

BETWEEN:

POPULAR FABRICS INC. APPELLANT;

AND

THE DEPUTY MINISTER OF
NATIONAL REVENUE FOR CUS-
TOMS AND EXCISE

RESPONDENT.

1963
Feb. 18, 19
1964
July 24

*Revenue—Customs Act, R.S.C. 1952, c. 58, ss. 35(3) and 45 as amended—
Limitation on right of appeal to Exchequer Court—Conclusions of
Tariff Board supported by evidence.*

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The appellant appeals from the declaration of the Tariff Board confirming the decision of the respondent whereby the value for duty of certain goods imported from Japan was reappraised to include amounts described as handling commission and financial charges in determining the amount for which the goods were sold by the vendor abroad to the purchaser in Canada.

Held: That the right of appeal to this Court under s. 45 of the *Customs Act* is limited to a question of law and the record before the Tariff Board.

2. That the conclusions reached by the Tariff Board were open to the Board on the evidence before it.
3. That the appeal is dismissed.

APPEAL from a decision of the Tariff Board.

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

Peter Meyerovitch, Q.C. and *Keith E. Eaton* for appellant.

C. R. O. Munro, Q.C. for respondent.

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

CATTANACH J. now (July 24, 1964) delivered the following judgment:

This is an appeal, under section 45 of the *Customs Act*, R.S.C. 1952, c. 58 as amended, from a declaration of the Tariff Board, dated February 21, 1962, in appeal No. 595 whereby a decision of the Deputy Minister reappraising the value for duty of ladies' shorts and blouses imported from Japan by the appellant was confirmed.

The issue before the Board was whether or not amounts described as handling and financial charges were properly included by the Deputy Minister in determining "the amount for which the goods were sold by the vendor abroad to the purchaser in Canada" for the purposes of section 35(8) of the *Customs Act* as amended by c. 32 of the Statutes of 1955, being the applicable provision of the Statute at the time of the importations herein.

There were two sets of transactions involving importation of goods from Japan and although substantially the same type of arrangements were made for each set of transactions, the appellant dealt with two different sets of companies.

In each case the appellant purchased goods from a Japanese exporter on ninety days credit. In each case the appellant was invoiced by or on behalf of the exporter for

an amount in respect of the goods imported. In each case a company which was affiliated with the exporter and carrying on business in New York rendered a bill for charges, in one case described as "financial charges" and in the other case as "handling commission" for an additional amount. In each case these charges related in some way to the arrangements that were made by the affiliated company with a bank for a letter of credit in favour of the exporter, which letter of credit was a condition precedent, under the law of or commercial practice in Japan, to the exportation of the goods to the appellant on credit.

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In these circumstances the Deputy Minister added the amounts of the "financial charges" and the "handling commission" to the respective invoice amounts in determining the amounts for which the goods were sold by the vendors abroad to the appellant in Canada for the purposes of section 35(8) (*supra*). Presumably he did so on the assumption that, in each case, the only thing the appellant received for the two amounts paid by him were the goods purchased by him.

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

Popular Fabrics Inc deeming itself aggrieved by a decision of the Deputy Minister of National Revenue, Customs and Excise, as to the value for duty of certain ladies' shorts imported from The Goshō Company, Ltd, and certain ladies' blouses imported from Nichimen Co., Ltd, both companies being in Japan, appeals to the Tariff Board from this decision of the Deputy Minister.

The only issue before the Board is whether or not certain amounts described as handling or financial charges were properly included by the Deputy Minister in determining the amount for which the shorts and blouses were sold, within the provisions of subsection 8 of section 35 of the Customs Act as it existed prior to the 1958 amendments.

In the case of the ladies' shorts the original contract, exhibit A-2, dated October 29th, 1957, is between The Goshō Company, Ltd., of Osaka, Japan, hereinafter referred to as Goshō (Japan) and the appellant. The terms of payment are: "as arranged with Goshō Trading Co, Inc., Montreal" Goshō Trading Company, Inc., Montreal, as appears from the evidence, is a branch of Goshō Trading Company, Inc., of New York, hereinafter referred to as Goshō (US) There is also an invoice dated March 3rd, 1958 from Goshō (U.S.) to the appellant, exhibit A-5, covering the shipment and indicating that the term of payment matured on May 13th, 1958. On March 5th, 1958 a debit note, exhibit A-6, was sent by Goshō (US) to the appellant for "financial charges" on several invoices, including that of March 3rd, 1958 for which the "financial charges" were \$164.47.

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In the case of the ladies' blouses the original contract dated November 19th, 1957, exhibit A-7, is between Nichimen Co., Ltd. of Osaka, Japan, hereinafter referred to as Nichimen (Japan), as seller, and Nichimen Co., Inc., of New York, hereinafter referred to as Nichimen (U.S.) as buyer though it is confirmed on behalf of the buyer by the appellant. The payment clause requires payment by letter of credit in U.S. dollars and has the further provision: "Popular Fabric Inc. will pay Nichimen Co., Inc., N.Y., total F.O.B. amount 90 days after shipment from Japan". There is a further document dated December 30th, 1957, exhibit A-10, entitled Sales Contract on a printed form of Nichimen (U.S.) showing the blouses as being sold to Segal's Reg'd., of Montreal. Counsel for both parties agreed that for the purpose of this appeal Segal's Reg'd might be considered as being the same person as the appellant; this document bears the notation "Details as per Osaka's relative confirmation" and the further notation that the "seller will charge 2½% handling charge in separate invoice". A further invoice from Nichimen (U.S.) to the appellant, exhibit A-15, shows the handling commission on the goods in issue to be \$24.98 and \$4.82: a total of \$29.80.

Apart from the exhibits filed by the appellant and the respondent the only evidence before the Board was adduced by the appellant. It appeared that much of the relationships between the various companies involved was the result of verbal understandings between the president of the appellant company and certain representatives of the Nichimen and Gosho companies. The president of the appellant company gave no evidence. The representatives of the other companies who gave evidence were men recently attached to the United States companies, whereas those more familiar with the transaction had returned to Japan to take office or employment with the Japanese companies. As a result of this the verbal evidence before the Board was characterized by unfortunate lacunae.

On behalf of the appellant it was urged that the "handling" charges of 2½% in the Nichimen transaction and the "financial" charges in the Gosho transaction were for the obtention of letters of credit; a witness explained that the appellant, not wishing to use up a portion of its line of credit with its bank, was willing to pay these charges to Nichimen (U.S.) and Gosho (U.S.). The appellant further argued that the two United States firms were agents of the appellant and not of the Japanese vendor firms.

The respondent contended that the "handling" or "financial" charges were an integral part of the whole contract between the appellant and the Japanese companies and that the agreement on this score was made prior to shipment.

An examination of the exhibits mentioned earlier throws interesting light on the problem of agency. Exhibit A-2 provides for terms of payment "as arranged with Gosho Trading Co., Inc., Montreal". Exhibit A-5 is an invoice from Gosho (U.S.) to the appellant for the price of the goods. Exhibit A-7 provides for payment to Nichimen (U.S.). Exhibit A-10 provides two interesting clauses: "Details as per Osaka's relative confirmation" and "Seller will charge 2½% handling charge in separate invoice". This documentation, in both transactions is certainly more consonant with agency of the United States companies on behalf of the Japanese companies than on behalf of the appellant.

In the Nichimen transaction the "handling charge" appears to have been 2½%, there is no evidence to show any specific amount disbursed

on behalf of the appellant to meet bank charges for the issue of a letter of credit though it is clear that such charges would not have amounted to the agreed 2½%.

In the Gosho transaction the agreed amount of the "financial charges" does not appear with any clarity; at pages 26 and 27 of the Official Report, the secretary-treasurer of the appellant company, a witness less familiar with all the facts than was desirable, stated that the Gosho charges were "sometimes at a particular rate" and, in relation to the transaction in issue, he answered: "I couldn't say for sure, but it might be in the vicinity of three per cent". There is no documentary evidence of the agreed amount of the "financial charges". At page 92 of the Official Report, the witness Nakamura, Vice-President of Gosho (U.S.), stated that about one quarter or one fifth of the total financial charges, "about \$30 or \$40 might be the expense paid to the bank" for the issue of a letter of credit.

Consequently in neither transaction is there evidence from which the Board could determine the amount, if any, which might have been disbursed on behalf of the appellant to meet any bank charges for the issue of a letter of credit. In the absence of such evidence and because in relation to official decisions there exists a rebuttable presumption of correctness, the decision of the Deputy Minister must be presumed to have been correctly made on the score of such disbursements, if any, made on the appellant's behalf.

The Board further holds that the so-called handling or financial charges, as the evidence showed them to be made in this case, were properly included by the Deputy Minister in determining the amount for which the shorts and blouses were sold, within the provisions of subsection 8 of section 35 of the Customs Act as it existed prior to the 1958 amendments. Therefore the appeal is dismissed.

It is from this finding that the appellant now appeals to this Court. Under section 45 of the *Customs Act* a party to an appeal to the Tariff Board 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 and the record before the Board.

While the process by which the Board reached its conclusion upholding the Deputy Minister's decision is not as clear to me as I should have preferred it to have been, I have not been convinced by the argument before me that the Board erred in law.

It seems clear the Board must have found that, in order to have the goods in question exported to the appellant on ninety days credit, it was necessary that the exporter should have a letter of credit covering the transaction and that the U.S. representatives of the Japanese exporters accordingly arranged with the appellant for payment of an additional amount in respect of the particular sales if the sales involved exportation of the goods from Japan on credit.

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There does not seem to be any doubt on the part of the Board that the U.S. companies were acting for the exporters. Similarly there does not seem to be any doubt on the part of the Board that the appellant, in each case, paid the extra charges as well as the invoiced amounts for the goods and that the goods were all that the appellant received for both such amounts. Such conclusions were open to the Board on the evidence before it. On the basis of such conclusions there was no reason for interfering with the Deputy Minister's decision.

The appeal is, therefore, dismissed with costs.

Judgment accordingly.