BETWEEN:

1953
Mar. 31
Apr. 4

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

AND

REDIFFUSION, INC.,.................RESPONDENT.

Revenue—Customs and Excise—Goods subject to duty—The Excise Tax Act, R.S.C. 1927, s. 116, Schedule I, item 6—Tariff Board—Leave to appeal to Exchequer Court from decision of Tariff Board—Questions of law—Whether a "Subscriber's Termination Unit" falls within either of terms "telecast receiving set" or "apparatus for receiving radio broadcast and music"—Whether Tariff Board's finding a question of fact only—Construction of terms of a statutory enactment a matter of law only—Application for leave to appeal from decision of Tariff Board granted.

The application herein is one by appellant, under the provisions of the Excise Tax Act, R.S.C. 1927, c. 179, s. 116, for leave to appeal, on a question of law, from a decision of the Tariff Board declaring that a certain telecommunication apparatus described as a "Subscriber's Termination Unit" was not subject to excise tax under Item 6 of Schedule I of the Act, which is as follows:

"Phonographs, record playing devices, radio broadcast or telecast receiving sets and tubes therefor, apparatus for receiving radio broadcast and music . . . fifteen per cent."

Neither "Subscriber's Termination Unit", "telecast receiving set" nor "apparatus for receiving radio broadcast and music" are defined in the Act. Respondent opposed the application on the ground that no question of law is involved.

Held: That the Tariff Board's finding that the "Subscriber's Termination Unit" did not fall within either of the terms "telecast receiving set" or "apparatus for receiving radio broadcast and music", is not a question of fact only. After ascertaining the facts as to the nature of the "Subscriber's Termination Unit" it was necessary for the Board to construe the meaning of the words "telecast receiving set" and

1953
THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE
v.
REDIFFUSION, INC.

"apparatus for receiving radio broadcast and music" before reaching a conclusion as to whether the imported article did or did not fall within either category.

2. Such construction on the part of the Tariff Board upon the provisions of Item 6 of Schedule I of the Act is a construction of the terms of a statutory enactment and, therefore, a matter of law only. *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* [1936] S.C.R. 249; *Rogers-Majestic Corporation Ltd.* v. *City of Toronto* [1943] S.C.R. 440; *General Supply Company of Canada Ltd.* v. *The Deputy Minister of National Revenue, Customs and Excise, et al* [1953] Ex. C.R. 185 referred to and followed.

3. That the question proposed by appellant involves a question of law.

APPLICATION under s. 116 of the Excise Tax Act for leave to appeal from a decision of the Tariff Board.

The application was heard before the Honourable Mr. Justice Cameron at Ottawa.

D. W. Mundell, Q.C. for the application.

Gordon F. Henderson contra.

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

CAMERON J. now (April 4, 1953) delivered the following judgment:

This is an application for leave to appeal from a decision of the Tariff Board, dated February 17, 1953 (Appeal No. 279), declaring that Subscriber's Termination Units are not subject to Excise Tax under s. 80 of the Excise Tax Act (ch. 179, R.S.C. 1927). The application is made under the provisions of s. 116 of that Act, which is as follows:

116. 1. Any of the parties to proceedings under section one hundred and fifteen, namely,

. . . .

may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court *upon any question that in the opinion of the Court or judge is a question of law.*

Section 80(1) imposes excise tax on goods mentioned in Schedule 1. The appellant contended before the Tariff Board that the goods in question, namely, Subscriber's Termination Units, were subject to tax under Item 6 of Schedule 1, which is as follows:

6. Phonographs, record playing devices, radio broadcast or telecast receiving sets and tubes therefor, apparatus for receiving radio broadcast and music . . . fifteen per cent.

The Board allowed the appeal of the respondent, its decision being as follows:

> The telecommunication apparatus at issue in this Appeal was described in evidence as a "Subscriber's Termination Unit," as supplied by Rediffusion Inc., Montreal, to all persons subscribing to its services. This apparatus has been held by the Excise Tax authorities to constitute, in each installation, a "telecast receiving set" and hence to be liable to tax under Schedule I(6) of the Excise Tax Act. It was contended by the appellant that the "Subscriber's Termination Unit" will not perform as does a "telecast receiving set", does not include many of the components necessary in a "telecast receiving set", and would not be acceptable as a "telecast receiving set" as those words are ordinarily understood.
>
> Even if the "Subscriber's Termination Unit" is not a "telecast receiving set", the Crown argued, it is "apparatus for receiving radio broadcast and music". The Board is persuaded that this equipment does, in fact, receive radio broadcasts and music. The Board does not, however, consider that the "Subscriber's Termination Unit" is properly described simply as "apparatus for receiving radio broadcast and music", and could not, under such an incomplete description, be said to attract the tax.
>
> The Board is equally persuaded that the "Subscriber's Termination Unit" is not a "telecast receiving set" as that phrase is understood by the trade and by the public.
>
> Accordingly, the Appeal is allowed.

The question of law submitted by the appellant is as follows:

> What is the meaning of the words "6. Phonographs, record playing devices, radio broadcast or telecast receiving sets and tubes therefor, apparatus for receiving radio broadcast and music" in so far as the meaning of those words is relevant for the purpose of determining whether the telecommunication apparatus known as a "Subscriber's Termination Unit" as supplied by the Respondent to persons subscribing to its services is subject to Excise Tax under Section 80 of the Excise Tax Act? or on such other question arising in the said appeal as in the opinion of this honourable Court or a Judge thereof is a question of law.

The respondent opposes the application for leave to appeal, on the ground that no question of law is involved. It is submitted that the Board's finding that the Subscriber's Termination Unit did not fall within either of the terms "telecast receiving sets" or "apparatus for receiving radio broadcast and music," is a finding of fact only, and that therefore the application should be dismissed. I am unable to agree with that submission. It seems to me that one of the problems before the Board—and possibly the main problem—was to place a proper construction upon the provisions of Item 6 of Schedule I of the Statute. After ascertaining the facts as to the nature of the imported goods, namely, Subscriber's Termination Units (a term

1953
THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE
v.
REDIFFUSION, INC.
Cameron J.

which is not defined in the Act), it was necessary for the Board to construe the meaning of the words in Item 6, namely, "Telecast receiving set" and "apparatus for receiving radio broadcast and music" (neither of which terms is defined in the Act), before reaching a conclusion as to whether the imported articles did or did not fall within either category. It is well settled that the construction of the terms of a statutory enactment is a matter of law only.

In *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (1), the sole question for determination was whether or not the land and building of the appellant came within the words "distribution premises" in Clause (*cc*) of s. 9(1) of the Assessment Act, R.S.O. 1927, c. 238 as amended. The Supreme Court of Canada unanimously rejected the contention that the finding in the courts below that the land and building in question were used as distribution premises was a finding of fact which should not be interfered with; and it held that the question raised was the proper construction of the statute. In that case Davis, J., in delivering the judgment of the Court, said at p. 254:

It is argued that, the courts below having reached the conclusion that the land and building were used as distribution premises, this is a finding of fact with which we ought not to interfere. But it is a question of law that is made the subject-matter of the right of appeal from the County Judge upon a stated case and we are bound to determine upon the proper construction of the amendment whether or not, upon the facts stated, the land and building are caught by the increased rate of assessment. Questions of this sort are constantly before the House of Lords on taxing statutes and are dealt with as raising the proper construction to be put upon the language of the statutes. For instance, in *Sedgwick* v. *Watney*, (1931) A.C. 446, above mentioned the question was whether a bottling store occupied by brewers in which beer brewed by them elsewhere was matured, carbonated, filtered and bottled, and from which, after the bottles had been corked and labelled, it was distributed to the trade, was "an industrial hereditament" under sec. 3 of *The Rating and Valuation Apportionment Act*, 1928, or was primarily occupied and used for the purposes of "distributive wholesale business" within an exception in the Act. The rating authority had put the premises on the special list as an industrial hereditament and their decision was upheld by the Assessment Committee. Appeal being taken to Quarter Sessions, a special case was stated to the King's Bench Division which reversed the court below. From that judgment, appeal was taken to the Court of Appeal which reversed the judgment of the King's Bench Division and restored the judgment of the Assessment Committee. The House of Lords then considered the matter and the judgment of the House was read by Viscount Dunedin, pp. 460-465, and while it said that "after all, the

(1) [1936] S.C.R. 249.

question is an individual one as to each particular hereditament," the appeal was determined upon the proper construction to be put upon the words of the statute.

The *Loblaw* case was referred to and followed in *Rogers-Majestic Corporation, Ltd.* v. *City of Toronto* (1). In the latter case reference was made to *Farmer* v. *Cotton's Trustees* (2). There Lord Parker of Waddington said at p. 932:

> My Lords, it may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. The question in the present case is whether the facts found by the Commissioners with regard to a block of buildings situate in Princes Street, Edinburgh, and known as the "Windsor Buildings," entitle such buildings to the partial exemption from inhabited house duty provided by sub-s. 1 of the 13th section of the Customs and Inland Revenue Act, 1878. This question can only be determined by putting a construction on the sub-section in question, and, therefore, is one of law, on which the Court of Session had jurisdiction to reverse the determination of the Commissioners. The question before your Lordships is whether the Court of Session was right in so doing.

In the same case, Lord Sumner, although dissenting in the result, said at p. 938:

> In this case the Commissioners have furnished a description of the building in question, partly in words and partly by plans, so full that your Lordships know as much about it as they did. The rest is a matter of law.

Reference may also be made to *General Supply Company of Canada, Ltd.* v. *The Deputy Minister of National Revenue, Customs and Excise, et al,* (3), in which on October 30, 1952, I allowed an application for leave to appeal from a decision of the Tariff Board, such decision having been based on a similar provision in s. 50 of the Customs Act, R.S.C. 1927, c. 42, as amended.

For these reasons, I am of the opinion that the question proposed by the appellant involves a question of law. The application for leave to appeal will therefore be granted. Costs of the Motion will be costs in the cause.

Judgment accordingly.

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(1) [1943] S.C.R. 440. (2) [1915] A.C. 922.
(3) [1953] Ex. C.R. 185.