
BETWEEN:— 1929

HIS MAJESTY THE KING.....PLAINTIFF; Feb. 26, 27. and 28. April 18.

AND

FROWDE LIMITED .....DEFENDANT.

Special War Revenue Act, 1915—Sales Tax—Proviso—Exemption from tax —Proof of export—Exportation to be by manufacturer

The Special War Revenue Act, 1915, imposed a consumption or sale tax on all goods manufactured and produced in Canada, and there sold by the manufacturer or producer, provided however, that when such goods were sold and exported the sales tax was not payable.

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Held, that the words sale and export as used in the Act, mean a sale and export by the manufacturer or producer, the exportation being an act consumating a transaction to which the tax does not apply.

2. That the language of the proviso relates only to exportation by the manufacturer, and cannot be extended to a case where the manufacturer loses control of the goods by selling and disposing of the same to a purchaser in Canada.

INFORMATION by the Crown to recover from the defendant certain sales tax for spirit and liquors manufactured and produced by the defendant in Canada.

The action was heard before the Honourable Mr. Justice Maclean, President of the Court, at Toronto.

N. W. Rowell, K.C., and *Gordon Lindsay* for plaintiff.

W. N. Tilley, K.C., and *W. Lawr* for the defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (April 18, 1929), delivered judgment.

This is an action to recover from the defendant company, the successors to Joseph Seagram & Sons Ltd., of Waterloo, Ontario, licensed manufacturers and producers of spirits, the sum of $101,641.06 with interest, for sales tax, claimed to be due and owing by the defendant to the plaintiff under the provisions of the Special War Revenue Act, 1915, and amendments thereto. As the sales in question were made by Joseph Seagram & Sons Ltd., I shall refer to that company alone, and for convenience as Seagram. The plaintiff's claim for sales tax is in respect of sales of spirits made in the years 1921, 1922, 1923, and 1926. The sales tax upon spirits sold by Seagram in the years 1924, 1925, and a portion of 1926 was paid. The sales for the years last mentioned were of the same character as those sued upon. The provision of the Special War Revenue Act, of importance here, is as follows:—

19BBB. 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; . . . . .

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported; or goods sold by a licensed manufacturer or producer to another licensed manufacturer or producer if the

goods are to be used in, wrought into, or attached to articles to be manufactured or produced for sale and which are articles subject to the consumption or sales tax; . . . . .

The defence is that the spirits sold by Seagram were exported out of Canada, and that under the proviso contained in sec. 19BBB, just recited, the sales tax was not payable.

The evidence shows that the sales in question were, as a rule, made in the following manner. First, an order upon a printed form for a stated quantity of whiskey would be mailed by a customer, from a point in the United States, to Seagram at Waterloo, very frequently in the quantity of 100 cases; the quantity of whiskey and the name of the consignee would be typewritten or otherwise inserted in the printed order. An actual order put in evidence, dated at Detroit, U.S.A., Nov. 27, 1925, is as follows:—

JOSEPH E. SEAGRAM & SONS LTD.,
Waterloo, Ontario.

Please fill this order to be shipped via Port Lambton

100 cases Canadian 60z.

AMERICAN EXPORT CO.,
Marine City, Mich.

I shall call and supervise handling of this order.

DAVID A. ROSE.

In the above order the quantity of spirits, and the name of the consignee, seem to have been inserted by means of an ordinary rubber stamp which would indicate that precisely the same order was commonly forwarded. These orders would come to Seagram in apparently liberal quantities, that is to say, orders would be on file at its office to anticipate any demand. So far as the sales in question here are concerned, they were limited to a few purchasers, one of the largest being one Yarrows, and as several of his transactions were described in detail as typical of others, I shall use the Yarrows transactions as being descriptive of the others. Rose who signed the order above mentioned was a partner or agent of Yarrows, the latter, I think at all times material here, resided at Waterloo, though I understand he belonged to the United States. I might here say that Yarrows' purchases of whiskey from Seagram during the period in question ran into several millions of dollars in value, his accounts at two banks at Waterloo show the same to have been quite active accounts, involving considerable amounts.

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They also show that frequently substantial amounts would be transferred to Yarrows' credit at his banks at Waterloo, from points such as Toronto, Hamilton and Windsor.

With such orders in the hands of Seagram, Yarrows would make purchases from Seagram at Waterloo as and when required, and these purchases would be noted in pencil on the order, as made and paid for. For example, the order from Rose, which I have mentioned was never fully filled. In the following January, upon three different dates, three different purchases and shipments of 25 cases each were made ostensibly upon that order, and these shipments are there noted, the last shipment or delivery being made on the 22nd of January, almost two months after the date of the order. In this way it seems any particular order would be filled, wholly or partially, according to the needs of Yarrows. Sometimes an order would be satisfied by delivery of a class of goods other than that mentioned in the printed order, if Yarrows or his representative at Waterloo so directed. After an actual purchase from Seagram was made and paid for by Yarrows, it would be delivered to him or his servants at the Seagram distillery, and there usually loaded on a motor truck belonging to or hired by Yarrows, and thus transported to some Ontario port such as Sarnia, Port Lambton, Windsor, Courtright, or some other port. No representative of Seagram accompanied the goods so transported by motor truck. Having been paid for the goods so issued from the distillery by permit, and free from excise duty, Seagram's interest and control in the goods ended, except possibly for the fact I am about to mention. Accompanying the shipment there would be an invoice of Seagram showing the name and address of the consignee, the nature and quantity of the goods, the port in Canada through which the goods were to be shipped to the United States, and the name of a boat which was to carry the goods from that point to their destination in the United States. A customs form, known as B. 13 also accompanied these motor truck shipments. This form was required by Customs from all Canadian exporters of goods as an entry for export, and for statistical purposes, as will appear from the printed matter on the back of such forms. This form would be filled in by Seagram and would contain the name and address of the consignee, a description of the goods together

with the quantity and the value; this form would be supplied by Seagram and delivered to Yarrows. It was not necessary that the form B. 13 should accompany the goods from Waterloo, to the Canadian port of exit, and it had no significance whatever until the goods reached the port of exit and the form was lodged with Customs there as an export entry. The requirements of the Customs Act and its regulations in this regard, would have been complied with by the completion and filing of this form with Customs at the last port in Canada through which the goods passed, en route to their foreign destination. The goods on reaching the designated port of exit would be there warehoused by Yarrows or his agent. This warehouse was not one under the control of Customs, and was not one selected by Seagram; the goods themselves would not by such warehousing come under the control of Customs authorities. The goods would be taken from the warehouse when and as required by Yarrows. In some instances, it was shown in evidence, the goods would remain in warehouse for some months. When the goods were removed from the warehouse to be laden in a boat or train, ostensibly for export to another country, the form B. 13 would be presented by Yarrows representative directing the export, not Seagram or its agent, to Customs, and it would then be stamped by Customs at port of exit, the same indicating that the goods were exported at that port. The words "exported at," followed by the name of the port appears on the customs stamp, but I am not aware of any authorization for the use of such words in this connection. There was no other entry outwards of the goods and apparently none was required by Customs. This form would then be returned to Seagram, by Yarrows or his servants, by hand or mail; in a few cases it would appear the form was returned by mail to Seagram by Customs. If any declaration or certificate was required by Customs referable to one of Yarrows' shipments, which had not been supplied by Seagram, this would be supplied by a Customs broker at the port of exit upon power of attorney executed by Seagram to such broker. This broker would be unknown to Seagram and his services would not be retained or paid for by Seagram, but by Yarrows, or whoever happened to be the purchaser of such goods from Seagram. The Yar-

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row shipments, and in fact all others, according to the shipping documents, were destined for the United States, but in some few cases for Mexico.

If the goods ordered were shipped by rail from the Seagram distillery at Waterloo, as they occasionally were, the goods would be routed for movement by a Canadian railway to an Ontario Lake Port, and thence by some boat named as at that port, to a stated destination in the United States. In some cases, the evidence reveals, the rail shipment would remain in a warehouse at the Ontario Lake Port for some days, weeks, or months, the goods in the meanwhile being entirely out of the control of Seagram and in that of Yarrows. One shipment of 305 cases of whiskey consigned to one Girrard of Port Huron, Michigan, went forward from Seagram by rail to Courtright, Ontario, from thence to be shipped by the boat *Elliott* to destination in the United States. This shipment was received by the railway on July 22, 1925, and on the day following some eighteen of the forms B. 13, were made out by Seagram and delivered to Yarrows or his agent, and in some way they would get to the Canadian border and into the possession of Yarrows or his agent. On reaching Courtright this particular shipment went into warehouse and was taken therefrom in eighteen different lots or parcels, and at different dates, the first being about August 2, and the last about October 12; this would represent eighteen different purchases made from Yarrows according to the evidence of an officer of Seagram conversant with the matter. While the bill of lading and all the B.13's indicated that this shipment was to go forward from Courtright to destination in the United States, portions of the same were shipped from ports other than Courtright, some going from Port Lambton, others from Sarnia. The goods were entirely in the control of Yarrows at the border point, and the shipping directions on the bill of lading and the forms B.13 were varied by him without any authorization from Seagram. There was no reason so far as I know, why Yarrows might not have removed the entire shipment from Courtright to any port in Canada. It is conceded that Seagram had no further interest or control in the goods and did not know why the goods in this instance did not go forward at once to the consignee.

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A few further facts may be stated. The Customs form B.13 and the invoices on bills of lading accompanying shipments by motor truck or rail from Waterloo, did not contain the true selling price of Seagram to Yarrows, but an advanced value was put upon them by Seagram upon the directions of Yarrows. Again, it was established at the trial that the importation of liquor into the United States at the times material here, was prohibited by law. The evidence I think also shows that Seagram knew that such a law was in force in the United States. Then there was an agreement or contract entered into between Seagram and Yarrows, in April, 1922, which must be referred to. This agreement is witnessed by an officer of Seagram who gave evidence in this case, and therefore I assume it was executed at Waterloo, Ontario, although the place of execution strangely does not appear in the agreement itself. This agreement was entered into at the request no doubt of Seagram. In this document Yarrows is referred to as purchasers, and Seagram as exporters. The agreement in part is as follows:—

WITNESSETH that in consideration of the delivery by Exporters to the agent or carrier of the Purchasers of whiskey for exportation from Canada at such times and in such quantities as the Purchasers shall require and direct the Purchasers do hereby covenant and agree with the Exporters as follows:

(1) That they will forthwith after delivery of the said whiskey to their said agent or carrier transport the same out of Canada.

(2) That they will comply with all regulations of the Canadian Department of Customs, respecting customs entries, and statistical returns of goods exported from Canada, and in particular that they will have an entry form B. 13 furnished them in triplicate by the Exporters duly stamped by the proper Customs Officer as required by said regulations and will forthwith deliver or transmit to the said Exporters one of the said duly stamped triplicate entry forms.

(3) That the purchasers will from time to time and at all times hereafter well and truly save, defend and keep harmless and fully indemnify the said Exporters, of, from and against all fines, costs, charges, damages and expenses which the said Exporters may at any time or times hereafter bear, sustain, suffer, be at or be put unto for or by reason or on account of the sale of whiskey to them and delivery of same to their agent or carrier as aforesaid or anything in any manner relating thereto.

(4) That the purchasers will pay unto and leave with the Exporters Three Thousand Dollars as a security or guarantee for the faithful performance by the purchasers of the covenants and agreements hereinbefore set out which said last mentioned sum shall upon the breach by the purchasers of any of the said covenants or agreements be forthwith forfeited to the Exporters as liquidated and ascertained damages.

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(5) It is further understood and agreed in case of breach by the purchasers of any of the said agreements or covenants this agreement shall be determined and no whiskey shall after notice to the Exporters of such breach be supplied to the Purchasers.

(6) That this agreement may be determined by either party at any time upon ten days notice to the other party hereto and upon such determination of this agreement the amount so deposited by the purchasers with the Exporters shall in case there has been no breach by the purchasers of the covenants or agreements aforesaid be repaid by the Exporters to the Purchasers within six weeks after the determination of this agreement as aforesaid.

Similar agreements were entered in by Seagram with other purchasers.

It is appropriate now to refer to the provisions of the statute upon which the plaintiff's action is based. It was the purpose of the statute to impose a sale tax on all goods manufactured and produced in Canada, if and when there sold, by the manufacturer or producer. If the goods so manufactured or produced in Canada, were sold and exported, the sales tax was not payable. This means however, in my opinion, a sale and export made by the manufacturer or producer, the exportation being the act consummating the sale. It means a definite sale of goods which were in fact exported by the manufacturer. The language of the proviso can relate only to the manufacturer and to no one else. That I think, is what the statute means, otherwise it would largely fail in its purpose. The purpose of the statute was to collect the tax at the source of production and primary sale in so far as was possible, and thus make the statute effective and easy of administration. The statute never could have contemplated that a manufacturer might sell and deliver goods in Canada to a purchaser, who might or might not export the same, and over which the manufacturer had lost control, and thus so very casually be relieved of the sales tax. If that was the intent of the statute it would hardly be operative, in a practical sense. A contingent or problematical export by a purchaser from a manufacturer, was not the kind of export intended by the statute to relieve a manufacturer of the sales tax, upon a sale of goods produced by him. See *Rex v. Gooderham & Worts Ltd.* (1). I do not mean to say that a purchaser of goods from a manufacturer, subsequently himself exporting

(1) (1928) 62 O.L.R. 218.

such goods might not be entitled to a refund of the sales tax if it entered into the computation of his purchase price. That is another case.

From the facts I have stated, can it be said that Seagram was an exporter of the goods in question, in fact, or within the meaning of the Special War Revenue Act? I do not think Seagram was in any sense an exporter of the goods. It made unconditional sales and deliveries of the goods in Canada, not only without any obligation on its part to export the goods to any named consignee in the United States, but, I think, under the stipulation that the export, if made, was to be the undertaking and liability of the purchasers. I do not regard the orders mailed from the United States as of importance or relevancy. The sales were not made in my opinion on bona fide orders received from outside of Canada. The use of these orders was adopted as a mere subterfuge. They were unnecessary, purchases for export might have been made without them, and the evidence shows that they were frequently disregarded. The actual purchases were determined upon and made, as a rule, on verbal orders communicated by the purchaser to Seagram at the distillery; the mere fact that a notation of actual sales were made on such printed orders really means nothing. The fact that the buyers, or most of them, went through the form of printing and forwarding these orders, and of having made rubber stamps bearing the names of consignees and the quantity of whiskey required, is suggestive of the fact that all this was done for a purpose, other than that appearing on their face. These orders were invented and intended as a shield, for the protection of Seagram, against any possible charge of a sale of this class of goods being made in violation of the laws of Ontario. And this was because of the fact, that after the sale and delivery of the goods at Waterloo to a purchaser, the same were not delivered, as a rule, to a common carrier and routed to the consignee as is usual in the case of goods sold for export; they were delivered to the purchaser who generally transported them by motor truck many miles to a warehouse as described. Seagram thereafter had no control or direction over the goods, and anything might happen to them. I have no doubt it was believed by Seagram that the invoices and the B.13's might, along with the orders,

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in the event of the seizure or arrest of the goods by provincial authorities while thus in transit, offer plausible evidence of intention on its part of a sale of goods for export and not for resale in the domestic market. The B.13's had no significance whatever, until the goods reached the port of exit from Canada, and were turned over to some carrier to be forwarded to a foreign destination, and the form concurrently stamped at Customs. Neither do I believe that the consignees named in the shipping and customs documents were bona fide consignees of Seagram, as an exporter. If they were, Seagram would have taken steps to protect the interests of such consignees, and his own as well, by delivering always the goods to some common carrier, and not to a third party over whom it had no control and who was under no restraints. The purchaser had undisturbed control of the goods, even when in the warehouse at the lake ports; at this point neither Seagram nor the consignee presumed, so far as I know, to exercise any direction or control over the goods, in fact they could not. The goods went out of warehouse when and as determined by the purchaser. They may have been again sold there, very probably they were, in some instances they were moved from the port mentioned in the shipping documents to another port as already explained; anything it seems might have been done with the goods by the purchaser. I do not wish to be understood as saying that it is my view, that the goods, in the hands and control of the purchaser, were in the wrong person. I think they were in the possession and control of the owner, he had purchased and paid for them and was free to do almost anything he wished with them. All the circumstances I have related dispel the existence of the usual relation obtaining between bona fide exporters and importers. The procedure adopted in the transactions here in question, was consistent only with the fact that those who bought and paid for the goods at Waterloo and who directed their movements throughout became the owners of the goods, and that no other person, exporter or consignee, was in fact thereafter connected with the transactions. I am satisfied that Seagram allowed its name to be used in the shipping documents relating to these transactions, first for its own protection, then to assist the purchasers in their venture, the precise nature of which it well understood, and

also to encourage a continuance of a business connection for the monetary advantage it yielded. This view is fortified by the fact that the value of the goods as expressed in the invoices, and the B.13's, was fixed not by Seagram, but by the purchasers. Then, Seagram it is admitted, did not apply to have the invoices certified by a consular officer of the United States, as required by the laws of that country in connection with exports thereto. I cannot believe that Seagram would not have known of this requirement; never having any intention itself to export the goods, it would leave this to the purchasers to obtain, if at any time an export of the goods was to be made. The whole course of dealing between Seagram and the purchasers, and every circumstance connected with these transactions, make it quite clear to me, that Seagram made domestic sales and deliveries of the goods in question, without any intention on its part to export or to become responsible for the export of the same to the United States or elsewhere, and it did not and could not know if, in fact, the goods would ever reach the United States. I see no grounds for believing other than that, Seagram sold goods in Canada, which it had there manufactured and produced and which it did not export.

The agreement between Yarrows and Seagram, which I have already mentioned, is I think, in itself conclusive as to the real facts of this case, and as to who was the exporter of the goods if, in any proper sense there were exports at all. It makes quite clear the fact that Seagram at least was not an exporter of the goods. This agreement entered into no doubt at the instance of Seagram, in effect means, that Seagram was to sell and deliver whiskey to Yarrows or his agent at Waterloo, in such quantities as required by the latter, who in turn undertook to carry the same out of Canada, and furnish Seagram with the forms B. 13, duly stamped by Customs. The preamble of the agreement recites that the whiskey was to be delivered to Yarrows for exportation from Canada, which means that whiskey was to be sold to Yarrows and that he was to undertake to export the same. Had Seagram been the exporter this protective agreement would have been unnecessary. This strange agreement seems foreign to a commercial transaction between two persons involving merely an export of

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goods from one country to another. It seems to me that the agreement, with the evidence adduced indicates clearly that domestic sales of goods in question were made directly by Seagram to Yarrows and others at Waterloo; that Seagram was not expected to and did not undertake or attempt to export the same, and that when the sales were made the only assurance it had that the goods would be exported was an agreement not enforceable in law. The fact that Seagram chose to designate itself as " exporters " in the agreement is of course of no weight. The deposit made with Seagram and forfeitable as liquidated damages in the event of a breach of the agreement, negatives any suggestion that Seagram was to export the goods, and indicates that it had doubts that the purchasers would.

The defence being that the goods were exported, and by Seagram, and my expressed view being that Seagram made no sale for export but only a domestic sale, it is not necessary to discuss the question as to whether the goods were subsequently exported by others, or whether they ever reached the United States or not.

Accordingly I am of the opinion that the plaintiff is entitled to judgment for the amount sued upon and interest as claimed, and also his costs of action.

Judgment accordingly.