

1947

April 23
August 23

BETWEEN:

HIS MAJESTY THE KING, on the }
information of the Attorney-General of } PLAINTIFF;
Canada, }

AND

GAS AND OIL PRODUCTS LIMITED, DEFENDANT.

Revenue—Customs Tariff Act, R.S.C. 1927, c. 44, s. 35, Schedule A, par. 710 (f)—Action for duties on packaging charges on gasoline imported in drums dismissed.

Defendant imported from The United States of America motor fuel in drums owned by defendant. The fuel was purchased from the Ethyl Corporation, a company carrying on business in the United States. The Crown alleges that the value of the fluid imported is greater than that declared by defendant and that such excess is accounted for by a charge for packaging the drums or filling them with motor fuel, paid by the defendant to the Ethyl Corporation. The action is to recover from defendant customs duties on this packaging charge.

Held: That the packaging charge so-called is merely an item of cost taken into account in a formula used to ascertain what credit on freight charges should be allowed defendant. The defendant paid the freight to the railroad and not to the Ethyl Corporation which corporation endeavoured to equalize the cost to the defendant between a shipment by tank car and a shipment of drums. In the result no packaging charge was imposed and the action must be dismissed.

INFORMATION exhibited by the Attorney General of Canada to recover customs duties alleged to be owing to the Crown by defendant.

The action was tried before the Honourable Mr. Justice O'Connor at Calgary.

H. W. Riley, Jr. and N. McDermid for plaintiff.

S. J. Helman, K.C., and R. H. Barron for defendant.

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

O'CONNOR J. now (August 23, 1947) delivered the following judgment:

Information exhibited by the Attorney-General of Canada to recover from the defendant customs duty on packing charges alleged to be coverings as defined in the Customs Tariff Act, R.S.C., 1927, chap. 44, and amendments thereto.

The facts have been agreed upon by counsel and may be summarized as follows:—

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The defendant is a distributor of gasoline and oil and carries on business in Calgary, Alberta.

The defendant during the relevant period imported motor fuel of a declared value of \$120,816.00 from the Ethyl Corporation, a company carrying on business in the United States.

The defendant owned the drums which when empty would be returned by the defendant to the Ethyl Corporation, filled by the Ethyl Corporation with the fluid and shipped by freight to the defendant.

The Ethyl Corporation would then send an invoice to the defendant similar to Exhibit "A", which showed 36 drums containing 4,320,000 cubic centimetres Tetraethyl Lead Content at .0018c = \$7,776.00.

The fluid was then cleared through the Canadian Customs on that basis, i.e., .0018c per cubic centimetre, and all the duties paid on the fluid. No question arises as to any duty on the drums themselves. The duty on these was paid on the first shipment in which they were used.

The Ethyl Corporation and the defendant had entered into an agreement (Exhibit 1), dated March 1st, 1938, whereby the Ethyl Corporation agreed to sell this fluid to the defendant. The agreement provided *inter alia*:—

(b) TANK CARS—On shipments in ETHYL'S tank cars ETHYL will prepay and absorb the freight from ETHYL'S plant to destination.

DRUMS—On shipments in drums (which will originate only from Carney's Point, N.J.) ETHYL will absorb and credit to LICENSEE a freight allowance based on the weight of the anti-knock compound content of the drums, and at the prevailing published tank car rate from cheapest source of supply (North Baton Rouge, Louisiana, or Carney's Point, N.J.), it being understood that such allowance shall be no greater than the actual freight paid by LICENSEE on the weight (net) of the anti-knock compound, and furthermore, when the rate from North Baton Rouge to destination is lower than that from Carney's Point, then ETHYL will absorb and credit LICENSEE with a further amount equal to the additional charges incurred by LICENSEE as a result of shipping from Carney's Point. Rates used for determining this further credit will be on the basis of the cheapest approved method of transportation. LICENSEE agrees to pay full freight charges assessed by carrier on such drum shipments and to pay ETHYL a per drum packaging charge which will be established from time to time by ETHYL.

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A Memorandum (Exhibit "E") headed "Illustrating Application of the Revised Terms of Article 1 'Sale of Anti-knock Compound'" of an Agreement between the defendant and Ethyl Corporation is as follows:—

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In applying the principles referring to shipments of Anti-Knock Compound outlined in the revision of Article 1, the following terms and conditions will govern subject to the changes as provided in said Article:

1. *Tank Car Shipments*

Tank car shipments shall be on the basis of freight allowed from Ethyl's plant to destination.

11. *Drum Shipments*

(a) All drum shipments will originate from Carney's Point, New Jersey.

(b) Freight allowance on the weight of the anti-knock compound content of the drums will be made at the prevailing published tank car rate from the cheapest source of supply (North Baton Rouge, Louisiana, or Carney's Point, New Jersey). The allowance shall be no greater than the actual freight paid by Licensee on the weight (net) of the anti-knock compound.

(c) Freight on the gross weight of the shipment will be equalized to the North Baton Rouge, Louisiana, rate when the rate is lower than that from Carney's Point, New Jersey. The rate used for determining this further credit will be that applicable via the cheapest approved method of transportation.

(d) The packaging cost will be at the rate of \$6.40 per 55 gallon drum.

The above packing charge as outlined in the preceding conditions is based on Ethyl's present average costs, and is subject to revision by Ethyl from time to time.

Several typical examples of the application of these principles are outlined as follows:

1. A drum shipment of 16 55-gallon drums of anti-knock compound with a gross shipping weight of 14,400 pounds, containing 11,950 pounds of anti-knock compound, is made from Carney's Point to Destination 1 at the less than carload rate of \$1.44 per 100 pounds, which is lower than the less than carload rate from North Baton Rouge to Destination 1; the tank car rate from Carney's Point to Destination 1 is \$1.06 per 100 pounds. The cost to Licensee for delivery and packaging of this shipment will be determined as follows:—

Total freight paid by Licensee to Carrier, on 14,400 pounds,	
@ \$1.44 per 100 pounds	\$207.36
Freight Allowance made by Ethyl on 11,950 pounds of anti-knock compound @ \$1.06 per 100 pounds	126.67
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Net freight expense to Licensee	\$ 80.69
Packaging charge on 16 drums @ \$6.40	102.40
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Total cost to Licensee for delivery and packaging	\$183.09
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Then follow several other examples.

This was signed by the defendant and returned to the Corporation.

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Pursuant to this arrangement for an allowance on freight, after each shipment the Ethyl Corporation issued a credit note similar to Exhibit "C" which is:—

We today credit your account as follows:—

Our Invoice No. A-4281, December 14, 1944.

Freight allowance to Licensee on fluid weight:

25,576 lbs. @ \$2.12 per 100 lbs.	\$542.21
Freight allowance to Licensee to equalize to B.R. Gross wt. 31,082 lbs. @ 30c per 100 lbs.	93.25
	635.46
(\$2.42-\$2.12) Freight allowance	635.46
Packaging charge: 36—55 gallon drums \$5.50, per drum	198.00
	\$437.46

At the end of each month an account was rendered similar to Exhibit "D" which shows:—

Reference	Debit	Credit	Balance
A. 4281	\$7,776.00		
CMJ. 642		\$437.46	\$7,338.54

The plaintiff alleges that the value of the motor fuel was declared at \$120,816.00 and that the true value was in fact \$124,024.23.

Section 35 (1) of the Customs Act, R.S.C., 1927, chap. 42 provides:—

35. Whenever any duty ad valorem is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

The difference of \$3,210.00 is alleged to be a charge for packaging the drums, i.e., filling the drums with motor fuel. The plaintiff alleges that this is a charge for coverings as defined by Paragraph 710 of Schedule A of the Customs Tariff Act, R.S.C., 1927, chap., 44 and amendments. Paragraph 710 specifies coverings, inside and outside, used in covering or holding goods imported therewith, shall be subject to the provisions set out. Subparagraph (f) of Paragraph 710 is:—

(f). Provided also that the term coverings in this paragraph shall include packing boxes, crates, casks, cases, cartons, wrapping, sacks, bagging,

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rope, twine, straw, or other articles used in covering or holding goods imported therewith, and the labour and charges for packing such goods, subject to the regulations prescribed by the Minister.

The defendant denies that the difference is a charge for packaging the drums and in the alternative that if there were, this does not represent coverings within the meaning of *Paragraph 710 (supra)*.

Mr. Bell, of the Customs Department, Senior Hardware Appraiser at Calgary of Customs, said that it had never been the practice of the Department to take freight charges into account for duty purposes. If the exporter in the United States paid the freight charges, the duty was still assessed on the fair market value, and if the Canadian importer paid the freight charges, the duty was still assessed on the fair market value in the United States.

In other words the amount realized by the United States exporter or the total cost to the Canadian importer were not taken into account in assessing duty.

In my opinion Mr. Bell was quite correct. *Section 35 (supra)* clearly lays down that the value shall be the fair market value when sold for home consumption in the principal markets of the country (in this case the United States) whence the same were exported directly to Canada, so that freight paid or allowed is not to be taken into account.

The fact that in tank car lots the Ethyl Corporation paid the freight, does not alter the fact that for duty purposes the value of the motor fuel is still the fair market value when sold for home consumption in the United States, and that fair market value is not reduced by the freight which the Ethyl Corporation paid. And conversely if the defendant paid the freight this would not be added to the market value for duty purposes.

The plaintiff's claim is based on the contention that the defendant paid the Ethyl Corporation a packaging charge of \$5.50 per drum in addition to .0018c per cubic centimetre for the motor fuel.

But it is quite clear that if the defendant purchased this motor fuel and paid the freight that the value of the fluid for duty purpose would be .0018c per cubic centimetre. If the transaction had finished there, no question of any packaging charge would arise.

If the defendant took delivery in his own drums in his own truck at Carney's Point, N.J., he would pay only .0018c per cubic centimetre which is clearly the fair market value of Ethyl gasoline when sold for home consumption in the principal markets of the United States.

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It would only be when the Ethyl Corporation gave a credit on the cost of hauling the drums back or on the freight charges paid by the purchaser, that the cost of packaging is taken into consideration by the Ethyl Corporation.

Then the Ethyl Corporation would ascertain not the actual freight charges on the drums, but, as set out in Exhibit "E", would compute the total credit on the weight of the contents of the drums at the tank car rate from either North Baton Rouge, Louisiana, or Carney's Point, New Jersey, although all drum shipments would originate from Carney's Point, N.J., not to exceed of course the actual freight charge. The gross credit then is arrived at on a purely artificial basis.

From this amount termed a freight allowance a packaging cost of \$5.50 per drum (Exhibit "C") was deducted leaving a net freight allowance.

While it is termed a charge in some places, it is properly described in II (d) of the Memorandum (Exhibit "E") as, "The packaging cost will be at the rate...". In other words it is the Ethyl Corporation's estimate of what it costs the Corporation to do the filling.

It is clear from this that no packaging charge was made by the Ethyl Corporation.

It was merely an item of cost taken into account in a formula used to ascertain what credit on freight charges should be allowed. And properly so because the cost to the Ethyl Corporation of filling the drums should be considered in arriving at a credit on freight to be given.

All the examples set out in Exhibit "E" show this clearly.

The defendant paid that freight not to the Ethyl Corporation but to the Railway.

What the Ethyl Corporation was endeavouring to do was to equalize the cost to the purchaser between a shipment by tank car and a shipment of drums.

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And in doing so it gave a credit based on the items which should reasonably have been taken into consideration. But that is entirely different from imposing a packaging charge. In my opinion no packaging charge was imposed. Because of the conclusions which I have reached, it is not necessary for me to decide the remaining question.

The action will be dismissed with costs; the money in Court, paid out to the defendant.

Judgment accordingly.