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Ottawa  
1968  
} Oct. 21-22  
Dec. 27

BETWEEN:  
M.F.F. EQUITIES LIMITED ..... SUPPLIANT;  
AND  
HER MAJESTY THE QUEEN ..... RESPONDENT.

*Sales tax—Exemption for “fish and edible products thereof”—Margarine composed in part of processed fish oil—Excise Tax Act, R.S.C. 1952, c. 100, s. 32(1).*

Suppliant sold margarine composed 80% of oil, 48% to 90% of which was fish oil which had been subjected to extensive processing to make it edible. Suppliant claimed the margarine was exempt from sales tax as being within the words “fish and edible products thereof” in Schedule III of s. 32(1) of the *Excise Tax Act*.

*Held*, the words “fish and edible products thereof”, construed according to the common understanding of such words used in relation to articles of commerce, which is the test to apply, do not encompass margarine even though fish oil is a principal ingredient thereof. Margarine is neither marketed, purchased nor thought of by the consumer as a product of fish.

*Townsend v. Northern Crown Bank*, 49 S.C.R. 394, considered.

PETITION OF RIGHT.

*Gordon F. Henderson, Q.C.* and *John D. Richard* for suppliant.

*D. H. Ayles* and *John E. Smith* for respondent.

CATTANACH J.:—The suppliant by its petition of right seeks to recover the sum of \$355,412.48 paid by it to Her Majesty under protest and without admission of liability pursuant to demands made by the officers of the Department of National Revenue as tax in respect of the sale of margarine between the period from April 7, 1963, to February 8, 1964.

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The fundamental basis of the suppliant's claim for relief is that the goods in question were exempt from sales tax and accordingly the Crown is liable to return to the suppliant the sum of money which was so paid by the suppliant under protest and for the return of which a demand was made in writing addressed to the Deputy Minister of National Revenue, Customs and Excise, which demand has not been complied with.

Section 30 of the *Excise Tax Act*<sup>1</sup> and amendments provides that there shall be imposed, levied and collected a consumption or sales tax on the sale price of all goods produced or manufactured in Canada.

However certain articles are exempted by section 32(1) of the Act which reads as follows:

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

Schedule III includes a large number of articles which are listed and classified under parts.

Part V of Schedule III is entitled "Foodstuffs" and the material portion of item 7 thereof reads as follows, "Fish and edible products thereof; . . .".

By order of Thurlow J. dated October 3, 1968, on motion made by counsel for the respondent in the presence of counsel for the suppliant, an issue was defined by agreement of the parties for the purposes of Rule 164B(1) (a) in the following terms:

Whether the goods manufactured by the Suppliant and sold by the Suppliant during the period April 7, 1963 to February 8, 1964 are exempt from sales tax by virtue of the provisions of Section 32(1) of the *Excise Tax Act* R.S.C. 1952 Chapter 100 and Schedule III thereof, in particular under the heading "foodstuffs" and the item reading as follows. "Fish and Edible products thereof" and/or the item reading as follows. "Materials to be used exclusively in the manufacture or production of the foregoing foodstuffs".

<sup>1</sup> R.S.C. 1952, c. 100

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In addition the parties agreed upon a statement of facts which reads as follows:

1. The parties hereto, for the purpose only of this cause, agree to and admit the facts hereafter stated but it is further agreed that the parties shall be at liberty to introduce in the usual manner at the trial of this action evidence of additional facts not inconsistent with any of the facts hereafter stated.

2. The Suppliant is the manufacturer or producer of the goods in issue.

3. The Suppliant has been granted a Sales Tax license under the provisions of Part VI of the *Excise Tax Act*.

4. Pursuant to general demands which did not specify any particular amount of tax, made by officers of the Department of National Revenue, Customs and Excise Division, the Suppliant paid to Her Majesty the Queen, under protest and without admission of liability the sum of \$355,412.48 in respect of the sale of goods in issue during the period from April 7, 1963 to February 8, 1964 this being the amount of tax payable as calculated by the Suppliant if the goods in issue are taxable.

5. The Suppliant has requested in writing to the Deputy Minister of National Revenue, Customs and Excise, that these monies be returned but to date the said monies have not been returned to the Suppliant.

6. If the goods in issue or any part thereof are exempt from sales tax as set out in the statement of the issue herein, the Crown is liable to return to the Suppliant the sum of money so held or that portion of the money so held which is applicable to those goods which are exempt.

7. The goods in issue are foodstuffs commonly known as margarine. Margarine is a fatty food resembling butter. It is composed of oil and other ingredients. The proportion of oil and other ingredients as measured by weight are as follows: oil—80%; other ingredients—20%.

8. The oil which is used is a mixture of herring oil and vegetable oil, the proportion of which varies depending on the particular formula used by the Suppliant.

9. During the period of April 1963 the Suppliant also used some whale oil.

10. The other ingredients are milk, salt, flavouring, vitamins and small quantities of colour, emulsifier and antioxidant.

11. The quality and quantity of each ingredient is carefully controlled and the manufacture of margarine from its various ingredients is a complex process requiring extensive and expensive processing apparatus. The oil used must first be made suitable for use in food. The extent of the treatment required for this purpose depends on the nature of the oil but commonly involves refining, bleaching and deodorizing and hydrogenation. Fish and whale oil are, subject to existing market conditions, ordinarily less expensive to buy than vegetable oil. The selection of vegetable oil on the one hand or marine oil on the other hand is governed mainly by the cost of using one as opposed to the other.

12. Prior to May 1963 the Suppliant purchased oils in a refined state from refiners of oil but in May 1963 opened its own refinery and has since purchased crude vegetable oil through brokers from crushers of oil and has since purchased crude fish oil through brokers from fish reduction plants. The crude oil is then refined in the Suppliant's own refinery.

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13. During the period in issue the Suppliant used three formula-tions in the manufacture or production of the goods in issue as follows: No. 35; No. 42; No. 63.

14. The contents of each formula are as follows:

- (a) *No. 35*
  - (1) Up to May 22, 1963:
 

Oil 80%	}	Herring oil 48%
Other 20%		Vegetable oil 52%
  - (2) From May 22, 1963:
 

Oil 80%	}	Herring oil 50%
Other 20%		Vegetable oil 50%
- (b) *No. 42*

Oil 80%	}	Herring oil 65%
Other 20%		Vegetable oil 35%
- (c) *No. 63*

Oil 80%	}	Herring oil 90%
Other 20%		Vegetable oil 10%

15. These percentages are based upon proportions of ingredients as measured by weight. Batches of ingredients are measured in 4,000 lb. portions. Of the 4,000 lb. batch, 3,200 lbs. are oil.

16 The goods in issue were sold by the Suppliant under brand names. The formula used in each brand name during the period in issue is as follows:

BRAND NAME	PERIOD 1	PERIOD 2	PERIOD 3
	<i>April 7, 1963</i>	<i>April 25, 1963</i>	<i>December 2, 1963</i>
	<i>to</i>	<i>to</i>	<i>to</i>
	<i>April 25, 1963</i>	<i>December 2, 1963</i>	<i>February 8, 1964</i>
I.G.A. Regular	63	63	35
I.G.A. Quick Bag	63	63	35
Monarch Quarters	42	35	—
Moms Regular	63	63	35
Moms Quick Bag	63	63	35
Moms Squares	63	63	35
Golden Girl	42	35	35
Golden Girl Cartons	42	35	35
Golden Girl Quick Bag	42	35	35
Silverdale Squares	63	63	35
Buttercup	63	63	35
Top Value Regular	63	63	35
Top Value Quick Bag	63	63	35
Top Value Squares	—	—	35
Monarch Regular	42	35	—
Jaymax	63	63	35
Moms Family Pack	63	63	35
Discount Margarine	63	63	35
Golden Gal Squares	63	63	35
Monarch Squares	—	35	—
Blue Band	63	63	35

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17. The Suppliant did not record the composition of margarine sold and now in issue. However, in general the Suppliant sold during the material period margarine made according to the formula in use in manufacture approximately one month prior to the sale of margarine by the Suppliant.

18. The alleged taxable sales of the Suppliant and the Sales tax paid under protest by the Suppliant to the Respondent during the period in issue in respect of each brand name are set out in detail in an exhibit annexed hereto and identified as Exhibit 1.

19. Margarine like that in issue is not ordinarily advertised, displayed or sold as a fish product but always shows on the label that it contains fish oil or marine oil and may usually be found in the dairy section of the food store.

Exhibit 1 attached to the agreed statement of facts and referred to in paragraph 18 thereof is a detailed list of the sales made by the suppliant during the period in issue, the sales tax paid thereon under protest by the suppliant in respect of each brand name used by the suppliant for its products. The formulae used in each such brand name are set forth by an identifying number in paragraph 16 of the agreed statement of facts and the content of each such numbered formula is set out in paragraph 14 of the agreed statement of facts.

During the trial it was stated that the amount of \$355,-412.48 is the accurate computation of the sales tax paid by the suppliant rather than the amount of \$361,114.46 as alleged in the petition of right.

Margarine is a fatty food resembling butter in appearance, character and composition and is used as a substitute for or an alternative to butter. The difference is that, in margarine the fat is not, or is only to a minor extent, derived from milk fat.

The invention of margarine was the result of the search for a substitute for butter, which in the middle of the nineteenth century was produced in insufficient quantity to meet the demands consequent upon the steadily growing migration of population from country to town with change of occupation from agriculture to industry, and a general recession in farming in Europe. Butter production in overseas countries, such as Canada, United States, New Zealand and Australia, was still in its infancy and could not do much to relieve the shortage in Europe where butter prices soared.

Napoleon III offered a prize for a suitable substitute for butter which should be cheaper and keep better than

butter. A French chemist, Mége-Mouriés, who was already engaged in this and other problems of national economy won the prize in 1896 and was granted a patent for his process and a concession to erect a plant for the manufacture of his product.

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The principal ingredient of Mouriés' product was animal fat. It was his belief that the soft part of his product consisted of margarine and olein, the glycerides of margaric and oleic acids, respectively, and the hard parts largely of the glycerides of stearic acid. Hence this "new butter fat" was called oleomargarine.

As the demand increased new and more efficient processes were introduced. The supply of beef fats could not keep pace with the expansion of the industry. The developing refining industry produced and made available other fats and oils derived from vegetables such as coconut oil, palm oil, soyabean oil, sunflower oil, corn oil, rapeseed oil, peanut oil and as time progressed a host of others.

Mouriés first described his product as "a variety of true butter taken at its source", "artificial butter", "butterine" and finally oleomargarine, but the name margarine has now become accepted and is generally used to designate this butter substitute regardless of the type of fats or oils going into its composition.

In the manufacture of margarine in Canada the proportions of edible oils and other ingredients measured by weight are edible oils 80%, other ingredients, 20%. This is confirmed in paragraphs 13 and 14 of the agreed statement of facts wherein the three formulae (No. 35, 42 and 63) for the production of the goods here in issue are described as containing fat or oil to the extent of 80% and other ingredients to the extent of 20%. The other ingredients consist of 16% water and the remaining 4% is comprised of solids being milk solids, a preservative and emulsifier.

Animal fats are used in the manufacture of margarine in Canada to a very limited extent for economic and practical reasons. First the cost of animal fats is higher than other available oils and secondly the product so manufactured is hard and not considered as desirable as those manufactured with other oils.

For all practical purposes margarine produced in Canada is either vegetable oil margarine or fish oil margarine or a combination of vegetable and fish oil margarine.

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The use of fish oil in margarine manufactured in Canada has increased. However, early attempts to use fish oils met with disappointment because the average consumer exhibited a distinct distrust of fish oils and a distinct preference for all vegetable fatty products.

The fish oils used in the manufacture of margarine in Canada are derived from the herring, menhaden, whale and seal. The term "marine oil" is used to describe the oils so derived, presumably because whales and seals are not truly fish but marine creatures but in any event the terms "marine oil" and "fish oil" are used interchangeably in the industry.

The oil derived from herring is used more extensively in Canada in the production of margarine, most likely because herring is more plentiful and the oil from this fish is therefore more readily available.

A margarine made from fish oil is almost always less costly than a margarine made from vegetable oil, for the reason that fish oil is almost always less costly than vegetable oil.

As a practical matter the oil used in the manufacture of margarine is never exclusively fish oil. Invariably the fish oil used is combined with vegetable oil. Most, if not all, provincial jurisdictions have enacted legislation requiring that margarine containing any fish oil shall not be sold as being a vegetable oil margarine and that the contents shall be displayed on the label.

It is my understanding that any margarine 40% or over of the total oil content of which is fish oil is referred to in the trade as a fish or marine oil margarine.

In the formulae for the production of the goods here in issue it will be observed from paragraph 14 of the agreed statement of facts that in formula No. 35, 48% of the 80% oil content was herring oil, which after May 22, 1963, was increased to 50%, in formula No. 42 the herring oil content was 65% of the total content of 80% and in formula No. 63 the herring oil content was 90% of the 80% oil content of the product.

Therefore all the goods here in issue would be described in the trade as a fish oil margarine.

Prior to May 1963 the suppliant purchased the fish oil it used in its margarine from refiners of oil, but in May 1963

it opened and operated its own refinery. It then purchased the fish oil through brokers in a crude state from fish reduction plants and subjected the crude fish oil to refining in its own refinery.

Crude fish oil can be ingested by humans but is unpalatable. There is no doubt in my mind that crude fish oil is not edible. While it has the initial advantage of being cheap, it requires extensive processing before it can be used in the edible product, margarine.

The processes to which the crude fish oil is subjected are,

- (1) refining,
- (2) bleaching,
- (3) hydrogenation and
- (4) deodorization.

The desirable characteristics of margarine, which stem from the selection and processing oil ingredients used, are,

1. good resistance to oxidative deterioration, that is resistance to the development of a rancid flavour;
2. good physical stability in its resistance to heat;
3. a pleasant eating quality and feeling in the mouth; and
4. an adequate spreadability.

These characteristics are obtained by the processes to which the crude fish oil is subjected.

The refining process essentially removes from the crude fish oil all the free acids, the non-glyceride oleaginous material and the carbohydrate matter.

The bleaching process is the method by which colour bodies are absorbed and the colour of oil is lightened to the desired degree.

The refined and bleached oil is deodorized. This term is self-explanatory and is designed to make the oil fully acceptable for use in foods. It is my recollection of the evidence that the deodorization process is the last following hydrogenation which I understood to be the most important process of the four mentioned.

Before crude fish oil can be used for margarine it must be hydrogenated. This is done to control the extent of "unsaturation" in the oil, and thus its hardness and to make it more "saturated" by the chemical addition of

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hydrogen. If this were not done the rate of oxidation would be much greater and the end product would become rancid very rapidly. In short the margarine would spoil quickly.

Thus hydrogenation serves a two-fold purpose, (1) to provide a matrix of solid fat for the support of liquid fat and (2) to increase the resistance to oxidative rancidity.

Thorough hydrogenation is required to eliminate excessive unsaturation and the fishiness of a fish oil must be destroyed before an oil originating from a fish can be used in margarine.

Evidence was introduced on behalf of Her Majesty to show that margarine is invariably displayed to the public in the dairy cases or sections of retail outlets alongside butter, cheese and like acknowledged dairy products. Fresh and frozen fish are displayed for sale in the meat section and canned fish is included in the grocery section. Efforts made by retailers to tie margarine in with shortening and lard proved unsuccessful because the public expects to find margarine in the dairy section of supermarkets. However it was elicited in cross-examination that margarine requires refrigeration and that the only refrigerated space normally available is the dairy cases. The purpose of the introduction of such evidence is undoubtedly to show that margarine is not marketed as a fish product.

As I understood the argument of counsel for the suppliant it basically amounted to this. He puts his claim exclusively on the item in Schedule III of the *Excise Tax Act* reading, "Fish and edible products thereof;". The words to be construed are "edible products thereof;". This gives rise to two conditions, (1) the product, margarine, is edible, with respect to which there is no controversy and (2) that the origin or source of the product, margarine, is fish. He argues that, having regard to the ordinary meaning of the words, it is clear that if the source of the product is fish, the intermediate processes are immaterial because the origin of the end product is fish and the fish oil content characterizes that product.

I fully agree with the submission of counsel for the suppliant that the words "Fish and edible products thereof;" must be given their ordinary meaning. The words of an Act of Parliament which are not applied to any particular science or art, are to be construed as they are understood in the common language.

However, I do not agree with his submission that the intermediate processes to which the original source is subjected are immaterial. Neither do I think that the decisions of the Supreme Court in *Townsend v. Northern Crown Bank*<sup>2</sup> and *Universal Fur Dressers and Dyers Ltd. v. The Queen*<sup>3</sup>, upon which he strongly relied as being in support of his submission that the processes to which the source of the end product are subjected are immaterial, are authorities for the proposition advanced by him.

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In *Townsend v. Northern Crown Bank (supra)* the question that the Supreme Court considered was whether sawn lumber is a "product of the forest" within the meaning of those words in the *Bank Act*. Duff, J. (as he then was) said at page 397:

. . . Is lumber then a "product of the forest" for the purposes of this section? According to the narrow construction which the appellant asks us to give effect to when pressed to its logical conclusion, timber ceases to be a product of the forest as soon as it has been subjected to any process of manufacture. That is almost a *reductio ad absurdum*, and Mr. Laidlaw, of course, did not assume any such untenable position, rather he tried to escape from it. He did not, as I understood him on the oral argument before us, dispute that what are commonly known as saw-logs would be "products of the forest," within the meaning of the "Bank Act." But why draw the line at the saw logs? Logs are frequently reduced to lumber at the very place, or at all events, within a short distance of the very place where they are felled, by means of portable sawmills. The appellant's answer, of course, to this mode of argument is that the line must be drawn somewhere and that if you admit dressed lumber as a "product of the forest" you cannot logically stop short of admitting the articles into which the lumber is further manufactured.

I concur with much that is said as to the difficulty of drawing an abstract line. This is only one example of the class of cases in which the court being loath and refusing to attempt to draw an abstract line, finds itself compelled to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits. In this particular case I prefer to say that according to the common understanding the articles in question would fairly be comprised within the description "products of the forest," and I think they are within the contemplation of the enactment we have to interpret.

It is apparent from the language above quoted that there is some point in the various processing stages beyond which the original source ceases to be used as descriptive of the end product in ordinary parlance.

<sup>2</sup> 49 S.C.R. 394.

<sup>3</sup> [1956] S.C.R. 632.

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In *Universal Fur Dressers and Dyers Ltd. v. The Queen* (*supra*) the question was whether the raw skins of shearlings of the merino type which had been processed into "mouton" was a fur and therefore subject to the excise tax on furs. Cartwright J. (as he then was) stated that the merino sheep is a wool-bearing animal and not a fur-bearing one, that its skin with the wool attached is not a fur and could not be transmuted into fur no matter what processes it was subjected to.

I fail to see how that decision has any application to the problem that I have to resolve.

In my view, in order to determine whether a particular product falls within an expression such as "Fish and edible products thereof;" resort must be had to the common understanding of such words when used in relation to articles of commerce. The question here is, therefore, whether, in the ordinary use of words, margarine may be fairly regarded as falling within the words, "Fish and edible products thereof;" or more specifically, applying such a test: is margarine a product of fish?

I do not think that, in common parlance, the words "product of fish" can be considered as comprehending margarine, even though it contains fish oil as one of its principal ingredients. Margarine is itself a well known article of commerce and is neither marketed, purchased, nor thought of by the consumer as a product of fish.

It seems to me that the fish from which oil has been extracted and which is used in the manufacture of margarine, which is by no means the sole ingredient of the end product, has become so obscured by the processes to which it and the oil thereof has been subjected and by the oil being intermingled with substantial amounts of other ingredients from other sources, the whole of which is again the subject of an extensive manufacturing process, that the resultant margarine cannot be considered as a product of fish, even though the fish oil content may make the margarine a fish oil margarine and the labels thereon disclose the fish oil content.

Therefore, the suppliant is not entitled to any portion of the relief sought by its petition of right and Her Majesty is entitled to costs.