1951
Jan. 22 & 23
Mar. 12

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

PLANTERS NUT AND CHOCOLATE COMPANY LIMITED..... } DEFENDANT.

Revenue—Sales Tax—Excise Tax Act, R.S.C. 1927, c. 179, s. 86(1), 89 and Schedule III—"Fruit"—"Vegetables"—Salted peanuts and cashew nuts not fruits or vegetables within Schedule III, Excise Tax Act—Words used in Excise Tax Act to be construed as they are used in common language and not as applied to any particular science or art.

Held: That Parliament in enacting the Excise Tax Act Part XIII and Schedule III was not using words which were applied to any particular science or art and therefore the words used are to be construed as they are understood in common language.

2. That what constitutes a "fruit" or "vegetable" within the meaning of the Excise Tax Act is what would ordinarily in matters of commerce in Canada be included therein and not what would be a botanist's conception of the subject matter.

3. That as products and as general commodities in the market neither salted peanuts nor cashews, or nuts of any sort, are generally denominated or known in Canada as either fruits or vegetables, and that salted peanuts and cashew nuts do not fall within the exceptions provided for fruit and vegetables in Schedule III of the Excise Tax Act.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant money alleged owing for sales tax.

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

J. W. Pickup, K.C. for plaintiff.

Honourable S. A. Hayden, K.C. and *J. W. Blain* for defendant.

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

CAMERON J. now (March 12, 1951) delivered the following judgment:

This is an Information in which the plaintiff claims from the defendant payment of the sum of $265,196.92 for sales tax in respect of sales of salted peanuts and cashew nuts in

the period May 19, 1948, to September 30, 1949, penalties for non-payment thereof, and costs. The defendant carries on business in Canada and has its head office at Toronto.

The defendant admits that during the said period it was a producer or manufacturer of salted peanuts and cashew nuts and that such were sold and delivered in Canada. It denies, however, that it is liable to payment of any tax, on the ground that salted peanuts and cashew nuts are (*a*) vegetables, or, alternatively, (*b*) fruit, within the meaning of Schedule III of The Excise Tax Act, and are, therefore, exempt from tax.

A commission or sales tax of 8 per cent on the sale price *of all goods* produced or manufactured in Canada is imposed by section 86(1) of The Excise Tax Act, ch. 179, R.S.C. 1927, and Amendments. It is not disputed that if the defendant is liable therefor, the amount now claimed for tax is the amount payable by the defendant.

Section 89 of that Act is as follows:

89. The tax imposed by section eighty-six of this Act shall not apply to the sale or importation of the articles mentioned in Schedule III of this Act.

Schedule III includes a large number of articles under various classifications, and under the heading "Foodstuffs" there appear, *inter alia,* the following:

Fruit, fresh, canned, frozen, dried or evaporated . . . Vegetables, fresh, canned, frozen or dehydrated, not including pickles, relishes, catsup, sauces, olives, horseradish, mustard, and similar goods.

The first question for determination, therefore, is whether or not salted peanuts and cashew nuts fall within the category of either "fruit" or "vegetables."

Dr. Marvin Bannan, B.A., Ph.D., Assistant Professor in the Department of Botany at the University of Toronto, gave evidence on behalf of the defendant. His work as Departmental Plant Anatomist and Morphologist has to do with the form and structure of plants. Technically and strictly from the botanical point of view, he said that a vegetable is any plant, but that in more common parlance "vegetable" refers to edible plants or the parts of edible plants. Again, in a botanical sense, he said that "fruit" was a division of the larger field of "vegetable" and that a fruit is a mature ovary together with such tissue as may be intimately associated with it. Fruits, again, are divided into

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dry fruits and fleshy fruits, the latter being again subdivided into twenty or more categories depending upon the nature of the envelope, internal structure, etc. Peas and beans have a fruit of a type termed a legume or pod. The peanut plant, known as *arachis hypogaea* is a member of the pea family, its fruits being legumes or pods. Its pod is a one-celled ovary which usually splits along two sutures and contains two or more seeds, and, as in the case of other members of the pea family, a slight pressure of the fingers will open the pod. Speaking as a botanist, therefore, he was of the opinion that the peanut was within the general category of "vegetable" and fell also within the special category of "fruit."

Again, he said that from a botanical point of view the peanut is not a nut. He said that a "nut" is a different type of fruit. It has a very hard outer covering, does not split unless pressure is applied mechanically during the later growth processes of the seedling, and inside the hard covering there is a single seed. Examples of "nuts" are the acorn, beechnut, pecan, walnut and filbert. He pointed out that from the technical point of view there was no difficulty in differentiating between "fruits" and "vegetables," but that in popular usage the terms were used quite loosely in that one person might call a tomato a "fruit," and another term it a "vegetable"; and that, therefore, it was difficult to erect a precise definition of either as the terms are used by different people. Speaking, however, of edible plants, he said that if the meaning of "fruit" were confined to its strictly botanical sense, the term "vegetable" would apply to the stems, leaves and roots. From that point of view he would include as vegetables, the potato, beets, lettuce, rhubarb, celery, etc.; and in the category of fruits the tomato, apples, peaches, pears, plums and the like. On that basis the peanut, in his opinion, would be a "fruit."

Dr. Bannan knew of the cashew nut only from botanical texts. Botanically it has a structure akin to the type of fruit known as a dry drupe, like the coconut. A drupe is a fruit derived from an ovary which is one-celled and has one seed in it. The peach is an example of a fleshy drupe. In describing the cashew nut Dr. Bannan said:

> Well, the fruit in the cashew is rather unique. It has first of all the association of the fleshy stalk with the ovary proper, such as occurs in some fruits, as for instance an apple, but in the apple of course the

fleshy part surrounds the core. There is no special botanical name for the type of compound fruit such as occurs in the cashew, as is the case with the apple and some other types. As to the terminal portion, the so-called nut, it does not fall within the category "nut", because during their early development nuts are derived from ovaries which have more than one cell and usually more than one ovule or seed, and in those respects the cashew nut does not fall within the category "nut"; it is more similar to the drupe, the dry drupe, where the ovary is initially one-celled and where the ovary is, as we say botanically, superior, that is, on the end of the stalk or above the point of insertion of the other floral parts. Because of those characteristics the terminal portion is more in the nature of a drupe than a nut.

He distinguished the cashew from the true "nut" in that the latter, while also having only one nut at maturity, had in the earlier stages of development more than one.

From the botanical point of view, therefore, the evidence indicates that both the peanut and the cashew nut are vegetables in the wider meaning of that word, that each is a "fruit," the former belonging to the same class as peas or beans and the latter to the dry drupe classification like the coconut, and that neither is a "nut." This evidence is not disputed.

The only other witness at the trial was P. J. McGough, who since 1930 has been vice-president and managing-director of the defendant corporation, and who prior to that date was associated with the parent company at Suffolk, Virginia, for many years. He described the planting and harvesting of peanuts, the growth of the plant and development of the peanut. He also described the uses to which the peanut is put by the farmers who grow them; that when harvested they can be used in the same way as green peas. They can also be used in many other ways, for example, in soups, and also can be baked in the same way as beans.

He described the process of making salted peanuts. After harvesting and threshing the vines are sold as cattle feed. The peanuts are then cleaned, shelled and graded. About 15 per cent are used for oil, the smaller ones are used for peanut butter and the remainder are used for salted peanuts. The latter process involves blanching, and boiling in oil for the purpose of sterilizing and preserving them and also to create and preserve a nutritious flavour. Later, butter and salt are added and, for merchandising purposes, they are packed in vacuum packed tins and in glaseen airtight bags to preserve the special flavour.

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For many years the defendant has widely advertised its peanut product as "the nickle lunch" in order to convey to the public the fact that it has food value. It stresses the fact that peanuts contain proteins, carbohydrates, vegetable oils and minerals. The defendant imports shelled peanuts from the United States and other countries and processes them in Canada as I have above described. About 70 per cent of the defendant's sales are of peanuts in 5 and 10 cent bags, the remainder being sold in tins of varying sizes.

While not disagreeing with Dr. Bannan's opinion that, from a botanical point of view, peanuts are fruits, Mr. McGough considered them to be vegetables and in his thirty-five years' experience has considered them to be such.

The words "fruit" and "vegetable" are not defined in the Act and so far as I am aware they are not defined in any other Act in *pari materia.* They are ordinary words in every-day use and are therefore to be construed according to their popular sense. In Craies on Statute Law, 4th Ed., p. 151, reference is made to the judgment of Lord Tenterden in *Att.-Gen.* v. *Winstanley* (1), in which at p. 310 he said that "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 common language." The author referred also to *Grenfell* v. *I.R.C.* (2), in which Pollock, B. stated that if a statute contains language which is capable of being construed in a popular sense such "a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning of course, by the words 'popular sense,' that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it."

In *Cargo ex. Schiller* (3), James, L.J. expressed the same ideas in these words: "I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, lagan and jetsam."

(1) (1831) 2 D. & Cl. 302.
(2) (1876) 1 Ex. D. 242, 248.
(3) (1877) 2 P.D. 145, 161.

Reference may also be made to *Milne-Bingham Printing Co. Ltd.* v. *The King* (1), in which Duff J. (as he then was), when considering the meaning of the word "magazines" as contained in the Special War Revenue Act, 1915, said: "The word 'magazine' in the exception under consideration is used in its ordinary sense, and must be construed and applied in that sense." In *The King* v. *Montreal Stock Exchange* (2), a case involving the interpretation of the word "newspapers" as used in Schedule III of the Special War Revenue Act, Kerwin, J. said: "In the instant case, the word under discussion is not defined in any statute in *pari materia* and it remains only to give to it the ordinary meaning that it usually bears." He then referred to the definition of the word as contained in Webster's New International Dictionary.

Again, in *Att.-Gen.* v. *Bailey* (3), it was held that the word "spirits," being "a word of known import . . . is used in the Excise Acts in the sense in which it is ordinarily understood." In that case the Court said at p. 292: "We do not think that, in common parlance, the word 'spirits' would be considered as comprehending a liquid like 'sweet spirits of nitre' which is itself a known article of commerce not ordinarily passing under the name of 'spirit'."

It is of some interest, also, to note the rule of interpretation adopted in the United States in construing Excise Acts. As stated in Craies on Statute Law, p. 152, the rule is that the particular words used by the Legislature in the denomination of articles are to be understood according to the common commercial understanding of the terms used, and not in their scientific or technical sense, "for the Legislature does not suppose our merchants to be naturalists, or geologists, or botanists." (200 *Chests of Tea* (4), per Story, J.)

A perusal of the consumption or sales tax sections of the Act (Part XIII) and of the list of exemptions set out in Schedule III is sufficient to indicate that Parliament, in enacting the sections and the schedule, was not using words which were applied to any particular science or art, and that, therefore, the words used are to be construed as they are understood in common language. To the words "fruit" and "vegetables," therefore, there must be given the mean-

(1) (1930) S.C.R. 282, 283.
(2) (1935) S.C.R. 614, 616.
(3) (1847) 1Ex. 281.
(4) (1824) 9 Wheaton (U.S.) 435.

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ing which they would have when used in the popular sense —that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. Now the statute affects nearly everyone, the producer or manufacturer, the importer, wholesaler and retailer, and finally, the consumer who, in the last analysis, pays the tax. Parliament would not suppose in an Act of this character that manufacturers, producers, importers, consumers, and others who would be affected by the Act, would be botanists. The object of the Excise Tax Act is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. In my view, therefore, it is not the botanist's conception as to what constitutes a "fruit" or "vegetable" which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are berries, but otherwise no one would consider them as such.

I think it can be asserted that in Canada both the peanut and cashew nut are considered by almost everyone (except possibly by botanists) as falling within the category of "nuts." Like other nuts such as the walnut, hickory, pecan and almond, they have a pod or shell enclosed in which is the edible seed. They are bought, sold and used in the same manner and can be found in any of the numerous "nut shops."

The following definition of "nut" appears in Webster's New International Dictionary and in my opinion correctly describes the word as it is generally understood in Canada:

> A hard shelled dry fruit or seed having a more or less distinct separable rind or shell and interior kernel or meat. Also the kernel or meat itself, loosely used, and including many kinds, as almonds, *peanuts*, brazil nuts, etc. . . . not botanically true nuts.

And in Vol. 16 of the Encyclopaedia Britannica at p. 645, "nut" is defined, and then follows an enumeration of the more important nuts and of products passing under that name and used either as articles of food or as sources of oil; included in that enumeration are both the peanut and the cashew.

It is equally clear to me that when in Canada the words "fruit" and "vegetables" are used, their obvious and popular

meaning would not include "nuts" of any sort, or the peanuts, salted peanuts or cashews sold by the defendant. Counsel for the plaintiff suggested a test which I think apposite. Would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew nuts or nuts of any sort? The answer is obviously "no."

Vegetable has been defined in many ways. In the World Book it is defined as follows:

> In the usual sense, the word vegetable is applied to those plants whose leaves, stalks, roots or tubers are used for food, such as lettuce, asparagus, cabbage, beet and turnip. It also includes several plants whose fruits are the edible portions, as peas, beans, melons and tomatoes.

In the Concise Oxford Dictionary, Third Edition, p. 1365, it is defined as:

> Plant; esp. herbaceous plants, used for culinary purposes or for feeding cattle, e.g., cabbage, potato, turnip, bean.

Again, in Webster's International Dictionary, vegetable is defined as:

> A plant used or cultivated for food for man or domestic animals, as the cabbage, turnip, potato, bean, dandelion, etc.; also, the edible part of such a plant, as prepared for market or the table.
>
> Vegetables and fruits are sometimes loosely distinguished by the usual need of cooking the former for the use of man, while the latter may be eaten raw; but the distinction often fails, as in the case of quinces, barberries, and other fruits, and lettuce, celery, and other vegetables. Tomatoes if cooked are vegetables, if eaten raw are fruit.

In the Encyclopaedia Britannica, Vol. 23, vegetable is defined as:

> A general term used as an adjective in referring to any kind of plant life or plant product, viz. "vegetable matter." More commonly and specifically, in common language, the word is used as a noun in referring to those generally herbaceous plants or any parts of such plants as are eaten by man. The edible portions of many plants considered as vegetables are, *in a botanical sense*, fruits. The common distinction between fruits and vegetables is often indefinite and confusing, since it is based generally on how the plant or plant part is used rather than on what it is.

And fruit is defined in the Encyclopaedia Britannica. Vol. 9, as:

> Fruit, in its popular sense is any product of the soil that can be enjoyed by man or animals; in the Bible the word is often extended to include the offspring of man and of animals . . . More often it is employed to denote a group of edible parts of plants, as contrasted with another group termed "vegetable." But the term is a loose one, including, e.g., the stalks of the rhubarb.
>
> In its strict botanical sense the fruit is developed from the ovary of the flower as a result of fertilization of the contained ovule or ovules.

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It will be noted that none of these definitions of "fruit" and "vegetable" (except in the strictly botanical sense) include "nuts" of any sort.

It is of considerable interest, also, to note that in the tariff rates under The Customs Act (which, as a revenue Act, I consider to be in *pari materia*), separate items are set up for fruits, for vegetables, and also for "nuts of all kinds, not otherwise provided, including shelled peanuts." This would seem to indicate that in the minds of the legislators, nuts were not included in the categories of fruits or vegetables, and also that peanuts fell within the category of nuts. I do not think that their view of the matter differs at all from the common understanding of the words.

My finding must be that as products and as general commodities in the market, neither salted peanuts nor cashews, or nuts of any sort, are generally denominated or known in Canada as either fruits or vegetables. I think it may be assumed, therefore, that if Parliament had intended to include "nuts" among the exempted foodstuffs, the word "nuts" would have appeared in the schedule. That being so, it must follow that salted peanuts and cashew nuts, which as I have said above are considered generally in Canada to be within the category of "nuts," do not fall within the exemptions provided for fruit and vegetables in Schedule III.

I have not overlooked the argument advanced by defendant's counsel that "peanuts" are used as food and may be used and at times are used in the form of soups or vegetables, or as substitutes for meat, and that, therefore, they are "foodstuffs." But while the heading of this part of Schedule III is "Foodstuffs," it is quite apparent that not all foodstuffs are included therein. In general, it would seem that the exemption from tax, insofar as it applies to foodstuffs, is confined to those articles of food which are commonly in use as, or are used in the preparation of, ordinary staple table foods. Condiments such as are derived from vegetables are particularly excluded from the exemption. Nor do I need to consider the question as to whether the defendant's products were "canned," having found that they were neither "fruit" nor "vegetables" within the meaning of those words in Schedule III.

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In the result, the plaintiff is entitled to judgment against the defendant in the amount claimed for sales tax, namely, $265,196.92; for penalties for non-payment thereof up to December 31, 1949, the sum of $16,767.55; for such additional sums as may have accrued for penalties thereon after December 31, 1949, to this date, as provided for in section 106(4) of The Excise Tax Act, and for costs to be taxed. The penalties provided for in section 106(4) are mandatory in the event of non-payment within the time provided for in section 106(3) and there is no power in the Court to waive such penalty.

Judgment accordingly.