411*b*, 427*b*, 427*c*, 427*f*, 428*c*, 428*e*, 440*k* and 447*a*.
>
> 1059—Materials, when used in the manufacture of articles entitled to entry under tariff items 410*b* and 410*z* when such articles are used as specified in said items.

The appellant's claim was based on the contention that the precipitators would be entitled to entry under tariff item 410*z*.

> 410*z*—Machinery and apparatus, n.o.p., and parts thereof, for the recovery of solid or liquid particles from flue or other waste gases at metallurgical or industrial plants, not including motive power, tanks for gas, valves ten and one-half inches or less in diameter, nor pipes of iron or steel.

On October 30, 1964, the Deputy Minister for National Revenue, Customs and Excise, decided that the appellant was not entitled to the claimed drawback because the appellant neither performed, nor caused to be performed, any manufacturing operation in connection with the precipitators.

There are many issues which could come before the Board in this appeal: Are the goods materials? Are they wholly or in chief part of metal? Are they of a class or kind not made in Canada? Are the precipitators entitled to entry under tariff item 410*z*?

By agreement between the parties they come before the Board on the sole issue of whether or not the precipitators were "manufactured" in Canada within the meaning of the drawback items in issue. The Board accepts this agreement and is considering only this issue in its declaration.

There is evidence, both documentary and oral, concerning the various companies which performed the work in Canada; the real issue appears to the Board to be not the identity of those carrying out the required steps but rather the nature of these steps to determine whether or not they constitute manufacture in Canada.

The appellant quoted authority to the Board to show that manufacturing involved the application of knowledge, art, care, skill and labour to articles, substances or materials to bring about a substantial transformation in form, quality and adaptability in use and thus bring into being, a new, different, useful and marketable product. (Re H. Robinson Corporation Ltd., The King v. Martin, (1937) 19 C.B.R. 22, affirmed 1938 O.W.N. 243; Rex v. Wheeler (1819) 2 B and Ald., 345; Ralston v. Smith (1865) H.L.C. 223; Re McGaghran (1931) 40 O.W.N. 122; Commonwealth v. Combustion Engineering Inc. 2 Penn. Tax Cases 21, 590; In Re Appeal of Titzel Engineering Inc. 2 Penn. Tax Cases 21, 526).

The Board adopts the observation of Sir Lyman Duff, C.J.C., in King v. Vandeweghe Ltd. 1934 S.C.R. 244:

> The words "produced" and "manufactured" are not words of any very precise meaning and consequently we must look to the context

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for the purpose of ascertaining their meaning and application in the provisions we have to construe.

It will not, for the purposes of this appeal, seek to establish any definition of general application to all cases but rather to declare whether or not the actions performed in this case constituted manufacturing.

The intent of tariff item 410*z* appears to be to benefit metallurgical or industrial plants in their acquisition of a certain type of machinery and apparatus by the imposition of lower rates of customs duties than would be levied were item 410*z* not in the Customs Tariff.

The intent of the drawback items 1056 and 1059 is clearly the encouragement of the manufacture in Canada of the goods or articles described in tariff item 410*z* as opposed to their acquisition abroad. In such a context it hardly seems a reasonable construction of the word manufacture to extend the benefits of the drawback items to imported goods which are simply assembled and erected on site.

In referring to the making of blast furnaces, oxygen furnaces, blast furnace stoves, open hearth furnaces and soaking pit furnaces, the word used in drawback item 1044 (now item number 97044-1) is "construction"; similarly, the word used to describe the making of bridges is "construction" in tariff item 460 (now item number 46000-1). Nor do the contracts for the installation of the precipitators use the word "manufacture", rather they use the words "erect" and "install".

In the present case, the Board finds the work carried out at Copper Cliff, Ontario, to be assembly and erection rather than manufacture.

Without adjudication upon any other phase of contention or possible contention between the parties now or at a later date, the board holds that the imported goods, not having been used in Canada in the manufacture of the precipitators, are not subject to drawback under items 1056 or 1059.

Accordingly the appeal is dismissed.

Counsel for the Deputy Minister contends that the Tariff Board, in holding that the precipitators were not "manufactured" in Canada but rather that the work carried on by the appellant at the site was merely "assembly and erection", did not err on any material point of law, that the finding of the Board that the erection of the precipitators did not constitute manufacturing within the meaning of tariff item 1056 or 1059 was one of fact, that there was ample evidence upon which the Board could so find and accordingly there is no appeal from that finding. In this contention he is supported by Counsel for the intervenant.

The rival contention of Counsel for the appellant is that the Board in declaring that the imported goods were not subject to drawback under tariff item 1056 or 1059 erred as a matter of law in that it misdirected itself on the wording and meaning of the tariff items in question and, as a consequence of that misdirection, posed to itself as the question to be answered "did the activities of the appellant constitute *manufacture* in Canada" rather than the question

"were the goods *used in the manufacture*" of the eight electrostatic precipitators which latter question, Counsel for the appellant contends to be the correct one.

The Board considered the issue before it to be "whether or not the actions performed in this case constituted manufacturing" and found "the work carried out at Copper Cliff, Ontario to be assembly and erection rather than manufacture".

Counsel for the appellant, during the course of his argument, readily conceded that the work done by the appellant at the site constituted "assembly and erection" but he further contended "assembly and erection" constituted the final step in the manufacture of the precipitators and therefore the imported goods were there used in manufacture within the legal meaning of those words in tariff items 1056 and 1059 and accordingly the Board, by deciding that the activities of the appellant were assembly and erection and therefore not manufacture, failed to decide the question whether those activities constituted a part of the process of manufacture which, he contends, was the question which the Board was obliged to answer.

Section 11(1) provides for payment of drawback on imported materials set forth in Schedule "B" "when used for consumption in Canada" and "for the purposes specified" in Schedule "B".

On the evidence before the Tariff Board there is no doubt whatsoever that the materials imported were consumed in Canada. They were incorporated in the eight electrostatic precipitators at Copper Cliff, Ontario. The words, "in Canada" modify the words "used for consumption". Tariff items 1056 and 1059 provide for drawback on "materials, including all parts" and "materials", "when used in the manufacture of" goods or articles entitled to entry under tariff item 410*z* of Schedule "A". The goods or articles entiled to entry under tariff item 410*z* are, in effect, the electrostatic precipitators.

The relevant words of the foregoing section and tariff items, therefore mean, when applied to the facts of this appeal, that a portion of the duty paid will be payable as drawback on imported materials "when used in the manufacture of" electrostatic precipitators.

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If this had been a case where an article (i.e. a precipitator) had been made in its entirety in the United States and for the purposes of shipping had been broken down into its parts, I would readily agree that the assembly and erection on the site did not constitute manufacturing. But this is not such a case. The Board, in the third paragraph of its decision, specifically points out that "some of the components were made in the United States by others and some were made in Canada". Therefore, this is a case where only a part of what was required to create the "precipitator" had been imported. Indeed such objects had not been, prior to importation into Canada, put in the precise forms in which they had to be put before they could be used in the creation of the precipitators. Things had to be done at the site which were variously described as "cutting, fitting, welding, wiring, joining, bolting and fabricating".

There was no evidence before the Board upon which it could have concluded that the precipitators were in existence before ultimate assembly and erection. There is no suggestion in the Board's judgment that they had any existence before that time. On the contrary the Board said "These components", some of which were made in the United States and some were not, "were shipped to Copper Cliff, Ontario, where . . . they were assembled into precipitators on the site". If the component parts, not having been previously physically fitted together, were assembled into precipitators on the site, that negatives any possibility that the precipitators had a prior existence.

In the absence of a finding by the Board either express or implied, that the precipitators had an existence outside Canada, then I am of the opinion that a finding that the precipitators were not "manufactured" in Canada because they were merely "assembled and erected" in Canada, is wrong in law. I am of the opinion that the Board erred as a matter of law in concluding, as they did, that if what was done in Canada can properly be described as assembly and erection, it follows that the ultimate article was not manufactured in Canada. Where the article never existed until after the acts performed by the appellant on the site, then in my view, as a matter of law the article must be regarded as having been manufactured in Canada.

The appeal is, therefore, allowed with costs.