BETWEEN:

1961
Jan. 26, 27
1962
Dec. 19

TURNBULL ELEVATOR CO. OF CANADA LTD. (formerly Gutta Percha and Rubber Ltd.) .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Revenue—Sales Tax—Excise Tax Act R.S.C. 1952, c. 100, ss. 2(a)(ii), 30(1)(a)(i) and 46—Petition of Right to recover a refund under s. 46 of Excise Tax Act for sales tax allegedly overpaid—Company selling footwear made by another Company—Whether selling company the "Manufacturer or Producer" of such footwear—Petition of Right dismissed.

Suppliant company sold several types of footwear manufactured for it by Dominion Rubber Co. Ltd., some of which was made to the designs and specifications of the suppliant, but most being selected from lines produced by Dominion for itself or for other customers. All bore the suppliant's trade mark. The contract entered into between these parties provided, *inter alia,* that Dominion would manufacture and deliver all the suppliant's requirements and that suppliant would purchase and receive all its requirements from Dominion, and that all the footwear would bear brands, markings and designs specified by the suppliant, that certain dies and moulds could be furnished by the suppliant and that suppliant would finance the inventory of goods held for it by Dominion under certain conditions. Suppliant paid the sales tax levied on the basis of the prices of the footwear paid to it by its customers. It admitted that the tax on the footwear made to its own designs and specifications was properly payable by it but contended that the balance of the tax had been paid by mistake of law or fact since Dominion was the manufacturer of the balance of the footwear. The Crown refused an application by suppliant for a refund of tax paid contending that suppliant was the manufacturer, within the meaning of

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manufacturer in the *Excise Tax Act*. Suppliant brings its Petition of Right to recover the sales tax which it claims had been paid in error.

Held: That the Petition be dismissed.

2. That suppliant was the manufacturer of all the footwear made for it by Dominion within the extended meaning of "manufacturer" in s. 2(*a*)(ii) of the *Excise Tax Act*.
3. That the sales tax paid by suppliant was paid in accordance with the terms of the Act.
4. That suppliant owned, held or used a proprietary sales or other right to the footwear manufactured on its behalf by Dominion.
5. That the suppliant held a sales right to the goods manufactured, as Dominion could not sell the goods to others but was required by the contract to sell and deliver them to suppliant only, and suppliant was bound by the contract to buy such goods.
6. That suppliant also used another right to the goods, its trade mark, which was used by its direction on all the footwear manufactured for it by Dominion.

PETITION OF RIGHT to recover sales tax allegedly paid in error.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

J. F. Howard for suppliant.

D. S. Maxwell and *D. H. Aylen* for respondent.

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

CAMERON J. now (December 19, 1962) delivered the following judgment:

In this Petition of Right, the suppliant asks for a declaration that it is entitled to a refund under s. 46 of the *Excise Tax Act* R.S.C. 1952, c. 100, of sales tax allegedly overpaid by it during the period May 20, 1951 to December 31, 1954. In the Petition of Right, the suppliant's name was given as Gutta Percha & Rubber Ltd., but at the trial, counsel for the suppliant stated that its name had been changed to Turnbull Elevator Co. of Canada, Ltd., and, by consent, the style of cause was amended accordingly.

The suppliant is a corporation incorporated under the laws of Canada, having its principal place of business at Toronto. Until August 1, 1950, it manufactured and sold, *inter alia,* certain types of footwear. Shortly before that date, it was decided that it would be advantageous for the company to discontinue the manufacture of such footwear,

acquire them from other sources, and sell them to its customers. Accordingly, on July 27, 1950 the suppliant entered into a contract (Exhibit 8) with Dominion Rubber Co. Ltd. of Montreal (hereinafter to be called "Dominion"), under which Dominion would manufacture and sell certain footwear to the suppliant. That contract was in effect from about August 1, 1950, to December 31, 1954, and during that period the suppliant manufactured no footwear, but acquired very substantial quantities from Dominion which it sold to retailers or jobbers.

The suppliant alleges that during that period, and by mistake of law or fact, it paid the sales tax levied by s. 30 on the basis of the prices paid to it by its customers; that it was not the "manufacturer or producer" of the footwear within the meaning of that term in s. 2(*a*)(ii) of the Act, but that Dominion was such manufacturer; that the sales tax should therefore have been levied only upon the prices at which Dominion sold the footwear to the suppliant; that applications for refund of the overpaid taxes have been duly made but have not been granted. Accordingly, in the Petition of Right the suppliant asks for (a) a declaration that during the said period Dominion was the manufacturer of the footwear purchased from it by the suppliant pursuant to the said agreement (Exhibit 8); and (b) that a refund to the suppliant be directed of taxes overpaid in the period between May 20, 1951 and December 31, 1954 (that amount being stated in the Petition of Right as $231,979, but substantially reduced at the trial as will appear later). It will be noted that no claim is made for a refund in respect of the period August 1, 1950 to May 19, 1951, presumably because the first letter on which the suppliant relies as being a claim for a refund is one from Dominion to the Department of National Revenue dated May 20, 1953 (Exhibit 9) and by the provisions of s. 46, applications for refunds must be made in writing within two years after such moneys were paid or overpaid.

In the Statement of Defence, it is admitted that sales tax was imposed, levied and collected on the sale price of the footwear on prices at which the footwear was sold by the suppliant to its customers. Therein, it is alleged that the suppliant was the manufacturer or producer of the footwear within the meaning of that term in the Act and that the

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sales tax which was paid was properly payable by the suppliant; and that no application in writing for and on behalf of the suppliant for a refund was made as alleged in the Petition of Right.

It may be noted here that for the first part of the period August 1, 1950 to December 31, 1954, sales tax was levied under the former *Special War Revenue Act*, R.S.C. 1927, c. 179, as amended (in 1947 its name was changed to the *Excise Tax Act*) and that for the latter part of that period it was levied under the *Excise Tax Act*, R.S.C. 1952, c. 100. The parties, however, are in agreement that the sections of those Acts which are here relevant are identical and it will therefore be understood that all references herein to the Act will be intended to refer to the latter Act.

The sales tax is imposed on the manufacturer or producer by s. 30(1), and by s. 2(*a*) "manufacturer or producer" is given an extended meaning. The applicable parts of those sections read:

> 30. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
>
> (*a*) produced or manufactured in Canada
>
> (i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,
>
> 2. In this Act,
>
> (*a*) "manufacturer or producer" includes
>
> * * *
>
> (ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, form or corporation sells, distributes, consigns, or otherwise disposes of the goods or not,

The first question to be determined is whether the suppliant was the manufacturer or producer of the footwear within the extended meaning of that term in s. 2(*a*)(ii). In opening his case, counsel for the suppliant stated that two types of transactions took place under the contract with Dominion. He conceded that in some cases the suppliant asked Dominion to make footwear to the designs and specifications of the suppliant; that those goods were made for Gutta Percha only; and that as Dominion, in manufacturing that type of footwear, was acting as the agent of

Gutta Percha, no claim for refund of sales tax was now being made in respect thereof. The claim for a refund would therefore be confined to the other type of transaction in which, as he submitted, the footwear was made to the design and specification of Dominion, that the product was the same or substantially the same as Dominion made for itself and other customers; that the relationship of the suppliant and Dominion in regard thereto was that of vendor and purchaser only; and that the suppliant had no sale, proprietary or other right in the goods until they were delivered.

Mr. A. E. Ruthven, who was employed by the suppliant as assistant manager of the footwear department during the years 1950 to 1954 but is now employed by Dominion, gave evidence for the suppliant. In the course of his duties, he accompanied the manager of that department (now deceased) on his semi-annual visits to Dominion's head office at Montreal to determine the type of footwear that the suppliant would require in succeeding months, but they placed no orders at that time. He stated that in some cases the suppliant supplied specifications and the designs of the footwear it required, and as to these no claim for refund is now made. In regard to the remainder, forming the larger part of the purchases, he said that the representative of Dominion would show them samples of footwear which it was planning to produce for itself or for its other customers, and that he and his superior would select the styles they required. I gather that in some cases they would choose footwear identical with the samples produced and, in others, a similar style, but with a different type of sole tread or with a different foxing, or with an added simulated bow or similar adornment, also chosen from samples or designs in the possession of Dominion. As an instance only of what was done, he referred to Exhibit 1, a lady's rubber manufactured by Dominion for itself and bearing its own mark. He said that another lady's rubber (Exhibit 2) was made for the suppliant by Dominion and that it differs from Exhibit 1 only in the tread design, has added a simulated bow by way of adornment and instead of the Dominion label, has that of Gutta Percha. He stated that all footwear made by Dominion for the suppliant bore one of the trade marks of the suppliant, either "Gutta Percha" or "G. P.", with or without a

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medallion; and that the labels in the case of rubber footwear at least were added to the footwear during the course of manufacture and at the time of curing. Even in cases where the suppliant chose footwear identical to that being manufactured by Dominion for itself or others, the product when delivered to the suppliant would be identifiable as that of the suppliant. Such an instance would be boots and lumbermen's boots which had a small top bind bearing the suppliant's name in fine print.

Mr. Ruthven did not think that Dominion in making the footwear used any of Gutta Percha's patents; he was unaware of any written contract between the suppliant and Dominion. At no time did any one representing Gutta Percha supervise the manufacture of the footwear by Dominion. To the knowledge of this witness, no footwear bearing the Gutta Percha marks were ever sold or transferred by Dominion to any one except to Gutta Percha.

I turn now to the contract (Exhibit 8) which governed the relationship between the suppliant and Dominion regarding the manufacture, sale and purchase of the footwear. It is a lengthy document of seventeen pages, but I shall limit my consideration of it to those provisions which are relevant to this particular issue.

The preamble is short and reads:

> WHEREAS Gutta Percha is desirous of entering into an agreement with Dominion, whereby Dominion will manufacture and sell certain footwear to Gutta Percha;

Clause 1 relates to quantities. The first sentence reads:

> Dominion will manufacture, sell and deliver to Gutta Percha and Gutta Percha will purchase and receive from Dominion and pay for all its requirements for sale in Canada and export therefrom, of rubber and canvas footwear and leather stitchdown shoes, hereinafter referred to as "footwear", subject to the terms and conditions set forth hereinafter.

It may be noted here that under cl. 13, the term of the agreement, in so far as it relates to canvas and rubber footwear, continued until February 31, 1957, and unless terminated then by six months' notice, would continue thereafter for yearly periods subject also to termination by six months' notice. The term of the contract, in so far as is related to leather stitchdown shoes, continued to December 31, 1952, with a proviso that it would be extended on

the same terms as mentioned for canvas and rubber footwear. Actually, the whole contract was terminated as of December 31, 1954.

Clause 1 further provides that Gutta Percha in each quarter would furnish long-range monthly forecasts (up to but not beyond one year) of its requirements and that on or before the first day of each month it would furnish Dominion with a firm order for such footwear "as is to be manufactured by Dominion and shipped to Gutta Percha hereunder" in the next month, which firm order was to be within 20 per cent. more or less of Gutta Percha's most recent long-range forecast for that month. Dominion, however, was not required to manufacture in any one month *for* Gutta Percha's account footwear by styles and genders in excess of Dominion's then capacity to produce such styles and genders.

By cl. 2 certain warranties were given, in part as follows:

> All footwear manufactured and sold hereunder, other than seconds, shall be substantially of and in no event inferior to the constructions and qualities of the corresponding grades, respectively, as agreed upon by both parties from time to time, of footwear regularly manufactured by Dominion and sold under its regular brands. The same warranty shall apply to such special lines or grades of footwear manufactured by Dominion for Gutta Percha as may be agreed upon by both parties from time to time, but the footwear manufactured and sold hereunder shall bear the brands, markings and designs from time to time specified in writing by Gutta Percha, not including, however, any of Dominion's brands, markings or designs, or brands, markings or designs of Dominion's special brand customers.

Clause 3 sets out a formula on which prices would be determined, but no actual amounts were stated. Roughly, the aggregate price to be paid by Gutta Percha was on the basis of all costs of Dominion (including factory costs, overhead, commercial and administrative expenses) plus profit, which consisted of stated percentages of other costs, but which percentages varied at fixed dates from 3 to 6 per cent. for canvas and rubber footwear, and was fixed at 3 per cent. for leather stitchdown shoes. Provision was also made by which Dominion regularly estimated in advance its prices for the footwear to be sold and delivered in the next season. "Billing prices" were to be submitted to the suppliant quarterly by Dominion (subject to revision in the event of contingencies), consisting of its estimate of the cost of the footwear in the following quarter, and the suppliant agreed

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to pay on the basis of such billing prices. It was also provided that at the end of each calendar year Dominion would compute and render to the suppliant a statement showing the exact aggregate price of the footwear, computed no doubt on the basis of the formula earlier referred to, and payment of any deficiency would be made by the suppliant, or Dominion would reimburse the suppliant for any actual over-payment which it had made on the "billing prices".

Under cl. 3, the suppliant also had the right at certain times to examine the books and records of Dominion, entering into the computation of the "aggregate price". The evidence is that this was done on one occasion only and as it was found to be burdensome, the suppliant thereafter relied on the good faith of Dominion.

By cl. 4, Gutta Percha was to pay the billing prices before the last day of any month for goods shipped during the preceding month and deliveries were f.o.b. at the plants or warehouses of Dominion.

By cl. 5, if shipping instructions of the suppliant so provided, Dominion would ship direct to the suppliant's customers, the freight pre-paid by Dominion thereon being for the suppliant's account. This clause was frequently carried out.

Clause 6 provided:

A 30 day inventory of finished goods will be carried by Dominion with no charge to Gutta Percha. If, however, at the end of any month shipments during such month are less than the inventory position on the last day of the preceding month, then Gutta Percha will keep Dominion in funds for such excess inventory; to the extent only that payments on account of such excess inventory have been made by Gutta Percha then Dominion will remit to Gutta Percha the amount in any month by which shipments exceed the inventory position as above set out.

The first sentence of cl. 7 reads as follows:

At its own cost and expense, and as and when needed for use hereunder, Gutta Percha will furnish or make available to Dominion, all sole rolls, heel moulds or last and die equipment required by Dominion for the specific manufacture of Gutta Percha footwear hereunder, and all art work, plates, etchings and other services and materials deemed by Dominion advisable for the reproduction of the markings and letterings required by Gutta Percha upon its said equipment and upon the labels, wrappings and containers for all footwear to be manufactured hereunder.

The oral evidence indicates that these articles to the value of about $100,000 were provided by the suppliant. I gather

from Mr. Ruthven's evidence that while these articles in the main would be used for the manufacture of footwear designed and specified by the suppliant, there were occasions when the suppliant supplied equipment which was used to supplement that of Dominion in the manufacture of footwear similar to that made by Dominion for its own uses or for other customers, and that it is impossible to draw the line between the two types of such user. The title to such goods remained in the suppliant and the cost of insurance thereon was to be borne by the suppliant.

By cl. 9, Gutta Percha assumed and agreed to indemnify Dominion from all liability resulting from the use or alleged invalidity of all copyright, trade marks, trade names and designs which the suppliant had authorized Dominion to use in manufacturing the footwear. Dominion recognized the ownership and exclusive right in Gutta Percha to use the word "Gutta Percha" and such other trade marks, figures and designs used on the footwear processed under the contract in so far as they were not the property of Dominion or others, and "agrees not to manufacture for or sell to others, footwear bearing any of the said trade marks or designs of Gutta Percha, excepting such seconds as Dominion may dispose of as in this agreement provided". I have examined the contract carefully and can find no provision therein which gives to Dominion the right to sell "seconds". Indeed, by cl. 10 Gutta Percha agreed to purchase "all seconds accumulated in the manufacture hereunder" on the terms therein set out.

By cl. 11 Gutta Percha, upon the expiration or termination of the agreement, agreed to purchase all footwear theretofore ordered, and also to purchase all labels, boxes, containers, cartons, wrappings, tags and other materials and supplies on hand, and intended for use in connection with the footwear to be sold under the contract.

Then cl. 12 reads as follows:

> Gutta Percha shall be responsible for and shall pay directly on its own account any and all taxes in the nature of excise or sales taxes now or hereafter imposed by the Dominion of Canada or by any Province or local subdivision or municipality thereof, in respect of footwear sold hereunder.

On this evidence there can be no doubt that Dominion, in manufacturing all the footwear, was manufacturing such goods for or on behalf of the suppliant. I have also reached

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the conclusion that the suppliant was the "manufacturer" of all the footwear within the extended meaning of "manufacturer" as in s. 2(*a*)(ii) (*supra*), as being a corporation that owns, holds or uses a proprietary, sales or other right to the footwear being manufactured.

In the first place, I think the suppliant held a sales right to the goods being manufactured. From what I have said above, it is clear that Dominion could not sell the goods to others, but was required by the contract to sell them to the suppliant only, and to deliver them to the suppliant or to the suppliant's customers, if directed to do so. Likewise, the suppliant not only had the right to buy the goods being manufactured, but was bound by contract to do so. It is particularly significant that the suppliant financed the inventory of the goods held by Dominion after thirty days. The essential facts here are similar in many ways to those in *The King v. Shore*[1], in which I held that the defendant had a sales or other right in the goods being manufactured for him by a corporation, and that he was therefore the manufacturer or producer of such goods. That decision was expressly approved in the *Rexair* case.

But in my view, the suppliant also used another right to the goods, namely, its trade mark rights, which were used by its direction on all the footwear manufactured for it by Dominion.

The section in question was considered by the Supreme Court of Canada in *Rexair of Canada, Ltd. v. The Queen*[2]. In many respects, that case was similar to the instant case. There the appellant (the defendant) entered into a contract with Canadian Radio to manufacture 10,000 vacuum cleaners for it. The appellant was a wholly-owned subsidiary of an American Corporation which owned certain patents and trade marks which the appellant had the right to use in Canada and which were used by Canadian Radio with the consent of the appellant and its parent company in the manufacture of the vacuum cleaners; the contract also contemplated that certain tools in the manufacturing operation would be supplied by the parent company. Unlike the present case, the appellant there had the right to maintain an inspector in the plant of Canadian Radio with the right to reject articles not conforming to the appellant's

[1] [1949] Ex. C.R. 225. [2] [1958] S.C.R. 577.

drawings and standards. The appellant there undertook to indemnify Canadian Radio against any claims for infringement of patent and in the present case the suppliant gave a similar indemnity in regard to the use of its trade marks by Dominion. In that case, Kerwin C.J.C., in delivering judgment for the majority of the Court, said at p. 580:

> Subsection (2) of s. 23 refers to "when goods are manufactured or produced and sold in Canada", but clearly the Rexairs were so manufactured or produced and the question is whether the appellant was the manufacturer or producer. On the evidence referred to above that question must be answered in the affirmative. Canadian Radio agreed to manufacture them "for" the appellant and the control exercisable and in fact exercised by the appellant over the production leads to the same conclusion. Even if the appellant did not own or hold a patent right (which is an affirmative, and not merely a negative, right) it used a patent right and also an "other right" being the trademark right; and both of these were rights to goods being manufactured for or on their behalf by Canadian Radio and so bring the appellant within the extended meaning of "manufacturer or producer".

I cannot find any difference between the use of the trade marks in the instant case and the use of the trade marks in the *Rexair* case which was found to be the use of an "other right" within s. 2(*a*)(ii). I must therefore find that in this case the suppliant used an "other right" being its trade mark right and that right was used in respect of all the footwear manufactured by Dominion for the respondent.

I am fully aware of the opinion of the President of this Court on this point as stated in *The Goodyear Tire & Rubber Co. of Canada, Ltd. et al. v. The T. Eaton Co. Ltd. et al.*[1], and relied on by the suppliant herein. In that case, the President affirmed a declaration of the Tariff Board (made on a reference to it by the Deputy Minister of National Revenue for Customs and Excise under s. 57 of the *Excise Tax Act*) that the T. Eaton Company was not the manufacturer or producer of certain "special-brand" automobile tires made by Dominion Rubber Company and sold to Eaton's and which tires were then sold by Eaton's at retail or used by the firm for its own purposes. He also found that the Tariff Board had jurisdiction to determine the question submitted to it. An appeal from that judgment was allowed by the Supreme Court of Canada[2] on the ground that the Tariff Board had no jurisdiction to make the declaration, and accordingly its declaration and the judgment in the Exchequer Court were set aside. The merits of the case

[1] [1955] Ex. C.R. 229. [2] [1956] S.C.R. 610.

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were consequently not considered in the Supreme Court of Canada.

In the circumstances of that case, the learned President stated at p. 238:

> Nor did the putting of Eaton's trade marks into the molds and curing them into the tires give Eaton's any sales or other right to them.

The facts of that case were substantially different from those of the case at bar. In any event, and with respect, I feel that I must follow the decision of the Supreme Court of Canada in the *Rexair* case.

My conclusion, therefore, is that the suppliant was the "manufacturer" of all the footwear manufactured for it by Dominion within the extended meaning of "manufacturer" in the Act, and that the sales tax paid by the suppliant was paid in accordance with the Act. It is unnecessary, therefore, to consider the question as to whether the alleged applications for refund were made in accordance with the provisions of s. 46; or the other question that arose at the trial, namely, whether the suppliant had established by valid and admissible evidence the amount of the refund which it claimed.

Accordingly, and for these reasons, the Petition of Right will be dismissed and there will be a declaration that the suppliant is not entitled to any of the relief claimed therein. The respondent is entitled to costs after taxation.

Judgment accordingly.