

BETWEEN :

PFIZER CORPORATION and PFIZER }
 COMPANY LIMITED—LA COM- } SUPPLIANTS;
 PAGNIE PFIZER LIMITÉE }

Montreal
 1965
 June 2, 3
 —
 Ottawa
 Sept. 28
 —

AND

HER MAJESTY THE QUEEN RESPONDENT.

Sales tax—Exemptions—Whether biscuit sold as dietary aid for obesity a pharmaceutical—Construction of exempting provisions—Excise Tax Act, R S C. 1952, c. 100, s. 2(1)(cc), s. 30, Sch. III.

Suppliants petitioned for a refund of sales tax and old age security tax paid by them under s 30 of the *Excise Tax Act*, R S C. 1952, c 100, and s. 10 of the *Old Age Security Act*, R S C. 1952, c. 200, on the sales of a food product in biscuit form sold under the trade mark “Limmits” and advertised as a dietary aid to weight control.

Held, dismissing the petition, “Limmits” were a pharmaceutical within the meaning of s. 2(1)(cc) of the *Excise Tax Act* (as amended by S. of C. 1959, c. 23, s. 1(5)), being “sold or represented for use in the . . . treatment . . . of an abnormal physical state”, i.e. obesity, and, as pharmaceuticals, were not within the exemption of Schedule III, viz “bakers’ cakes and pies including biscuits . . .”. Exceptions in a taxing statute should not be presumed or given the benefit of doubt.

[*The Queen v. Continental Air Photo Ltd.* [1962] Ex. C.R. 461 at pp 471-472; *Federal Comm’r. of Taxation v. Farey Bros.*, 2 Aust. T.C. 140 at p. 143; *Jackett v. Federal Comm’r of Taxation*, 2 Aust. T.C. 203 at pp. 205-207 considered]

PETITION OF RIGHT for refund of sales tax and old age security tax.

Julian C. C. Chipman for suppliants.

C. R. O. Munro, Q.C. and *D. G. H. Bowman* for respondent.

DUMOULIN J.:—By their joint petition of right the suppliants are claiming from the respondent a refund in the sum of \$59,235.62 for sales tax imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, and old age security tax, s. 10 of the *Old Age Security Act*, R.S.C. 1952, c. 200, allegedly because “. . . all sales tax paid by the Suppliants, . . . were paid under mistake of law or fact and may be recovered” (cf. petition, s. 19).

Should this assertion be vindicated, then, no procedural impediment would bar its way since it is admitted that “on or about March 13, 1964, the Suppliants made application in writing for refund of all said taxes” paid “under protest . . .” (this last statement denied but satisfactorily

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substantiated at trial), from April 24, 1963, down to February 18, 1964, in compliance with s. 46(5) of the *Excise Tax Act*.

Of the two suppliants, the first, Pfizer Corporation, has its head office in Panama City, Republic of Panama, the second, Pfizer Company Ltd.—La Compagnie Pfizer Ltée, maintains its principal place of business in the City of Montreal, Province of Quebec.

The petition, of which the leading passages should be reproduced for a clearer statement of the case, sets out that:

1. Until March 27th, 1963, the Suppliant Pfizer Corporation had been selling and since that time the Suppliant Pfizer Company Ltd.—La Compagnie Pfizer Ltée, a wholly-owned subsidiary of the Suppliant Pfizer Corporation, has been selling to retail outlets in Canada a food product in biscuit form under the trade mark "Limmits" (hereinafter called "Limmits").

2. Limmits was sold and advertised for sale as a limited calorie meal plan for weight control.

3. Limmits was made and baked for the Suppliants by Christie, Brown & Co. Ltd., bakers. (a fact admitted by respondent's counsel).

with para. 4 the recital of litigious facts begins:

4. On January 17th, 1962, the Deputy Minister of National Revenue ruled that Limmits was exempt from sales tax under Schedule III of the Excise Tax Act and from the related old age security tax . . . as coming under the exemption of "biscuits, cookies or other similar articles".

5. At about the same time the Deputy Minister of National Revenue had ruled that "Metrecal and MinVitine", both dietary products for weight control in concentrate form, were not exempt from sales tax.

This apparently conflicting attitude came to a head by way of a hearing before the Tariff Board in the Appeal No. 650, instituted by Mead Johnson of Canada, Limited, "urging that the Department of National Revenue, Customs and Excise, wrongly held the product known as 'Metrecal' to be subject to sales tax . . .".

On February 25, 1963, the Tariff Board issued its declaration, the gist of which is hereunder excerpted:

The Respondent (i.e., National Revenue, Customs and Excise Branch) urged that Metrecal is a pharmaceutical within the provisions of Section 2(1)(cc) of the Excise Tax Act which is as follows:

"pharmaceuticals" means any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, sold or represented for use in the diagnosis, treatment,

mitigation, or prevention of a disease, *disorder, abnormal physical state*, or the symptoms thereof, in man or animal, *or the restoring correcting, or modifying organic functions* in man or animal.

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(Italics not in text)

The Metrecal label stresses a "dietary plan for weight control". It is clear from the evidence that the words "weight control" mean the control of excessive weight. The labels on Metrecal packages and the advertising by the applicant advise consumers of Metrecal to consult physicians on weight control.

Metrecal is designed for human consumption, without other food, over a period, for the purpose of reducing or preventing excessive weight.

It is undisputed in the evidence that overweight in man is an abnormal physical state.

Section 2(1)(cc) of the Act is very broad in its application, but is binding in the determination of what is a pharmaceutical within the meaning of the Excise Tax Act; from the evidence it is clear that Metrecal was "sold or represented" by the applicant "for use in the . . . treatment, mitigation, or prevention of . . . abnormal physical state . . . in man".

Accordingly, the Board finds that Metrecal is a pharmaceutical within the meaning of the Excise Tax Act; it cannot, therefore, be exempt from sales tax under the exempting provision of Schedule III of the Act. . . .

Leave to appeal this ruling to the Exchequer Court was refused by the then President, Honourable Mr. Justice Thorson.

Although the Tariff Board's decision is dismissed as irrelevant to the issue in the Statement of Defence (para. 2), it seems crystal clear that it at once induced in the respondent a complete change of mind and brought about the rescinding of its January 17, 1962, ruling.

This new and altered policy was made known to Pfizer Corporation through a departmental letter on March 5, 1963, saying that "...in view of the above declarations of the Tariff Board, it was decided that Limmits was not exempt from sales tax and that sales tax should be accounted for and paid with respect to sales made on and after February 26th, 1963. . ." Hence, the payment of \$59,235.62, under protest, and the instant petition for a refund, to which the respondent replies, in substance, that Limmits is not exempt from the sales taxes imposed by the *Excise and Old Age Security Acts* "...because it is not an article mentioned in Schedule III to the *Excise Tax Act*, and in particular it is not included in the item 'bakers' cakes and pies including biscuits, cookies and similar articles' contained in the said Schedule III". I have in the opening lines

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disposed of respondent's objection based upon s. 46 of the *Excise Tax Act*.

A protracted scrutiny of the moot question leads me to the belief that it should be answered by a strict adherence to the terms of s. 2(1)(cc) and a correlative interpretation of Schedule III in the two first lines of its subdivision headed "Foodstuffs".

As noted by the Tariff Board, the expression "pharmaceuticals" in s. 2(1)(cc) is very broad; so wide, indeed, as to encompass within the enunciation of "any material, substance, mixture, compound or preparation, of whatever composition or in whatever form" unlimited varieties of products, were it not for the restricting condition that the pharmaceutical qualification only applies if and when such wares are "sold or represented for use in the . . . treatment, mitigation, or prevention of . . . abnormal physical state . . . in man"; and it goes without saying that none concerned disputed the physical abnormality of obesity or overweight.

With this assumption in mind, my initial investigation should be directed towards the advertising publicity, or, as the French put it "la réclame commerciale et publicitaire", according to which Limmits "are sold or represented" in appropriate retail outlets throughout Canada.

Possibly, the most cogent illustration consists in a standard package of Limmits, filed as ex. S.-1, advertising the product as a "Limited Calorie Meal Plan for Weight Control" with directions indicated and contents described. This attending publicity reads thus:

DIRECTIONS

FOR WEIGHT LOSS: Replace breakfast and lunch with two Limmits biscuits plus tea or coffee (no cream). Eat a well-balanced, calorie-restricted meal (see specimen menus on inside flap) for dinner.

FOR WEIGHT MAINTENANCE: Replace lunch with two Limmits biscuits and coffee or tea (no cream). Eat a well balanced, calorie-restricted breakfast and dinner (see specimen menus on inside flap).

Limits is a nutritious, satisfying calorie-limited meal in delicious biscuit form. Limits provide essential vitamin and food elements and help satisfy your appetite, *yet provide so few calories that you lose weight.*

(emphasis added)

I interrupt the rather verbose citation to note that a substance advertised as appeasing hunger "yet (providing) so few calories that you lose weight", wears the appearance

of being "sold or represented for use in the ... treatment, mitigation or prevention of ... an abnormal physical state" consequent to overweight.

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Next comes, on the longitudinal side of the cardboard container, a chemical and pharmaceutical nomenclature of the various contents compounded in "Limmits"; I quote:

CONTENTS: This package contains 6 Limmits. Each biscuit weighing 1.14 oz. contains soya, baking and whole meal flour, sugar, malt extract, glucose syrup, powdered milk, sodium carboxymethyl cellulose (850 mg) and the following essential minerals and vitamins: vitamin A (as palmitate) 894 I.U.; vitamin B1 0.31mg; riboflavin (vitamin B2) 0.52 mg.; vitamin C 10.74 mg; niacinamide 3.1 mg; calcium (as dibasic calcium phosphate) 115.4 mg; phosphorus (as dibasic calcium phosphate) 88.6 mg.; iron (as reduced iron) 2.5 mg

Each biscuit provides 175 calories, 3.07 gm. protein, 15.5 gm. carbohydrate, and 11 gm fat

The closing paragraph surely underscores a certain degree of connexion between the objects thus "sold or represented" and the "treatment, mitigation or prevention" of some disorder or abnormal physical state, when it cautions the eventual purchaser as follows:

Consult your physician on any long term program of weight reduction. Not recommended for use during pregnancy and lactation, unless under the direction of a physician.

In telling contrast with the curative or preventative properties claimed for Limmits on its wrapping envelope is ex. S-2, a package of "Afternoon Tea, assorted biscuits", made by the well-known English manufacturers, Peek, Frean & Co. Ltd., of London. No special hygienic or restorative virtues are mentioned on this container, nothing but the company's name, its Royal appointment, the net weight contained; no physician need be consulted, nor is there any warning that pregnant or nursing women should refrain from eating those biscuits except with medical advice.

Also produced as exs. R-2, 3 and 4, and commented upon by respondent's counsel, were the December, 1962, December, 1963, and September, 1964, issues of what can properly be called a technical publication, "Drug Merchandising", plus the explanatory sub-title of "Drug Index". These trade magazines, it should be noted in all fairness, extend their listings to the entire schedule of drug stores' non-pharmaceutical wares such as: Toiletries & Cosmetics, Photographic, Sundries and Store Equipment.

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This professional catalogue is credited by respondent's witness, Mr. O. L. Christie, a graduate pharmacist of Toronto University, presently purchasing agent for G. Tamblin, Ltd., the largest retail drug chain in Canada, as reaching every pharmacy in the country (evidence, p. A-27) because "in our profession, pharmacists are not familiar with every product by name or supplier; and we use this as an indication where to procure the merchandise that is listed in this index" (ev. p. A-30).

On p. 32 of ex. R-2 appears the product "Limmits" with code number 1165, which at p. 98 locates the manufacturer as Lee-Cliff Products, a division of Pfizer Corp. A similar listing is found in R-3, p. 36, with Pfizer's name as producer, and in R-4, a full page advertisement asserting, in bold print, that "You can't turn your back on profit. Limmits are profitable to promote" (next, in smaller characters) "because the total dietary market is not shrinking! because over 60% of the total dietary business is done through drug stores. . . ; *because Limmits are the most heavily promoted dietary products in Canada! . . .*" (italics mine). It seems hard to deny some significance to the listing and promotional literature of "Limmits" in this "Drug Index", when contrasted with a total omission of all ordinary brands of table or bakers' biscuits. An explanation of this one-sided publicity might well be the undisputed dietary or medicinal nature of Limmits, differentiating them, without a doubt, from the non-pharmaceutically treated varieties of biscuits.

The April, 1963, number of Reader's Digest, possibly the most widely read monthly booklet in North America, (Canadian Edition), filed as ex. R-4, ran a full-page (7) advertisement captioned:

Remarkable Limmits Diet Plan Gives Overweight Canadians New Lease on Life.

No medicinal tasting pills, powders, liquids . . . but a delicious cream-filled two-biscuit meal with flavoursome variety!

Such are the alluring introductory lines, followed by the statistical lament that:

Canadians are carrying around 20 million pounds in excess weight. One man in seven and one woman in four are overweight. *Most are aware that being overweight poses a serious threat to health and shortens life.*

(emphasis added throughout)

Necessarily, the victorious weapon in this daily "battle of

the bulge”, so reads the “ad”, can be none other than Limmits about which, I quote:

Medical opinion and marketing experts attribute Limmits’ success to the fact that, unlike the nutrient liquids, they can be eaten and are filling . . .

And the concluding paragraph:

Health experts agree that obsession with obesity is here to stay as long as we continue to enjoy an affluent society. Not only will there be those who need a drastic weight reduction program, but thousands who will wish to exercise permanent control to maintain an ideal weight level. It looks like Limmits are here to stay. Lee-Cliff Products, Montreal, Canada.

(a wholly-owned subsidiary of Pfizer Corporation)

If this style and form of propagandizing Limmits, country-wide, as “*a drastic weight reduction program*”, a treatment or preventative against “*overweight*” which “*poses a serious threat to health and shortens life*”, bears no relation to “*any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, sold or represented for use in the . . . treatment or prevention of an . . . abnormal physical state, or the symptoms thereof, in man . . .*”, I had as well confess my inability to conceive what could ever give rise to such an application.

Before entering upon another chapter of the case, it is apposite to inquire into the statutory scope of s. 2(1)(cc). so frequently cited in these notes.

It is, of itself, the sole interpretative provision of the Act and, as such, exercises throughout the statute a pervasive, overriding authority, that a positive and unequivocal exception might alone curtail. Sub-section (cc) pursues a single objective of a fiscal, tax imposing, nature, in nowise concerned with scientific or technical matters. The wording of the text confirms this conclusion since, of its own authoritative determination, a “pharmaceutical” is an object of any possible shape, form, substance or size, whether pharmaceutically prepared or totally devoid of drugs or medicaments, “if” it is “*sold or represented* for use in the . . . treatment, mitigation or prevention . . . of (an) abnormal physical state . . . in man”. Here, the chemical substance is of no practical avail; here again, the specific essence of the ingredients is not considered, merely the way in which, through a promotional campaign, the resulting compounds are “*sold or represented*”.

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In my humble opinion those three governing words have paramount sway over the Act and are mandatory unless superseded by an exception, expressed or logically inferred.

Dumoulin J. It was convincingly shown, I believe, that the particular products, in biscuit form, called Limmits, were "sold or represented" to the public at large precisely in the manner and for the purposes foreseen by s. 2(1)(cc). How, then, could they escape the consumption taxes of eight percent and two percent imposed, respectively, by the *Excise Tax* and *Old Age Security Acts*?

The suppliant replies by a reference, initially, to s. 32(1) of the *Excise Tax Act* (also applicable to the *Old Age Security Act*, s. 10(2)) decreeing that:

32 (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

In the first lines of Schedule III, entitled "Foodstuffs", we reach the rub of the problem, exempting, as they do, from sale taxes:

Bakers' cakes and pies including biscuits, cookies and similar articles but not including simulated chocolate bars or candy bars.

Now is the time to give a description of the object in dispute, the "Limmits" biscuit, with frequent references to the evidence of a professional chemist, Alfred Bendin Deans, the technical director of Pfizer Company, Ltd.:

The full ingredients of that biscuit (Limmits) would—conveniently be divided into the ingredients that enter into . . . the two shells of the biscuit and the ingredients that enter into the icing which goes between the two shells of the biscuit . . . ,

explains the witness, who continues thus:

The shells of the biscuit are baked in equipment used for the manufacture of all other type of biscuits, and the ingredients that enter into the process are of necessity the same type of ingredients that go into ordinary everyday biscuits—flour, sugar, vegetable oil, malt syrup . . . milk powder, some salt, iron, sodium bicarbonate (i.e. baking soda).

(cf. transcript, pp. 54 and 55)

All of the components aforesaid relate to the double shell.

Mr. Deans next describes the filling or icing contents that can have vanilla, chocolate, orange or cheese flavourings, as "hydrogenated palm kernel oil . . . sugar . . . carboxymethyl cellulose", a bulking agent that "probably swells to form a thickened solution. It helps to break down the biscuit and make it more digestible when it is consumed. At the same time it imparts a feeling of fullness. . . so that the consumer's sensation of hunger is, in part, reduced" (trans. pp. 57

and 67). Other additives are "Dicalcium phosphate... a normal ingredient of infant formulas. It supplies things like phosphorus and calcium, that are needed to build up the bone structure in the body." (trans. p. 58). Skimmed milk is added, but the most active and probably distinctive agents in the filling would be vitamins, mentioned by the suppliants' technical director as Vitamin A in its combined form of Palmitate, resulting from the treatment of Vitamin A with palmitic acid. Then come vitamins B-1, B-2, C and Niacinamide (trans. pp. 60, 61, 62).

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My impression persists that the same Mr. Deans approached the matter in more scientific and revealing fashion in a business communication, dated February 9, 1965, addressed to Mr. R. Brewerton, a chartered accountant, and comptroller of Pfizer Co. Ltd. It forms part of a brief, comprising seven documents produced as ex. R-1. Additional references will be made to this letter, but, for the time being, I will quote from its second page (2), headed "Limmits, Vitamin Mix Formula", the components listed, attaching particular attention to the medicinal functions attributed to six of them by the suppliants:

INGREDIENT	FUNCTION	GM/1000 GM
(1) Vitamin A Palmitate in Corn Oil	Medicament	41.0
(2) Vitamin A Palmitate	"	82.0
(3) Thiamine Hydrochloride	"	17.8
(4) Riboflavin	"	26.2
(5) Ascorbic Acid	"	615.4
(6) Niacinamide	"	177.6

Nowhere did the evidence reveal any kindred mixtures of medicinal preparations in regular table biscuits, either Peek, Frean's (ex. S-2), Gray, Dunn's, or other brands whatsoever.

Because of these medicated ingredients and remedial objectives, Limmits fall in the category of "Dietary Aids", segregated from candies and biscuits in all the stores owned or controlled by the Tamblyn organization, testified that company's purchasing agent, Mr. Orval L. Christie, to whom one of respondent's counsel put this question:

Q. . . if a person came into your store, to Tamblyn store or any of the other stores that you operate and asked for biscuits, would they be given "Limmits"?

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The answer:

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A. I would say definitely not. "Limmits" would be sold on request; and the customer wanting biscuits would not ask for "Limmits" or vice versa. (trans. p. A-23)

Limmits, supplied by Pfizer Corporation to the Tamblyn chain of drug stores, figure in the heavy sellers' list, though costing three times the price of Peek, Frean's and Gray, Dunn's biscuits, says the witness.

On this topic of expert evidence, I note Mr. Deans' attempt at waving aside the caution on the boxes of Limmits: "not recommended for use during pregnancy and lactation unless under the direction of a physician". To suggest, as he did (trans. p. A-3) "that during pregnancy and lactation it is quite common for stomach upsets and that type of thing to occur; and if the people at the same time were using a product, say, of this nature, they are quite likely to blame the upsets on the product rather than blame it on the normal type of thing that happens during pregnancy and lactation" sounds like a lame endeavour to minimize a risk quite apparent to his principals. The undeniable fact that, alive as any to the protection of their own commercial repute, none of the biscuit manufacturing firms ever print warning advices of this kind, conclusively refutes the tentative plea of the petitioners' chemical director.

This summarization of the oral evidence will be, I hope, a helpful introduction to the suppliants' basic argument.

Mr. Chipman, for Pfizer Corporation, started off by citing several dictionary definitions, both English and French, of the nouns: cake, pie and biscuit, to prove the undisputed and rather meaningless fact that the "shells" used in Limmits are made of biscuit components.

In a similar vein of reasoning, one could argue that a codein pill was a speck of sugar because sugar-coated, or a capsule of morphia nothing but a wisp of wafer because robed in that air-thin substance. Since, in the instant case, the shells are not sold without the filling, but simply serve the ancillary purpose of enticements, the decisive factor resides precisely in the preventative or restorative effects of the pharmaceutically compounded mixture pressed between the double shell. If this assumption proves true it does away with the possibility of Limmits being a "bakers'

biscuit” as required by the exempting clause. Moreover, Limmits though baked by regular confectioners, Christie, Brown & Co. Ltd., are prepared in strict and partly blind compliance with the formulas handed down by Pfizer Corporation. Conclusive evidence of this appears in Alfred Deans’ communication to R. Brewerton, ex. R-1, already mentioned, stating that:

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At your request, a copy of the manufacturing instructions for the shells and fillings of these biscuits is attached.

Not all the information in these manufacturing instructions was supplied to Christie, Brown & Co. Limited. *The vitamin mixture and several ingredients were coded. Instead of the actual name of the ingredients, only the code letters were supplied.*

(italics added)

NAME OF INGREDIENT	CODE LETTER
Sodium Carboxymethyl Cellulose	Ingredient A
Dicalcium Phosphate	Ingredient B
DL. Methionine	Ingredient D
Reduced Iron	Ingredient E

The Tamblyn Stores’ purchasing agent, Orval Christie, testified that Limmits were obtained directly from the Pfizer people. The information on the end parts of the container (ex. S-1) reads: “Limited-Calorie Meal Plan for Weight Control. Pfizer Company Ltd. Montreal, Quebec —Contrôle du poids, peu de Calories par Repas. La Compagnie Pfizer Ltée. Montréal, Québec.”

Lastly, I cannot detect how the definitions, hereunder, of the word “biscuit” could enhance the suppliants’ demands. I am referring to pages B-17 and B-18 of the record:

Mr. Chipman:

... Now, let us turn to “biscuits”. The Shorter Oxford Dictionary, “a kind of crisp, dry bread more or less hard, made generally in thin, flat cakes. Essential ingredients are flour and water or milk without leaven.”

... And Petit Larousse says: “Biscuit; n.m. (pref. bis, deux fois, et cuit). Galette très dure, constituant autref. un aliment de réserve pour les soldats et les marins. Pâtisserie faite de farine, d’œufs et de sucre. Ouvrage de porcelaine qui, après deux cuisson, est laissée dans son blanc mat, imitant le grain du marbre: statuette de biscuit.”

Webster, “biscuit, any or certain hard or crisp dry baked products; a quick bread made in a small shape from dough which has been rolled and cut or dropped; and that is raised in the baking by a leavening agent other than yeast (baking powder)”.

Those defining lines do not allude to biscuits used in subservient conjunction with pharmaceutical or medicated agents. Even though these definitions could apply to the

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shells alone, they hardly extend to filling and shells jointly. It remains doubtful whether or not Limmits, a chemical preparation, fit in with the popular notion of "biscuit", a light, innocuous pastry eaten at mealtime or between meals. At all events, I believe the evidence, exhaustively sifted, excludes them from the class of "bakers' biscuits" written in the exception of Schedule III, prepared, as they are, according to a complex, partly coded, recipe, and "sold or represented" not by bakers, confectioners or regular biscuit manufacturers, but exclusively through the selling facilities of Pfizer Corporation, a chemical organization of international extent, absolutely alien to the bakery trade.

The suppliants' contention lends itself, fairly enough, to the very concise summarization submitted, in these words, by their learned counsel, Mr. Chipman, at the close of his address (transcript, p. B-60):

A biscuit is a biscuit; and it does not change the quality because a variety of vitamins may have been added to it. . . . It is still a biscuit and it is nothing else.

That brings us back, albeit repetitiously, to that which, in my humble opinion at least, operates as the mandatory condition of the tax exemption in Schedule III. The determining, decisive, factor does not consist in the quantity of vitamins contained in, or calories excluded from, an edible substance; it is set and prescribed by the interpretative authority of s. 2(1)(cc) decreeing that: must be considered "pharmaceuticals", unmentioned in Schedule III, "any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, *sold or represented* for use in the. . . treatment, mitigation or prevention of a . . . disorder (or) abnormal physical state . . . in man."

On that score, more than enough has been shown and said as to how the disputed product is "sold or represented", to label it with the etiquette of "pharmaceuticals".

There was also a suggestion at trial that, either in Schedule III itself, or elsewhere in the statute, it should be clearly expressed that "Foodstuffs" drop out of the exempted category, whenever the manner in which they "*are sold or represented*" renders them "pharmaceuticals" in the intent of the law.

The necessity of repeating a legal prescription distinctly uttered in the interpretation part of the Act, all embracing

in its scope, is, to my mind at least, a novel proposition, at variance, it would seem, with the principle that derogations to the general rule require special mention. Had Parliament meant to hold tax-free weight-control simili-biscuits, it could have manifested its intention thus, for instance: "Bakers' cakes and pies including biscuits, even though pharmaceuticals...".

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Honourable Mr. Justice Noël, in the matter of *Her Majesty the Queen and Continental Air Photo Ltd.*,¹ aptly commented upon the restricted field of exempting clauses. The learned Judge wrote:

We are not dealing here with a tax charging section but with an exemption provision, and therefore, if there is any doubt as to which of the two possible conclusions should be preferred, the narrowest and strictest should be adopted in order to give the benefit of exemption to the narrowest group, consistent with the meaning to be given to the words . . .

In line with the doctrine that exceptions to a taxation statute, especially, should not be presumed nor given the benefit of doubt, are two Australian decisions. The first one, *F.C. of T. (Federal Commissioner of Taxation) v. Farey Bros.*² dealt with a taxing statute in which "bread" was exempted. The court had to decide if bread derivatives such as: milk loaves, currant loaves, cinnamon loaves, raisin bread, were extended the exemption decreed in favour of "bread". The presiding judge found that:

A baker making all or most of such articles, would, for most purposes call them bread, though I do not think that he would think of supplying them on an order which asked for "bread" without more.

As a result, the Court decided that milk loaves, raisin bread and similar foodstuffs were not "bread" within the meaning of the law.

In the second case: *Jackett v. F.C. of T.*³, ordinary flour was exempted from sales tax. A manufacturer, milling self-raising flour out of plain flour with certain leavening additives, claimed this exemption for his product. The Supreme Court of Australia, three judges sitting, unanimously agreed that self-raising flour was not the kind of flour privileged by the Act. Chief Justice Murray held in his notes that:

In the retail grocery trade, customers sometimes ask for flour when they want self-raising flour . . . The effect of the evidence, as a whole, I think is

¹ [1962] Ex. C.R. 461 at 471-472.

² 2 Australian Tax Cases, 140 at 143.

³ 2 Australian Tax Cases, 203 at 205-207.

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to show that the difference between the two (2) is substantial and well understood by manufacturers, shop-keepers and retail purchasers; and that although a much lesser proportion of flour than of self-raising flour is now used in cooking, self-raising flour is not commonly known simply as flour, but is only so described by purchasers in exceptional circumstances and then is not supplied without further inquiry or some indication that it is the article required.

Mr. Justice Piper spoke to the same effect:

People carelessly use the word "flour" sometimes to mean self-raising flour. I do not regard self-raising flour as flour from a practical point of view. It is a different article.

A mere transposition of words, substituting "biscuits" for "bread" in the one case, or for "flour" in the other, renders the reasoning in both these precedents quite suitable to the instant suit dealing with medically treated biscuits. I agree with this observation of respondent's counsel, Mr. C. R. O. Munro, Q.C., asserting as follows:

... I think it is quite clear from the evidence of Mr. Christie that the consuming public regards biscuits as ordinary bakers' biscuits and they regard "Limmits" as reducing aids, which is what they are sold for. There is a substantial distinction between ordinary bakers' biscuits and "Limmits".

For the above reasons, the Court reaches a threefold conclusion that:

1. "Limmits" are not biscuits in the ordinary or statutory sense of the word.
2. They cannot be considered "bakers' biscuits" as intended by Schedule III.
3. Above all else, the "*suprema ratio decidendi*" is that "Limmits", pursuant to the clear language of paragraph (cc), s-s. (1) of s. 2, are "sold or represented" in such a way, and intended to secure specified results that unmistakably stamp them with statutory qualification of "pharmaceuticals".

Therefore, the suppliants' petition of right is dismissed with costs in favour of the respondent.

Petition dismissed.