

56, 1939

In the Privy Council

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN :

CANADA RICE MILLS LIMITED,
(Defendant) Appellant,

AND:

HIS MAJESTY THE KING, on the information
of the Attorney-General of Canada,
(Plaintiff) Respondent.

Record of Proceedings

MESSRS. GRIFFIN, MONTGOMERY & SMITH,
Vancouver, B.C.,
Solicitors for the Appellant.

MESSRS. WILLIAM A. CRUMP & SON,
London Agents.

W. STUART EDWARDS, ESQ., K.C.,
Solicitor for the Attorney-General of Canada.

*Messrs. Charles Russell & Co.,
London Agents.*

I.
INDEX

No.	DESCRIPTION OF DOCUMENT	Date	Page
PART I.			
1	Statement of Case.....		1
2	Information.....	Dec. 11, 1936.....	2
3	Defence.....	Jan. 13, 1937.....	6
4	Notice to Admit Facts.....	Sept. 10, 1937.....	7
5	Admission of Facts.....	Sept. 13, 1937.....	8
6	REASONS FOR JUDGMENT:		
	The President.....	Aug. 13, 1938.....	10
7	Judgment.....	Aug. 13, 1938.....	14
8	Order of Mr. Justice Maclean, granting extension of time for Notice of Appeal.....	Oct. 19, 1938.....	15
9	Notice of Appeal to the Supreme Court of Canada.....	Oct. 20, 1938.....	16
10	Agreement as to contents of Case.....	Nov. 21, 1938.....	17
11	Registrar's Certificate.....		18
12	Certificate as to Case.....		19
SUPREME COURT OF CANADA			
15	Judgment.....	Apr. 8, 1939.....	19A
16	Oral Reasons for Judgment.....		19A
17	Registrar's Certificate.....	Apr. 24, 1939.....	70
18	<i>Order in banc</i> RESPONDENT'S EVIDENCE:	<i>May 1939</i>	<i>71</i>
13	L. J. Thorburn:		
	In Chief.....	Sept. 27, 1937.....	21
	Cross-Examination.....	Sept. 27, 1937.....	29
	Re-examination.....	Sept. 27, 1937.....	37
	Re-cross Examination.....	Sept. 27, 1937.....	37

II.

INDEX—*continued*

No.	DESCRIPTION OF DOCUMENT	Date	Page				
	APPELLANT'S EVIDENCE:						
14	D. Gavin:						
	In Chief.....	Sept. 27, 1937.....	41				
	Cross-examination.....	Sept. 27, 1937.....	47				
	PART II.—EXHIBITS						
1	Regulations under Special War Revenue Act (Extract).....	Jan. 1, 1935.....	58				
1A	Letter from Assistant Supervising Auditor of Dept. of National Revenue to K. Takahashi.....	May 15, 1936.....	68				
2	Letter, Canada Rice Mills Ltd. to Commissioner of Excise.....	Aug. 6, 1935.....	60				
3	Letter, Griffin, Montgomery & Smith to Minister of National Revenue.....	Nov. 13, 1935.....	62				
4	Declaration of Partnership.....	Oct. 2, 1933.....	54				
5	Statement of Division of Profits and Losses of Canada Rice Sales Co.....		58				
6	Admission of Facts.....	Sept. 13, 1937.....	8				
A	Agreement, Duncan Gavin et al.....	Oct. 2, 1933.....	55				
B	Appellant's Invoices of rice sales (3).....	<table border="0"> <tr> <td data-bbox="910 1441 1142 1481">Sept. 11, 1937.....</td> <td data-bbox="1142 1441 1157 1543" rowspan="3">}</td> </tr> <tr> <td data-bbox="910 1481 1142 1522">Sept. 17, 1937.....</td> </tr> <tr> <td data-bbox="910 1522 1142 1543">Sept. 17, 1937.....</td> </tr> </table>	Sept. 11, 1937.....	}	Sept. 17, 1937.....	Sept. 17, 1937.....	69
Sept. 11, 1937.....	}						
Sept. 17, 1937.....							
Sept. 17, 1937.....							

In the Supreme Court of Canada

ON APPEAL FROM THE EXCHEQUER COURT
OF CANADA

(No. 17,347)

RECORD
In the
Supreme Court
of Canada
No. 1
Statement of
Case

BETWEEN:

CANADA RICE MILLS LIMITED,

(Defendant) Appellant.

AND:

10 HIS MAJESTY THE KING, on the information
of the Attorney-General of Canada,
(Plaintiff) Respondent,

PART I.

No. 1

STATEMENT OF CASE

This is an appeal from the Judgment of the President of the Exchequer Court rendered 13th August, 1938, holding the Appellant liable for \$9741.55 (with penalty interest) as and for a balance of Sales Tax on rice sold between the month of October, 1933, and the month of August, 1936.

RECORD
 In the
 Exchequer Court
 of Canada

In the Exchequer Court of Canada

No. 2
 Information
 Dec. 11, 1936

BETWEEN:

HIS MAJESTY THE KING, on the information
 of the Attorney-General of Canada,

Plaintiff,

AND:

CANADA RICE MILLS LIMITED,

Defendant.

No. 2

Filed the 15th day of December, A.D. 1936

10

To the Honourable the Exchequer Court of Canada.

The information of the Honourable Ernest Lapointe, K.C., His Majesty's Attorney-General of Canada, on behalf of His Majesty, sheweth as follows:

1. The Defendant is a company duly incorporated under the laws of British Columbia and having its head office in the City of Vancouver, in the said Province.

2. Under and by virtue of Subsection 1 of Section 86 of The Special War Revenue Act, Revised Statutes of Canada, 1927, Chapter 179, as amended by Section 11 of Chapter 54, Statutes of Canada, 1932, there is charged and payable to His Majesty, the King, for and in respect of all goods produced or manufactured in Canada, a consumption or sales tax of 6% on the sale price of such goods, payable by the producer or manufacturer at the time of delivery of such goods to the purchaser thereof, such provisions of Section 11 being effective by virtue of Section 18 of the said Act, on and after the 7th day of April, 1932. 20

3. Under and by virtue of Section 5 of Chapter 45, Statutes of Canada, 1936, the said Subsection 1 of Section 86, of The Special War Revenue Act, Revised Statutes of Canada, 1927, as amended by Section 11 of Chapter 54, Statutes of Canada, 1932, the aforesaid consumption or sales tax payable to His Majesty the King as 30

aforesaid was increased to 8% on the sale price of all goods produced or manufactured in Canada, payable by the producer or manufacturer at the time of delivery of such goods to the purchaser thereof, such provisions of said Section 2 being effective by Section 18 of the said Act on and after the 2nd day of May, A.D. 1936.

RECORD
In the
Exchequer Court
of Canada
No. 2
Information
Dec. 11, 1936
(Contd.)

4. The Defendant produced or manufactured goods in Canada to wit: Rice and bags, and sold and delivered the same throughout the period commencing March the first, 1933, and
10 ending August thirty-first, 1936, in respect of which goods the Defendant stands indebted for balance of consumption or sales tax in the sum of \$9,746.67, the said balance of sales tax from time to time remaining unpaid being as follows:

	Date	Total Due	Amount Paid	Balance Due
	1933 March	\$ 122.24	\$ 122.00	\$.24
	April	896.55	896.23	.32
	May	1217.75	1216.96	.79
	June	18.78	1878.19	.74
	July	1487.45	1486.30	1.15
20	August	1520.64	1519.91	.73
	September	1529.19	1528.04	1.15
	October	2062.80	1705.25	357.55
	November	1755.48	1451.06	304.42
	December	1425.10	1173.38	251.72
	1934 January	2169.28	1894.08	275.20
	February	2414.91	2109.59	305.32
	March	1799.63	1571.14	228.49
	April	2209.52	1934.12	275.40
	May	2084.18	1821.23	262.95
30	June	1922.08	1678.74	243.34
	July	2304.74	2014.05	290.69
	August	1364.06	1191.24	172.82
	September	3104.93	2712.81	392.12
	October	2432.10	2124.46	307.64
	November	2347.43	2050.40	297.03
	December	1861.55	1626.11	235.44
	1935 January	2227.94	1979.53	248.41
	February	2277.47	2024.57	252.90
	March	1658.83	1473.26	185.57
40	April	2580.53	2222.78	357.75
	May	2131.86	1881.11	250.75
	June	2534.92	2192.33	342.59

RECORD
In the
Exchequer Court
of Canada
 No. 2
 Information
 Dec. 11, 1936
 (Contd.)

	Date	Total Due	Amount Paid	Balance Due	
	July	2671.60	2096.92	574.68	
	August	2808.66	2286.66	522.00	
	September	2621.05	2235.35	385.70	
	October	2435.15	2252.98	182.17	
	November	2213.14	2050.16	162.98	
	December	2640.70	2574.78	65.92	
1936	January	2105.30	1698.07	407.23	
	February	2359.37	2083.70	275.67	
	March	3282.79	2612.10	670.69	10
	April	2316.00	2249.22	66.78	
	May	2784.13	2666.32	117.81	
	July	3934.32	3390.50	543.82	
	August	2901.41	2743.57	157.84	
	TOTAL	<u>\$88395.71</u>	<u>\$78419.20</u>	<u>\$9976.51</u>	
			TOTAL PAID	88,395.71	
			LESS PAID	78,419.20	20
				<u>\$9,976.51</u>	
	Less Overpaid (1936 June)		169.75		
	Less Refund Cheque to A/C Entry No. 2543		3.99		
	Less Refund Cheque to A/C Entry No. 7388		56.10	229.84	
				<u>\$9,746.67</u>	30

5. Section 106 of said Special War Revenue Act as amended or enacted by Section 13 of Chapter 54 of the Statutes of Canada, 1932, provides that in default of payment of the tax in Sub-Section 1 of Section 86 of the said act mentioned, or any portion thereof within the time prescribed by the said Act or by regulations established thereunder, there shall be paid in addition to the amount in default a penalty of two-thirds of 1% of the amount in default in respect of each month or fraction thereof during which such default continues.

6. The Defendant defaulted in payment of the said tax as set out in paragraph 4 hereof and there is now payable to His Majesty the King in respect thereto penalty interest amounting to the sum of \$1258.20, calculated up to the 30th day of November, A.D. 1936.

7. Demand has been duly made upon the Defendant for payment of the said balance of sales tax and for payment of penalty interest but the Defendant has neglected and refused to pay the same.

RECORD
In the
Exchequer Court
of Canada
 No. 2
 Information
 Dec. 11, 1936
 (Contd.)

CLAIM

The Attorney-General on behalf of His Majesty the King claims as follows:

- (a) Judgment for the sum of \$11,004.87, being the sum of the said amounts of \$9,746.67 and \$1,258.20.
- 10 (b) Interest to date of Judgment.
- (c) Costs.
- (d) Such further or other relief as to this Honourable Court shall seem meet.

DATED at Ottawa this 11th day of December, A.D. 1936.

(Sgd.) ERNEST LAPOINTE,
 Attorney-General of Canada.

C. L. McAlpine,
 675 West Hastings Street,
 Vancouver, B.C.

20 Solicitor for the Attorney-General of Canada.

NOTE: This information is filed by the Honorable Ernest Lapointe, K.C., His Majesty's Attorney-General, on behalf of His Majesty.

STATEMENT OF DEFENCE

No. 3
 Statement of
 Defence
 Jan. 13, 1937

Filed the 18th day of January, A.D. 1937.

1. The Defendant admits the passing of the Special War Revenue Act referred to in Paragraphs 2, 3 and 5, of the Information but for the terms and effect thereof will rely on the text of the said Act when produced on the trial.

2. The Defendant further says that the purpose (amongst other purposes) of the said Act was and is to place the Canadian producer or manufacturer and the importer of taxable goods on 10 a parity.

3. In answer to Paragraph 4 of the Information the Defendant admits that during the period referred to in the said paragraph it sold and delivered to The Canada Rice Sales Company rice and bags and says that it paid all sales tax payable on or in respect of the said sales. Save as aforesaid the Defendant denies each and every allegation set forth in the said paragraph 4 and in particular the allegation that any sales tax is due by it to His Majesty.

4. In answer to Paragraph 6 of the Information the Defendant 20 ant denies that it made any default in payment of the sales tax referred to in Paragraph 4 of the Information and denies that any penalty interest is payable to His Majesty.

5. The Defendant denies the allegations set forth in Paragraph 7 of the Information.

DATED at Vancouver, British Columbia, this 13th day of January, A.D. 1937.

MARTIN GRIFFIN,

Solicitor for the Defendant.

This Statement of Defence is filed on behalf of the Defendant 30 by Martin Griffin of the firm of Griffin, Montgomery & Smith, Solicitors, 602 Hastings Street West, Vancouver, British Columbia.

NOTICE TO ADMIT FACTS

RECORD
 In the
 Exchequer Court
 of Canada

No. 4
 Notice to
 Admit Facts
 Sept. 10, 1937

TAKE NOTICE that the Plaintiff in this cause requires the Defendant to admit, for the purpose of this cause only the several facts respectively hereunder specified; and the Defendant is required within six days from the service of this Notice to Admit, to admit the several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

DATED at Vancouver, British Columbia, this 10th day of Sep-
 10 tember, A.D. 1937.

C. L. McALPINE,

Solicitor for the Plaintiff.

TO: The Defendant:

And to Messrs. Griffin, Montgomery & Smith,
 Its Solicitors.

1. That the Defendant Company is a body corporate, incorporated under the laws of the Province of British Columbia.

2. That the Directors of the said Company are now and have been since the 1st day of March, A.D. 1933, up to the date of the
 20 Information herein, the following:—

D. Gavin, President.
 A. E. Mason, Vice-President.
 A. S. Gavin, Secretary-Treasurer.
 N. L. Lauchland, Managing Director.
 D. F. Sacks, Director.
 E. D. Dowler, Director.

3. That on or about the 31st day of October, 1933, the De-
 fendant Company set up a selling agency for sales tax purposes,
 which selling agency was then and is now known as "Canada
 30 Rice Sales Company."

4. That the Canada Rice Sales Company has been since its formation and is now the selling agency for the Canada Rice Mills Limited only.

5. That the said Canada Rice Sales Company is controlled and owned by the Defendant Company.

6. That the Members of the said Canada Rice Sales Com-
 pany have been since its formation and are now:—

D. Gavin, A. E. Mason, A. S. Gavin, N. L. Lauchland,
 D. F. Sacks and E. D. Dowler.

RECORD
In the
Exchequer Court
of Canada
No. 4
Notice to
Admit Facts
Sept. 10, 1937
(Contd.)

7. That the Defendant Company produced and manufactured during the period mentioned in the Information herein rice and sold and delivered rice and bags throughout the period commencing March 1st, A.D. 1933, and ending August 31st, A.D. 1936.

8. That the said sales mentioned in the foregoing paragraph were made by the Defendant Company to the Canada Rice Sales Company.

9. That the sales were effected throughout the aforementioned period by the Canada Rice Sales Company at prices less than the actual selling price of rice in bags to independent wholesalers, 10

10. That the Canada Rice Sales Company was formed and created by the Defendant Company as a sales Company only and buys no goods from any firm, person or corporation other than the Defendant Company.

11. That the Defendant Company during the period in question has carried on business and produced and manufactured and sold rice and bags and delivered the same in the Dominion of Canada.

12. That if the said tax is payable on the Defendant's actual selling price of rice and bags to independent wholesalers then the Defendant Company is indebted to the Plaintiff in the sum of \$9746.67 as set out in Paragraph 4 of the Information herein. 20

No. 5
Admission of
Facts
Sept. 13, 1937

No. 5

ADMISSION OF FACTS

1. The Defendant makes the admission asked.
2. The Defendant makes the admission asked.
3. The Defendant admits that on the 2nd day of October, 1933, the partnership known as the Canada Rice Sales Company was formed. 30

6. The Defendant admits that the partners of Canada Rice Sales Company are:

Duncan Gavin, E. D. Dowler, J. C. Ranking, A. S. Gavin, F. A. Loescher, A. F. Mason, N. L. Lauchland and J. F. Sachs.

7. The Defendant admits that during the period mentioned in the Information it produced and manufactured rice and sold and delivered rice and bags throughout the period March 1st, 1933, to 31st August, 1936.

8. The Defendant makes the admission asked.

9. The Defendant admits that the prices received by it from the Canada Rice Sales Company referred to in Admissions numbered 7 and 8 are less than the prices at which the said Canada Rice Sales Company resold the rice to wholesalers.

10 10. The Defendant admits that the Canada Rice Sales Company did not buy any rice from any person firm or corporation other than the Defendant.

11. The Defendant admits that during the period in question it has carried on business and has produced and manufactured rice and has sold and delivered rice and bags in the Dominion of Canada.

12. The Defendant admits that if the Defendant is legally obliged to pay tax on the price at which the Canada Rice Sales Company sells the rice and bags to wholesalers, then the Defendant is indebted to the Plaintiff in the sum of \$9741.55.

DATED at Vancouver, B.C., this 13th day of September, A.D. 1937.

MARTIN GRIFFIN,
Solicitor for the Defendant

To the Plaintiff
and to
Messrs. McAlpine & McAlpine
his Solicitors.

RECORD
In the
Exchequer Court
of Canada
No. 5
Admission of
Facts
Sept. 13, 1937
(Contd.)

RECORD

*In the
Exchequer Court
of Canada*

MACLEAN J.

JUDGMENT RENDERED AUGUST 13, 1938

No. 6
Reasons for
Judgment
Maclean, J.

This is an action to recover from the Defendant Canada Rice Sales Ltd. (to be referred to hereafter as "Rice Mills"), as sales tax, under the provisions of The Special War Revenue Act, the sum of \$9,741.55, which with penalty interest amounted to \$11,004.87, on November 30, 1936. The taxation period in question is from March 1, 1933, to August 31, 1936.

The issue here arises from the fact that the Defendant, a 10 manufacturer of rice and bags, sold its entire output during the period in question to The Canada Rice Sales Company (to be referred to hereafter as "Rice Sales"), a partnership, and Rice Mills was assessed for the sales tax upon the selling price of Rice Sales. This assessment Rice Mills contests and claims it should be assessed on its own selling prices to Rice Sales. No question arises as to the quantity of the sales in question, and Rice Mills admits that if it is obliged to pay the tax on the prices at which Rice Sales sold the goods to wholesalers, then it is indebted to the Plaintiff in the sum of 9,741.55; there is no admission as to the 20 penalty interest, in fact that was not mentioned by either party during the course of the trial.

The purpose of forming the partnership, Rice Sales, its nature and activities, should be explained. The Defendant commenced the business of manufacturing and selling rice in 1907, on the Fraser River, some sixteen miles from Vancouver, B.C., where was the office of Rice Mills. In 1932 Rice Mills, on the suggestion of its chartered accountant, first considered the matter of forming some selling organization, and in 1933 there was formed the partnership, Rice Sales, which was to market the products of 30 Rice Mills. One of the purposes in forming the partnership was to separate the accounting of production costs and selling costs, so that Rice Mills might conveniently and accurately inform the Revenue Department as to its production costs, and which would assist the Minister in fixing the fair selling price of Rice Mills as a manufacturer or producer, for the purposes of the tax, in the event of any dispute. It was claimed that at this time Rice Mills was encountering severe competition from rice imported from Oriental countries, and that the sales tax did not fall evenly upon such importations and domestic manufactures of the same pro- 40 duct, because in the former case the tax was based only on the foreign or export price plus the duty, without the inclusion of freight and other items of cost which the domestic manufacturer

had to incur on the importation of his raw material, and it was claimed by Rice Mills that it paid as sales tax \$1.50 more per ton than did importers of Chinese rice; and it was also claimed that the sale of rice manufactured by Japanese residents of British Columbia was in a favoured position so far as the tax was concerned, owing to the conditions under which the same was manufactured, and otherwise, and apparently it was thought that by the separation of the manufacturing and selling ends of the business of Rice Mills, relief would, in some way or other, be afforded
 10 it in respect of the sales tax. These were important considerations leading to the formation of Rice Sales.

The members of Rice Sales, the partnership, are, with one exception, shareholders in Rice Mills. One of the partners is a Mr. Ranking who is not a shareholder in Rice Mills, but it appears that he represents, in the partnership, the firm of Martin and Robinson Ltd., which concern is a shareholder in Rice Mills. For our purposes here it may therefore be said that all the partners of Rice Sales are shareholders in Rice Mills. The partners of Rice
 20 Sales divide any profits accruing to it, from the business in question, in the proportion of their share holdings in Rice Mills. As Rice Sales only purchases rice from Rice Mills as it sells, its losses are probably negligible, but no mention was made of this. In fact it is not clear by which concern the losses of Rice Sales, if any, are borne.

Rice Mills and Rice Sales occupy the same office premises in the City of Vancouver. The accounting of each concern is kept apart, apparently in separate books, though that is not absolutely clear, but that of itself is not of any moment. The secretary-treasurer of Rice Mills is the book-keeper of both concerns but he
 30 is allowed remuneration by Rice Sales for such services as are performed on its account. The wages of Rice Sales employees are said to be paid by Rice Sales. The entire production of Rice Mills, during the period in question, was sold to Rice Sales at an advance of from 5 to 10 per cent. above the cost of production, but, it is admitted, at a price below the wholesale prices current at the time of sale; Rice Mills, prior to the formation of Rice Sales, sold its rice, from day to day, at the current wholesale price. Rice Sales sells to wholesalers, retailers, departmental stores, and in fact to
 40 any person wishing to buy. The same warehouse is used by both concerns, and apparently—though I am not sure of this—rice there stored on account of either is subject to a lien under section 88 of the Bank Act, for banking advances or credits extended to Rice Mills. There is but one bank account, that of Rice Mills, and drafts, with bills of lading attached, made by Rice Sales upon customers for goods shipped are at once endorsed over to Rice

RECORD
 In the
 Exchequer Court
 of Canada
 No. 6
 Reasons for
 Judgment
 Maclean, J.
 (Contd.)

Mills, and from the proceeds of such drafts, cheques are issued by Rice Mills for the difference between its price and the selling price of Rice Sales, directly to the partners of Rice Sales, not the partnership, in the proportions in which they hold shares in Rice Mills. Under this practice it would look as if the partnership, Rice Sales, was never in funds with which to pay any expense of doing business, if so it was not clearly explained. It is of course claimed by the Defendant, that both concerns are independent business enterprises, and the relationship of principal and agent is denied. 10

Now the facts of this case are quite different from those in other cases which have come before the courts, that is, so far as I am acquainted with them. The Plaintiff is not contending that Rice Sales is in any way liable for the tax, in fact it is not even a defendant in this action. The Plaintiff takes the position that, for the purposes of the tax at least, Rice Sales is a part of Rice Mills, and that its business activities are but a part of those of Rice Mills. While cases of this kind are never free of difficulties, yet, I think, it is fairly clear in this case that the Defendant must be held liable for the tax. Rice Sales was formed at the instance of 20 the directors and shareholders of Rice Mills in the belief that they might thus minimize the sales tax, or, that, in some way or other, they might put themselves on what they thought would be a parity with their competitors so far as the sales tax was concerned, or, that they might induce the Revenue Department to accept a more favourable basis of assessing the sales tax against Rice Mills, as a manufacturer or producer. The formation of Rice Sales does not seem to have been suggested by the usual motives underlying the creation of business enterprises. Mr. Gavin, the president, positively affirms that it was not the directors of Rice Mills that 30 first suggested the partnership, but rather their chartered accountant. And I would expect that what the accountant had in mind was a separation of the accounting of production costs from the selling costs, to assist the Minister in fixing the selling prices of Rice Mills as a manufacturer, under s. 98 of the Act, as apparently was done in the case of other manufacturers. The two concerns occupied the same warehouse, and they occupied the same office building. The intervention of the partnership into the business affairs of Rice Mills did not add to the number of employees or staff so far as I know, it neither added to nor subtracted from the 40 cost of producing and selling rice, it merely separated the costs incident to production from the costs incident to sales, and this only required two sets of books instead of one. It did not alter the financial position of the shareholders of Rice Mills; the combined profits of both concerns were divided precisely as before, and in

fact the profits all went to the shareholders of Rice Mills. It seems to me that Rice Sales was not formed as an independent trading unit or business enterprise, but merely as a paper partnership, to facilitate the purposes which Rice Mills had in mind and which I have already explained. The partners never contributed one dollar of capital to the partnership and I am disposed to suspect that any expenditure made by the partnership was a book-keeping expenditure only. In this case I think it may be said that no real change occurred in the business set-up of Rice Mills, 10 except that some or all of its officers, shareholders and servants, for some purposes, were given the colour of a partnership. The partnership was but another name for that which already existed and was functioning. The same people performed the same services as before, under the colour of a partnership, but nothing more.

I am not relying upon that portion of regulation No. 6, which states that where the vendor and purchaser are associated or affiliated concerns the price at which the goods are sold to bona fide independent wholesalers by either of them shall be the value upon which the tax is payable. Mr. Griffin urged that this regula- 20 tion was ultra vires and I am inclined to think that this contention is correct. I am disposing of the case upon the facts here disclosed, and as I weigh them. It was conceded that the goods in question were sold by Rice Mills below the current wholesale prices, and I think the tax must be calculated against the Defendant, on the basis of the selling prices of Rice Sales. However, Counsel having stated that if I reached the conclusion that the Defendant was liable for the tax, the amount payable under this Judgment would be determined between the parties themselves, and there is no need therefor to add anything further.

30 The action is therefore allowed and with costs.

RECORD
 In the
 Exchequer Court
 of Canada
 No. 6
 Reasons for
 Judgment
 Maclean, J.
 (Contd.)

IN THE EXCHEQUER COURT OF CANADA

RECORD
*In the
Exchequer Court
of Canada*

Saturday, the 13th day of August, A.D. 1938

No. 7
Judgment
Aug. 13, 1938

PRESENT:

THE HONOURABLE the PRESIDENT

BETWEEN:

HIS MAJESTY THE KING on the information
of the Attorney-General of Canada,

Plaintiff,

AND:

CANADA RICE MILLS LIMITED,

10

Defendant.

No. 7

THIS ACTION having come on for trial at the City of Vancouver, in the Province of British Columbia, on the 27th and 30th days of September, A.D. 1937, before this Court in the presence of Mr. C. L. McAlpine, K.C., and Mr. Ross Tolmie of counsel for the Plaintiff and Mr. Martin Griffin, K.C., of counsel for the Defendant; UPON HEARING the evidence adduced on behalf of the parties and what was alleged by counsel aforesaid THIS COURT WAS PLEASED TO DIRECT that this action 20 should stand over for judgment and same coming on this day for judgment;

THIS COURT DOTH ORDER AND ADJUDGE that the Plaintiff do recover from the Defendant the sum of \$12,320.12 and costs to be taxed.

By the Court,

(Sgd.) ARNOLD W. DUCLOS,

Registrar.

IN THE EXCHEQUER COURT OF CANADA

The Honourable Mr. Justice Maclean, in Chambers,
 Wednesday, the 19th day of October, A.D. 1938.

BETWEEN:

HIS MAJESTY THE KING, on the information
 of the Attorney-General of Canada,

Plaintiff,

AND:

CANADA RICE MILLS LIMITED,

Defendant

10

No. 8

UPON the application of the Defendant for an Order granting an extension of time for filing Notice of Appeal to the Supreme Court of Canada from the Judgment of this Court rendered on the 13th day of August, A.D. 1938, upon reading the Affidavit of G. F. Maclaren filed, and upon hearing Counsel for the Defendant as well as for the Plaintiff,

IT IS ORDERED that an extension of time for filing Notice of Appeal to the Supreme Court of Canada for two weeks from the date of this Order be granted to the Defendant.

IT IS FURTHER ORDERED that the costs of this Motion be costs in the cause.

(Sgd.) A. W. DUCLOS,

Registrar

RECORD
 In the
 Exchequer Court
 of Canada

No. 8
 Order Granting Extension
 of Time for
 Notice of
 Appeal
 Oct. 19, 1938

IN THE SUPREME COURT OF CANADA

RECORD
*In the
Supreme Court
of Canada*

No. 9
Notice of
Appeal
Oct. 20, 1938

BETWEEN :

CANADA RICE MILLS LIMITED,
(Defendant) Appellant

AND:

HIS MAJESTY THE KING, on the information
of the Attorney-General of Canada,
(Plaintiff) Respondent

No. 9

TAKE NOTICE that Canada Rice Mills Limited being dis- 10
satisfied with the Judgment herein given by the Honourable Mr.
Justice Maclean of the Exchequer Court of Canada dated the
13th day of August, A.D. 1938, intends to appeal against the
Judgment to the Supreme Court of Canada.

DATED at Ottawa this 20th day of October, A.D. 1938.

By POWELL, AYLEN & MACLAREN,
Ottawa Agents for the Appellant.

To: The Registrar
of the Exchequer Court of Canada

W. Stuart Edwards
Solicitor for the Attorney-General of Canada.

AGREEMENT AS TO CASE

RECORD
*In the
Supreme Court
of Canada*
No. 10
Agreement
as to Case
Nov. 21, 1938

The parties hereto agree upon the following Case in Appeal:

Information.

Defence.

Notice to Admit Facts.

Admission of Facts.

Judgment and Reasons for Judgment.

10 Order of Mr. Justice Maclean, dated the 19th day of October,
1938.

Notice of Appeal to the Supreme Court of Canada.

Agreement as to Contents of Case.

Registrar's Certificate.

Certificate as to Case.

Record of the Proceedings at the Trial as per the Official
Reporter's transcript.

All the Exhibits, that is to say: 1, 1A, 2, 3, 4, 5, and 6, "A"
and "B."

DATED the 21st day of November, A.D. 1938.

20

MARTIN GRIFFIN,

Solicitor for Appellant.

C. L. McALPINE,

Solicitor for Respondent.

RECORD

*In the
Supreme Court
of Canada*

No. 11
Registrar's
Certificate

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE EXCHEQUER COURT
OF CANADA

(No. 17347)

BETWEEN:

CANADA RICE MILLS LIMITED,

(Defendant) Appellant

AND:

HIS MAJESTY THE KING, on the information
of the Attorney-General of Canada,

(Plaintiff) Respondent

10

No. 11

CERTIFICATE OF REGISTRAR

I, the undersigned Registrar of the Exchequer Court of Canada do hereby certify that the printed documents hereto attached from pages 1 to 69 inclusive is the Case stated by the parties pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in an appeal to the said Supreme Court of Canada in this cause.

IN WITNESS WHEREOF I have hereunto subscribed my 20
hand and affixed the Seal of the Exchequer Court of Canada this
day of January, A.D. 1939.

Registrar, Exchequer Court of Canada

IN THE SUPREME COURT OF CANADA

 ON APPEAL FROM THE EXCHEQUER COURT
OF CANADA

(No. 17347)

 RECORD
 In the
 Supreme Court
 of Canada

 No. 12
 Certificate
 as to Case

.....19.....

BETWEEN :

CANADA RICE MILLS LIMITED,

(Defendant) Appellant

AND:

 HIS MAJESTY THE KING, on the information
 of the Attorney-General of Canada,

(Plaintiff) Respondent

10

 No. 12

CERTIFICATE AS TO CASE

I, GORDON FORIN MACLAREN, of the City of Ottawa, in the Province of Ontario, hereby certify that I have personally compared the annexed print of the Case in appeal to the Supreme Court of Canada with the originals and that the same is a true and correct reproduction of such originals.

DATED at Ottawa this

day of January, A.D. 1939.

Agent for Martin Griffin, K.C.,

Solicitor for the Appellant

20

RECORD
 In the
 Supreme Court
 of Canada
 No. 15
 Judgment
 Apr. 8, 1939

IN THE SUPREME COURT OF CANADA
 On appeal from the Exchequer Court of Canada
 Monday, the 20th day of February, A.D. 1939

PRESENT:

The Right Honourable the Chief Justice of Canada;
 The Honourable Mr. Justice Crocket;
 The Honourable Mr. Justice Davis;
 The Honourable Mr. Justice Kerwin;
 The Honourable Mr. Justice Hudson.

No. 15

10

JUDGMENT

The appeal of the above named Appellant from the judgment of the Exchequer Court of Canada rendered in the said cause on the thirteenth day of August in the year of our Lord one thousand nine hundred and thirty-eight having this day come on to be heard before this Court in the presence of counsel as well for the Appellant as the Respondent whereupon and upon hearing what was alleged by counsel aforesaid this Court did order and adjudge that the said judgment of the Exchequer Court of Canada should be and the same was affirmed and that the said appeal should be 20 and the same was dismissed with costs to be paid by the said Appellant to the said Respondent.

DATED at Ottawa the 8th day of April, 1939.

Sgd. "J. F. SMELLIE,"
 Registrar

No. 16
 Oral Reasons
 for Judgment

No. 16

ORAL REASONS FOR JUDGMENT

The Court: It will not be necessary to call upon you, Mr. Varcoe.

The real point is whether or not the partnership was carrying 30 on business for the Company. That is a question of fact and we are quite satisfied that the learned President of the Exchequer Court had ample evidence before him upon which to base his finding, and we agree with his finding, which, in effect, we take to be that the partnership was carrying on business for, and as the agent of, the company.

The appeal will, accordingly, be dismissed with costs.

RECORD
 In the
 Exchequer Court
 of Canada

In the Exchequer Court of Canada

No. 17347

No. 13
 Respondent's
 Case
 Sept. 27, 1937

BETWEEN :

HIS MAJESTY THE KING, on the information
 of the Attorney-General of Canada,

Plaintiff,

AND:

CANADA RICE MILLS LIMITED,

Defendant.

No. 13

10

Before the Honourable Mr. Justice A. K. Maclean, President
 of the Exchequer Court of Canada, at Vancouver, B.C., September
 27th, 1937.

COUNSEL: C. L. McAlpine, K.C.,

and J. R. Tolmie, Esq.,

for Plaintiff:

Martin Griffin, K.C.

for Defendant.

Mr. McAlpine: My Lord, the Canada Rice Mills Limited is
 the manufacturing company and the Canada Rice Sales Company
 is a partnership made up of the Directors and shareholders of
 the Company, with one exception. There is one member of the
 partnership who is not a shareholder in the manufacturing com- 20
 pany. The Manager of the Canada Rice Sales Company is a
 Director of the manufacturing company and draws no salary,
 the only ones drawing a salary being the shareholders who act
 as salesmen for the partners.

His Lordship: You want to tax on the basis of the sales
 made by the Canada Rice Sales Company?

Mr. McAlpine: Yes, my Lord, that being the wholesale price.

His Lordship: You show by your statement of claim year
 by year and month by month what were presumably the sales of 30
 the sales company, the amounts paid by the manufacturing com-
 pany and the balance due.

Mr. McAlpine: Yes, my Lord. There is no dispute as to the amount due, if our submission is correct, and the same thing applies to the penalty interest.

His Lordship: Does the Department exact penalties in all cases where there is a bona fide contest?

Mr. McAlpine: My instructions from the Justice Department are that that is so. Mr. Tolmie also advises me that is so. The Department desires the penalties in these cases.

His Lordship: Mr. Griffin, I suppose you say the identities
10 of the two companies are entirely different.

Mr. Griffin: A mere application of your Lordship's previous decision in the Palm Olive case and your subsequent decision in the Victoria Brick and Tile Company case. This case falls within the purview of the Victoria Brick and Tile or Palm Olive cases.

LEONARD JAMES THORBURN, a witness called on behalf of the Plaintiff. Sworn. Examined by Mr. McAlpine, K.C.:

Q. What is your occupation, Mr. Thorburn? A. Excise Tax Auditor.

Q. Located at the City of Vancouver? A. Yes.

Q. For how long? A. Twenty-five years.

Q. You know the Defendant, Canada Rice Limited, do you not? A. You mean Canada Rice Mills Limited?

Q. Yes? A. Yes, I do.

Q. Is that concern a licensed manufacturer? A. Yes.

Q. Do you know a partnership known as Canada Rice Sales?
A. Yes.

Q. Is that an unlicensed branch? A. Yes.

Q. You had occasion, had you not, to see the books of the Defendant Company? A. Yes.

Q. On what date was that, please? A. Around July 5th,
30 1935.

Q. When you were at the offices of the Defendant Company, who did you see? A. Mr. Gavin.

Q. Do you remember his initials? A. Mr. Duncan Gavin.

Q. Is that the gentleman who is sitting opposite Mr. Griffin?
A. No, sir.

Q. That is the other Mr. Gavin? A. Yes, Mr. A. S. Gavin.

Q. What position did he occupy in the Defendant Company?
A. He was an accountant.

Q. And Director of the Company? A. I understood so.

Q. Now, upon investigating the books of the Company, which
40 you did in connection with sales tax, will you please say just what you found and what conversation you had with Mr. Gavin? A. From an examination of the records I found that they were

RECORD
In the
Exchequer Court
of Canada

No. 13
 Respondent's
 Case
 L. J. Thorburn
 Direct Exam
 Sept. 27, 1937
 (Contd.)

accounting for tax on a lesser basis than they were selling the goods for.

Mr. Griffin: What he found he must prove. We will produce the books if they are required.

Mr. McAlpine: This witness can state what he found from an examination of the books—from notes which he made at the time he examined the books.

Mr. Griffin: It is a new one on me, that any one can examine books and come here and state what they contained without producing the books. We have the books here and will produce them. 10
 I am not going to be bound by the witness' general summary. I do not want to be bound by his summarizing the result of an examination of our books. He may have misled the Department through drawing a wrong conclusion from the examination.

His Lordship: I think an Accountant can go through books and then state what he found.

Mr. Griffin: I submit that is not so.

His Lordship: If you were proving a particular debit or credit item you would then have to produce the books.

Mr. Griffin: The witness is not entitled to say 'I looked at 20
 these books and I find so and so'; the books must be produced and the items pointed out.

Q. (Mr. McAlpine): What did you find first in relation to sales in the books of the Company?

Mr. Griffin: I might as well argue on the ruling now. I say that question is one which no one could answer without trying to summarize what figures he found in the books and what prices he saw entered therein. He says they were accounting for tax on a price less than they were selling for and I challenge that statement. We had a lengthy correspondence with the Department and 30
 I challenge that statement. Let the witness produce a record and say 'here it is.' His reports are on a printed form called form 93A or 93B and my learned friend has them. They were all turned in. He may put them in and then try and prove that they were made at a lesser price than the legally proper price for sales tax purposes.

His Lordship: We have had in Court a great number of these cases, actions where it was necessary to deal with quantities and values, and where the same were investigated by accountants. In all these cases that has always been the procedure, statements 40
 produced and accepted. I do not think the Rule requires that you must bring the books here and examine every item before the Court.

Mr. Griffin: I am not trying to force him to go over item by item, but I want him to take a few items and show that one of them or any of them is so and so. You may turn to the pleadings and take any item that is mentioned. The first one is in

the month of October, 1933. The amount paid was \$1705.25 and the amount claimed was \$2062.80. That one would be as good as any; now let the witness show that that figure there is right or wrong.

His Lordship: That is what he is going to do.

Mr. Griffin: He has got to do it by the process of taking any one particular item. He has not the right, in my submission, to give his idea as a conclusion; that question is for the Court.

His Lordship: He will show that he examined the books, 10 what system of book-keeping was followed, and what he was told by the firm's accountant. That is all he is stating now and I think that evidence is admissible.

Mr. McAlpine: Proceed.

The Witness: I went down to make an examination of the records and I found that Canada Rice Sales were accounting for the tax on a transfer basis, that is, between the factory and the selling organization.

Q. Which was the factory? A. The Canada Rice Mills Limited.

20 Q. And which was the selling end? A. Canada Rice Sales.

Q. Now go on in detail and tell us what you found, tell us what Canada Rice Mills Limited was doing with its product?

A. It was selling its entire output to Canada Rice Sales Company.

Q. At what price? A. At a price lower than it sold to independent wholesalers.

Mr. Griffin: That would clearly not be evidence against the manufacturer.

30 Mr. McAlpine: They are the same books.

His Lordship: What of the system of book-keeping?

The Witness: There was an entry showing the cost of the rice from the factory to the selling organization and the tax was accounted for on that basis instead of on the selling price by the selling organization.

His Lordship: The books of Canada Rice Mills Limited contained a record of sales to the selling company?

The Witness: Yes, my Lord, there was a book entry covering that but the invoices were all made out by the selling organization to various companies, but it was the same set of books.

40 Q. (Mr. McAlpine): Where was the office of the sales company located? A. On Alexander Street.

Q. And where was the office of the manufacturing company located? A. I have no knowledge of it having any office.

Q. At whose office were you when you inspected the books? A. At the sales company's office.

RECORD
In the
Exchequer Court
of Canada

No. 13
Respondent's
Case
L. J. Thorburn
Direct Exam
Sept. 27, 1937
(Contd.)

RECORD
In the
Exchequer Court
of Canada

No. 13
 Respondent's
 Case
 L. J. Thorburn
 Direct Exam
 Sept. 27, 1937
 (Contd.)

Q. From your inspection of the books, did you ascertain the basis on which the manufacturing company transferred or sold to the sales company? A. I asked the accountant, Mr. Gavin, as to the basis on which he was accounting for the tax.

His Lordship: What did he say?

Mr. Griffin: That is not evidence against my client.

His Lordship: It is good evidence. Go on, witness.

Mr. Griffin: The Directors would not have power to make admissions.

His Lordship: Just as to the system. We are not going 10 into amounts.

Q. (Mr. McAlpine): Who was Mr. A. S. Gavin? A. I understood he was the Accountant.

Q. For whom? A. The sales organization.

Q. What relation, if any, had he to the Manufacturing Company? A. He was a Director. That was admitted.

Q. Where was Mr. A. S. Gavin when you saw him? A. In the sales company's office.

Q. Did you go over the books of the sales company with Mr. A. S. Gavin? A. Yes. 20

Q. Where were the books of the Manufacturing Company? A. In the same office.

His Lordship: The witness said they were the same books.

Q. (Mr. McAlpine): Were they the same books? A. It is quite a long time since I was there and I cannot say offhand at the present time, but I think they were the same records that I extracted the figures from.

His Lordship: Did you see two sets of books?

The Witness: No, my Lord, I was working on one set of books. 30

Q. (Mr. McAlpine): Did those books show the manufacturing costs? A. I do not know about that, but they showed the transfer value that they paid the tax on.

Q. They showed the transfer value to the sales company? A. Yes, if I remember correctly.

His Lordship: Why not say the sales value?

Mr. McAlpine: It is not a sale, I submit, but simply a transfer. The sales value was the value of the goods sold by the sales company.

His Lordship: How did it appear on the books; does it 40 appear on the books as a sale from the manufacturing company to the sales company?

The Witness: Yes, they had an entry covering the sale.

Q. (Mr. McAlpine): What did A. S. Gavin say about it? A. That they had to do something in order to compete with the Oriental trade.

Mr. Griffin: I do not deny anything about Mr. Gavin's identity. He is a Director of the sales company and book-keeper and accountant of the sales company, but he cannot make admission as an official of the sales company against the manufacturing company.

His Lordship: The Crown is asserting that they are not two distinct bona fide companies, that the existence of these two companies was for the purpose of effecting a reduction in the sales tax, that the whole thing is not bona fide but illusionary.

10 Mr. Griffin: But there is no such suggestion in the pleadings. Take the information, for instance.

Paragraph 4: "The Defendant produced or manufactured goods in Canada to wit: Rice and bags, and sold and delivered the same throughout the period commencing March the first, 1933, and ending August thirty-first, 1936, in respect of which goods the Defendant stands indebted for balance of consumption or sales tax in the sum of \$9,746.67 . . ."

20 Then in paragraph 5 of the information the Crown says that Section 106 of the Special War Revenue Act as amended or enacted by Section 13 of Chap. 54 of the Statutes of Canada, 1932, entitles the Crown to penalties for default in payment of the tax. There is no suggestion in the information of there being an elusive arrangement between the two companies.

His Lordship: I would allow the Crown to amend its pleadings any way. Their case must be that the sales were not bona fide. The Crown will assert that they are not two bona fide distinct companies and the sales from the manufacturing company to the sales company are not bona fide. That is the case you must meet.

30 Mr. Griffin: There is no suggestion of non-bona fide companies in the correspondence ranging for over a month; I maintain the Crown has no right to be in Court.

His Lordship: If I were asked by Counsel for permission to amend the Crown's pleading, I would grant the application.

Mr. McAlpine: My pleadings are in order, my Lord. I claim for sales tax pursuant to the Act on the actual wholesale value of the goods sold and we show that they did not account for the tax on that basis.

40 His Lordship: And you say that Canada Rice Sales Company was introduced merely for the purpose of avoiding payment of sales tax, but Mr. Griffin says that you do not say that in your pleadings.

Mr. McAlpine: I do not think I have to say that.

His Lordship: I am not so sure that you do not have to; however, I do not suppose the other side was taken by surprise. Were the sales from the manufacturing company to the sales

RECORD
In the
Exchequer Court
of Canada

No. 13
Respondent's
Case
L. J. Thorburn
Direct Exam
Sept. 27, 1937
(Contd.)

RECORD
In the
Exchequer Court
of Canada

No. 13
 Respondent's
 Case
 L. J. Thorburn
 Direct Exam
 Sept. 27, 1937
 (Contd.)

company bona fide transactions; was it a sale made in the ordinary course of business, a sale from one to the other; you say it was not.

Mr. McAlpine: In the Palm Olive case there was no allegation that the selling organization was not bona fide.

His Lordship: I may be wrong myself, but I do know that in a case I heard in Calgary the words used were "illusionary" and something else.

Mr. McAlpine: I show, for instance, what the wholesale price of rice was at the time of the transfer. 10

His Lordship: Does the Sales Tax Act say that the tax must be paid on the basis of the wholesale price?

Mr. McAlpine: Yes, my Lord, when it is an interlocking company.

Mr. Griffin: It says 'on the sale price'—not the wholesale price.

Mr. McAlpine: I should have said that the Regulations do. The Regulations read:

"In respect of goods subject to Consumption or Sales Tax sold or transferred by the manufacturer or producer 20 thereof in Canada, to his own wholesale branch(es), the value for purposes of the tax shall not be less than the wholesale price.

"The 'Wholesale Price,' for purposes of this Regulation, shall be the price at which the goods are regularly sold in representative quantities in the ordinary course of business to bona fide independent wholesalers.

"In cases where vendor and purchaser are interrelated, associated, or affiliated concerns, or where one is subsidiary 30 to the other, the price at which the goods are sold to bona fide independent wholesalers by either of them, in the ordinary course of business, shall be the value upon which the tax is payable."

Then Section 86 of the Act reads:

"86: In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax on the sale price of all goods

"(a): produced or manufactured in Canada, payable by the producer or manufacturer at the time of the 40 sale thereof by him;"

and then we have Section 99 which deals with Regulations:

“99: The Minister of Finance or the Minister of National Revenue, as the case may be, may make such regulations as he deems necessary or advisable for the carrying out of the provisions of this Act.”

Now the Regulations referred to are the Regulations passed pursuant to that section.

Mr. Griffin: For the moment all we are debating is this. Mr. Duncan was examined for discovery and I have made certain
10 admissions. Now is it right that I should be asked to be governed by what the Accountant in the office—

His Lordship: You mean that Mr. Duncan Gavin, the President of Canada Rice Mills Limited, the Defendant, was examined on discovery and answered the questions asked by Counsel on the other side and that you should not now be held to be bound by any information that may have been given by Mr. A. S. Gavin the accountant in the office?

Mr. Griffin: Yes, my Lord. I submitted my client for Examination for Discovery and then there are my admissions; now
20 it is only fair and reasonable to say that a casual conversation is not admissible as evidence. I could not use Mr. Thorburn's statement against the Crown, if Mr. Thorburn had made one. I am not trying to be technical but want to be fair and reasonable. Mr. A. S. Gavin is not a salesman or official of the manufacturing company.

Mr. McAlpine: He is Secretary and Treasurer of the Manufacturing Company and a partner in the sales company.

Mr. Griffin: He did not make this statement in that capacity. He has not the power to make admissions.

His Lordship: What the witness wants to state is what he
30 found in the books and the statement which Mr. Gavin made—which directed him to the entries in the books.

Mr. McAlpine: The witness made inquiries as to the method followed and the purpose of it.

His Lordship: Merely a confirmation of the books.

Mr. McAlpine: And also showed the build-up of the sales organization and the purpose of it.

Q. How did that transfer value compare with the wholesale price received from independent wholesalers at that time?

40 A. It was lower.

Q. At what price was the selling company selling the rice?

A. At the regular market value.

Q. What conversation did you have with Mr. A. S. Gavin in reference to the sales company and the manufacturing company? A. He said he was advised.

RECORD
In the
Exchequer Court
of Canada
No. 13
Respondent's
Case
L. J. Thorburn
Direct Exam
Sept. 27, 1937
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada

No. 13
 Respondent's
 Case
 L. J. Thorburn
 Direct Exam
 Sept. 27, 1937
 (Contd.)

Q. Who advised him, did he say? A. Their accountants advised them to set up a selling organization and account for the taxes on the transfer value.

Q. Did he say whether or not that had been done? A. Yes. He said that had been done in order to compete with the Oriental trade.

Q. And that Transfer Company was what? A. The Canada Rice Sales Company.

Q. Now, from March, 1933, up to the end of August, 1936, did the Defendant Company account for the sales tax on this transfer price? A. Yes, on the transfer price. 10

Q. And, during that period, how did the transfer price compare with the value to independent wholesalers? A. It was less.

Q. And how did it compare with the price at which rice was sold by the wholesale company to wholesalers? A. The value was less than that.

Q. The wholesale price at which Rice was sold by the Sales Company was the same as that prevailing amongst independent wholesalers? A. Yes.

Q. Now whatever conversation you had with reference to the selling organization and manufacturing company, was the conversation which you had with Mr. Gavin? A. Yes. 20

Q. Now give us the complete conversation? A. I do not recall anything else in connection with it.

His Lordship: Does Mr. Duncan Gavin, in his Examination for Discovery, admit the facts stated by this witness?

Mr. McAlpine: Mr. Duncan Gavin was examined on discovery but it is Mr. A. S. Gavin that is referred to by this witness.

His Lordship: What is Mr. Duncan Gavin's position in the Company? 30

Mr. McAlpine: He is President of Canada Rice Mills Limited. I do not find his examination of much value and I do not propose using much of it.

His Lordship: Is there any denial on the part of the manufacturing company that it was selling the rice to the selling company at a specific price which was below the regular sales price?

Mr. Griffin: No, my Lord.

Q. (Mr. McAlpine): Is there anything further which you discovered in your examination of the books and what other conversation, if any, had you? A. There is nothing else. 40

His Lordship: I gather that the books only show the sales from the manufacturing company to the selling organization?

The Witness: Yes, my Lord.

His Lordship: And did not show the price from the selling organization to the public?

The Witness: Yes, my Lord, the same books show that.

Mr. McAlpine: Here is your file. You made some notes. See if they will help you and give you any information on the point. These were made at the time you inspected the books, were they not?

The Witness: Yes.

Mr. Griffin: You cannot make evidence by merely producing extracts from documents. He might refresh his memory by looking at the books but not by looking at the notes.

The Witness: I will refresh my memory and proceed.

10 His Lordship: Look at the notes and then answer the question.

The Witness: There is nothing further than what I have already stated.

Mr. McAlpine: His Lordship wants to know if the books showed the price from the manufacturing company to the selling company and also the price at which the sales company sold to wholesalers.

The Witness: I have got the sales value from the Rice Mills to the sales company.

20 Q. Where did you get that? A. From the books of the sales company. I have also got the sales of the sales company, both credit and cash sales, to wholesalers.

Q. Where did you get that information? A. From the same books.

Mr. McAlpine: I will put in the Regulations of the Department under the Special War Revenue Act as EXHIBIT No. 1.

Mr. Griffin: I wanted to enter an objection, my Lord, to the Regulations in this respect: Many things in them are perfectly all right, but the part which my friend wants to use goes beyond
30 the Act which, in Section 99, says:

“99: The Minister of Finance or the Minister of National Revenue, as the case may be, may make such regulations as he deems necessary or advisable for carrying out the provisions of this Act.”

Now the Act only contains power to tax on the sale price which means the actual sale price and in endeavouring to fix fictitious and arbitrary values the regulations go beyond the Act and I object to that as being ultra vires.

Mr. McAlpine: You may cross-examine the witness.

40 CROSS-EXAMINED BY MR. GRIFFIN, K.C.

Q. Now just take what you found down there. Are you sure the set of books you saw were not the books of the sales company. I am instructed that it has an entirely different set of books; do you say that the books you saw were the books of the sales company? A. That is right; I did see the books of the sales company.

RECORD
In the
Exchequer Court
of Canada

No. 13
Respondent's
Case
L. J. Thorburn
Direct Exam
Sept. 27, 1937
(Contd.)

L. J. Thorburn
Cross Exam
Sept. 27, 1937

RECORD

*In the
Exchequer Court
of Canada*

No. 13
Respondent's
Case
L. J. Thorburn
Cross Exam
Sept. 27, 1937
(Contd.)

Q. Are you sure that is all you saw? A. I think it was all I saw.

Q. The milling company, insofar as you know, can have and do have a complete set of their own books? A. Yes, insofar as costs are concerned they may have a set of books—a ledger, cash book, journal and Bank book, but those are not the books I examined there. The books that I examined there I was given to understand were the books of the selling organization.

Q. You do not know and do not pretend to know whether the milling company had its own complete set of books? A. I do not recall right now, but I never saw them. 10

Q. But, insofar as you know, they may have a complete set of their own books? A. They may have.

Q. Including the various books you referred to? A. They may have but I never saw them.

Q. The books which you saw were books which appeared to be books of the selling organization? A. I understood they were.

Q. Did they not appear to be so? A. Yes.

Q. And were they not so marked? A. Yes.

Q. And the evidence you gave was taken from the books of the sales company and not the books of the Defendant company; now is that not so; answer the question; it is the milling company that is sued in this court? A. Yes. 20

Q. And the books which you saw were the books of the selling company? A. That is right.

Q. And not the milling company books? A. No.

Q. All that you have been telling your Lordship you learned from the books of a company which is not the Defendant company? A. That is right.

Q. Now you would see in the sales company's books, if they were well kept, what they had paid for the goods to the milling company? A. Yes. 30

Q. And there you would find what they got for the goods? A. Yes.

Q. And would thereby achieve a knowledge of what profit they made? A. Yes.

Q. But you would not know what they sold to the individual at? A. No.

Q. You would just find the total profit, the difference between the purchase price and sales price; you did find that out? A. Yes. 40

Q. And the profit would have to be ascertained after deducting expenses? A. Yes.

Q. But you found out what the gross profit was? A. Yes.

Q. But you did not find out how much profit there would be on any one sale? A. No.

Q. And they may have made money on one or twenty sales and lost money on others? A. That is right.

Q. You did not find out whether they sold their rice to wholesalers only; did you find that out? A. I found that the largest portion of sales by the selling organization was to wholesalers.

Q. But they sold to retailers too? A. A little.

Q. And to Department stores? A. Yes.

Q. And to some of the milling companies? A. Yes, cash
10 sales.

Q. And the money they took in was the result of sales to wholesalers, retailers, department stores and consumers? A. Yes, that is right.

Q. Now you used the phrase "a branch." I take it that was just your deduction. You make an inference that the sales company is a branch of the milling company? A. Yes.

Q. But it does not say so? A. No, sir.

Q. Now when you spoke in your testimony of the wholesale price, you meant the sales price at which the selling company sold
20 to wholesalers? A. That is right.

Q. And not the wholesale price apart from these particular sales? A. No, sir.

Q. Now am I right that the Canada Rice Mills Limited, the Defendant here, is the only company in British Columbia operating a rice milling establishment except those run by Orientals? A. That is right.

Q. And their mill is on the Fraser River about 16 miles from here—with a wharf and shipping facilities? A. Yes.

Q. And their office is on Alexander Street in the City? A.
30 Yes.

Q. And the selling company has its books in the same office? A. Yes.

Q. And the other manufacturers of rice are Japanese with small mills? A. Yes.

Q. Have you seen their records? A. No, sir.

Q. Have they proven to be insufficient and incomplete? A. I do not know.

Q. Have you found that it is a fact that it is difficult to collect the tax from them? A. I have not gone into that at all.

Q. The unmanufactured rice is duty free, is it not? A. I
40 do not know.

Q. And that rice manufactured on the continent is dutiable? A. It is.

Q. And large quantities of manufactured rice are imported from Oriental countries? A. That is so.

RECORD
In the
Exchequer Court
of Canada
No. 13
Respondent's
Case
L. J. Thorburn
Cross Exam
Sept. 27, 1937
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada
 No. 13
 Respondent's
 Case
 L. J. Thorburn
 Cross Exam
 Sept. 27, 1937
 (Contd.)

Mr. Griffin: The point we take, my Lord, is this, that the competition which this Defendant company meets is from importers of rice manufactured in Siam, China, and other places abroad. They import on a much more favourable basis than this Defendant can make it at as they only pay on the duty paid value which is the f.o.b. Hong Kong price. The principle laid down in the Palm Olive case was that sales tax was intended to apply as far as possible and bring into line and make the same the position of those importing and those who manufactured and not for the purpose of discriminating against the local manufacturer.

10

His Lordship: What is manufactured rice?

Mr. Griffin: Cleaned rice. It comes in in a form called paddy rice and it is cleaned and polished and it is by reason of that cleaning and polishing that the Department rules that it is a manufactured product. I will ask the witness a few questions along that line.

Q. Mr. Thorburn, this foreign rice that comes in comes mostly from China? A. So I understand.

Q. And on that they pay sales tax on the duty paid value only? A. If it is not further processed, yes.

20

Q. And they do not pay tax on the freight? A. No.

Q. Nor on the cost of manufacturing here? A. Yes they do.

Q. Not if they pay only on the duty paid value? A. If they further process it they pay on the milling charges.

Q. But if it is imported in an unfinished condition, they do not pay on the manufactured cost? A. Just on the duty paid value if it is not further processed.

Q. Whereas the local manufacturer of rice has to pay on the sale price? A. Yes.

30

Q. Which includes the freight on the original product and the cost of milling it here? A. Yes.

Q. Now am I right in saying that the Act under which this case is brought imposes the tax only on the sales price? A. Yes.

Q. And defines that as?

Md. McAlpine: That is a matter of law and it is not for this witness to say.

Mr. Griffin: In one case there is a sales tax levied on the purchase price and not on the sale price and that is the third branch of the case.

40

Q. Are your familiar, Mr. Thorburn, with Section 86, the sales tax on manufactured articles, on imported articles and thirdly, on articles sold by a licensed wholesaler in which case it is on his sale price and not on the purchase price? A. Yes, I am. That is right.

Q. In your search, did you find that the milling company

had made sales of rice to any one excepting the sales company?

A. I understood the sales company took the entire output.

Q. Did you find any record showing that the Defendant company did sell to any one but the sales company? A. Yes, the breweries.

Q. When and what did they sell? A. I cannot say offhand.

Q. Did you find any record? A. I cannot say offhand.

His Lordship: Did you ask the officers of the milling company if they had a set of books?

10 The Witness: I understood the books which I was examining were the books of the milling company and of the selling organization as well.

His Lordship: Did you ever make a specific request for the production of the books of the milling company?

The Witness: I went down there for the purpose of examining the milling company's books.

Q. Mr. Griffin: But, according to your testimony, the milling company sold only to the selling company except what it sold to the breweries? A. I followed it up from the sales organiza-

20 tion. Q. The sales from the milling company to the breweries covered a rough unmanufactured rice? A. Yes, a paddy rice.

Q. Did you find that the Defendant company, from any record you saw there, ever sold manufactured rice to any one but the sales company? A. I could not find any.

Q. So that in that case the Defendant company's ordinary course of business was to sell only to the sales company, was it? A. Yes.

Q. Did the Minister fix a discount applicable to rice? A. 30 Not that I am aware of.

Q. A discount which the manufacturer of rice could deduct from the price for sales tax purposes? A. I have no recollection of that.

Q. Do you know what quantity of rice the Defendant company sold to the sales company during those years? A. Not in quantity, no.

Q. Are you in a position to say whether the Defendant company was able and willing to sell to anybody else the same quantity of rice which it sold to the selling company at the same price?

40 A. It was understood that the selling organization took the entire output, the milling company not selling to anybody else.

Q. Do you know whether the Defendant company was able and willing to mill a larger quantity of rice and sell the same quantity to any other person as it did to the sales company and at the same price? A. I do not know.

Q. You did not find out? A. No.

RECORD
In the
Exchequer Court
of Canada
No. 13
Respondent's
Case
L. J. Thorburn
Cross Exam
Sept. 27, 1937
(Contd.)

RECORD

*In the
Exchequer Court
of Canada*

No. 13

Respondent's
CaseL. J. Thorburn
Cross Exam

Sept. 27, 1937

(Contd.)

Q. Here are three invoices of September, 1937; do you know anything about these? A. No.

Q. Have you ever had occasion to read the sales tax pamphlet of the Canadian Manufacturers' Association?

Mr. McAlpine: I object to that question.

His Lordship: Do not ask the witness to interpret these things. It is hard enough for the Court and Counsel to tell what these regulations mean, as a rule.

Q. (Mr. Griffin): The Minister has, on various occasions, fixed the prices for sales tax purposes for various commodities? 10

A. Yes.

Mr. McAlpine: I object to that too.

Mr. Griffin: It is done by the Department. I will use the word "Department."

Q. For boots and shoes there is a special price? A. Yes.

Q. And for ladies hand bags? A. Yes.

Q. Electric stoves? A. Yes.

Q. Cosmetics? A. Yes.

Mr. McAlpine: I object. These are not relevant at all. The Minister has never set a price for rice, arbitrary or otherwise. 20

Mr. Griffin: I am going to show one for rice.

Mr. McAlpine: The Minister has set no price for rice and it is governed entirely by the Act and Regulations.

His Lordship: I do not see, Mr. Griffin, how it would be relevant. No special price is fixed for rice.

Mr. Griffin: Here is one which I will bring to the witness' attention. The price was fixed for a rice mill in Vancouver, B.C., Japanese rice millers.

Mr. McAlpine: I object.

His Lordship: If there has been any inconsistency on the 30 part of the Department then it should be disclosed.

Mr. McAlpine: This is not anything that was done by the Department but it is something that was written by a member of the accounting department here and the Minister is not here to answer it.

His Lordship: You can easily argue what its legal effect is.

Mr. McAlpine: I do not know whether this letter is authorized, or unauthorized, nor does Mr. Griffin.

His Lordship: I will receive it subject to your objection.

Mr. Griffin: I will explain it. I sent him a copy some days ago 40 and invited him to refer to Mr. A. J. W. Page, Assistant Supervising Auditor at Vancouver. Now my friend has said that he would like your Lordship to observe, and use against the Defendant company, what Mr. A. S. Gavin, the accountant, said in the office to Mr. Thorburn, but he is not willing to receive what Mr.

A. J. W. Page said to a Japanese miller of rice, K. Takahashi, Vancouver, Mr. Page wrote to Mr. Takahashi on 15th May, 1936:

"I have pleasure to advise that the Department has approved the basis for tax that Japanese rice millers may use from the 1st November, 1935, in accounting for the sales tax on their sales of cleaned rice, which shall be as follows:

Cost of Brown or Paddy Rice (including draft in Canadian or U.S. funds, special excise tax and transportation charges known as cost, insurance and freight—the foregoing may be known as cost of draft).

10

Handling and harbour dues

Commissions

Cartage

Milling, per ton

\$3.00

Plus 15%

Tax on the total at 6% up to and including 1st May, 1936, and 8% from May 2nd onwards

20

This amount to be returned to the Department on Forms B. 93 and B. 93A before the last day of the month following that during which the raw material was cleared through Customs and on the total weight imported, with the undernoted exceptions:

"On sales at special prices, the selling price of which would be less than the above computation, you will be permitted to pay tax on the actual selling price at the rate of tax in effect at the date of sale providing adequate records are maintained in English to permit these transactions to be checked in your regular books of account. The quantities thus sold may be deducted from the quantity imported before computation of the tax under the method prescribed. You will be held strictly accountable for the total weight of rice imported.

30

"If the foregoing instruction is not clear I shall be pleased to give you further advice and guidance as it is desired there shall be no misunderstanding in respect of this matter."

Mr. McAlpine: This witness says he never saw this and knows nothing about it.

His Lordship: He has not seen the letter nor has he read it, but the questions were put clearly. I would prefer however that the question be put in such a way that it will bring out from his knowledge the facts of this particular case.

40

RECORD
In the
Exchequer Court
of Canada
No. 13
Respondent's
Case
L. J. Thorburn
Cross Exam
Sept. 27, 1937
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada
 No. 13
 Respondent's
 Case
 L. J. Thorburn
 Cross Exam
 Sept. 27, 1937
 (Contd.)

Mr. Griffin: I intend to put my questions that way.

Q. Now is it not a fact, witness, that with respect to Japanese rice millers their price has been fixed by the Department by taking the various ingredients of cost plus an arbitrary milling charge plus an arbitrary operating charge? A. Not by the Department.

Q. But by Mr. Page? A. Yes. That was due to the fact that Japanese rice millers did not keep a proper set of books.

Q. Are they not difficult to collect from because of the fact that their records are incomplete and inaccurate? 10

His Lordship: He did not quite comprehend the question.

Q. (Mr. Griffin): Is it not a fact that the Japanese as taxpayers are hard to collect from due to the poor records which they keep? A. Yes.

Q. And the method which Mr. Page introduced, rightly or wrongly, was designed to correct that? A. Yes.

Mr. Griffin: Agreement of the 2nd of October, 1933, I put in as EXHIBIT "A".

Q. Now, Mr. Thorburn, let us take this circular dated June, 1936? A. I have never seen that. 20

Q. That refers to clothing? A. Yes.

Q. Do you know this one about clothing—in November? A. Yes.

Q. That purports to fix the price of clothing?

Mr. McAlpine: I object to that.

His Lordship: I would like to hear the witness explain it.

Q. (Mr. Griffin): Does not that document provide that on sales to wholesalers the price which is to be used as the basis for sales tax is the actual selling price? A. Yes.

Q. And that means the actual selling price of the manufactured article? A. Yes. 30

Q. And if, on the contrary, he sells to retailers he has to charge sales tax on 90% of the actual price? A. Yes.

Q. And if to consumers it is to be 70% of the actual price? A. Yes.

Q. And in all cases they are prices which the manufacturer gets? A. He gets more than on the value he collects tax on.

Q. In the case of wholesalers it says the actual selling price? A. Yes.

Q. And in the case of the other two he gets it on 90% and 70% respectively? A. He accounts for the tax on that basis although he receives 100% for his goods. 40

Q. In the case of a retailer he receives say \$1.00 for the goods and pays a tax on 90c only and in the case of a consumer where he receives say \$1.00 he pays a tax on 70c only? A. That is right.

RE-EXAMINED BY MR. McALPINE, K.C.

Q. Did you examine, at the time of which you have spoken, the books of the Milling Company? A. I understand these books were the milling company's books.

Q. Who gave you that information? A. Mr. A. S. Gavin.

Q. Now from March 1, 1933, to the end of August, 1936, did you set out in these paragraphs the wholesale price and also the transfer price from the milling company to the sales company?

A. Yes, there are two columns showing that.

10 Q. And that information was taken from the books of the company? A. Yes, where the sales tax was paid.

Q. Paid by whom? A. By the milling company.

Q. Then where did you get these entries; from whose books?

A. The sales company's books. The purchase price of the sales organization from the milling company was the value on which the milling company paid the tax.

His Lordship: It is quite possible that the witness assumed, and no one said anything otherwise, that they were the milling company's books. At any rate he obtained the price at which the
20 sales company purchased.

Mr. McAlpine: Yes, my Lord, and also the price at which the sales company sold wholesalers and the difference in the claims is the difference in the tax, one based on the transfer price and the other based on the wholesale price.

His Lordship: Mr. Griffin says they have a set of books and the witness might be mistaken, although I do not see why he did not ask specifically for their books.

Mr. McAlpine: I have served my friend with notice to produce those books and if there is any question about the entries I
30 ask that this witness stand down for now.

RE CROSS-EXAMINED BY MR. GRIFFIN, K.C.

Q. When were you there, Mr. Thorburn A. July 3rd or
5th, 1935.

Q. And not there since? A. No, sir.

Q. How long were you in the office? A. About a week—
day by day.

Q. Was there a Mr. Hill from your Department there subsequently? A. Yes.

Q. And you had ample opportunity to read or look at any
40 thing you asked for? A. Yes.

Mr. Griffin: I was a little confused, my Lord, in connection with my learned friend's reference to two claims. I take it that he was referring to the two columns.

Q. Now, witness, were you addressing yourself to the first or second column set out in the Information? A. To both—the first and second.

RECORD
In the
Exchequer Court
of Canada

No. 13
Respondent's
Case
L. J. Thorburn
Re-Exam
Sept. 27, 1937
(Contd.)

L. J. Thorburn
Re-cross
Exam.
Sept. 27, 1937

RECORD

*In the
Exchequer Court
of Canada*

No. 13
Respondent's
Case
L. J. Thorburn
Re-cross
Exam.
Sept. 27, 1937
(Contd.)

Q. Now the second one covers the amount that is alleged to have been paid? A. Yes.

Q. On what you allege as the transfer and we call the sales price? A. Yes.

Q. Now take the first column—October, 1933, \$2062.80; what does that figure represent? A. That was the amount assessed on the sales of the selling organization.

Q. Was it calculated by your Department? A. Yes.

Q. And not calculated by the Defendant company or the sales company? A. That is right. 10

Q. All the way down that column? A. Yes.

Mr. Griffin: My Lord, he never got what that column contains out of their books at all.

His Lordship: He got the quantities sold and then he calculated the wholesale prices.

Mr. McAlpine: I put in a letter dated August 6, 1935, from the Defendant company to the Commissioner of Excise. I will read part of that letter to your Lordship as it shows the purpose for the formation of The Canada Rice Sales Company:

“The formation of The Canada Rice Sales Company 20
arose in this way: Our Chartered Accountants, Messrs. A. H. Rathie & Co., advised us that in their opinion it would be of advantage to the company if a more accurate system of production costs were kept separating the selling costs entirely from the cost of Rice plus landing and milling charges . . . ”

His Lordship: That is enough.

Mr. Griffin: I suggest that it is not proper to use the correspondence. This was designed to get the Minister to exercise the power which, under Section 98, he has, to fix the price for Canadian Millers the same as he did in the case of Japanese millers, but he would not. These letters were ineffective for the purpose for which they were designed and should not be read. 30

His Lordship: I cannot refuse the acceptance of a letter but you may refer to this in argument.

Mr. McAlpine: I will read further from the letter of August 6, 1935:

“In discussing this suggestion the question of selling operation then arose and upon looking up The Canadian Manufacturers' Association's Sales Tax Pamphlet dated February 1st, 1932, on page 3 the following clause appears: 40

“‘Fair Price-Power of Minister to Determine.’

“Section 98 of the Act provides that where goods subject to Sales Tax are sold at a price which in the judgment of the Minister is less than the fair price on which Sales Tax should

be imposed the Minister shall have the power to determine the fair price and tax shall be payable on the price so determined.

RECORD
 In the
 Exchequer Court
 of Canada
 No. 13
 Respondent's
 Case
 L. J. Thorburn
 Re-cross
 Exam.
 Sept. 27, 1937
 (Contd.)

10 "The explanatory note published when this legislation was introduced stated that this provision was designed particularly to cover these cases where the vendor and the purchaser are inter-related, associated or affiliated concerns or where one is subsidiary to the other. It stated that it had been found by experience that in such cases the price at which one concern sells to the other and on which Sales Tax is computed has been at times set at a figure very much below even the cost of production. The provision was designed to check the evasion of sales tax in this or similar ways by giving the Minister in such cases power to determine and set a fair price on which Sales Tax shall be computed and paid."

I think that is all that is pertinent.

20 Now as to Mr. Page's letter to Mr. Takahashi, dated 15th May, 1936, was read, I will put the same in as EXHIBIT No. 1A, and the letter from the Defendant company to Mr. Sim, Commissioner of Excise, dated August 6th, 1935, part of which I have read, as EXHIBIT No. 2. Then I put in a letter from my friend to the Minister, dated November 13th, 1935, as EXHIBIT No. 3.

His Lordship: Covering the same point as is contained in the letter, part of which you have just read?

Mr. McAlpine: Yes, my Lord.

His Lordship: The fact that the net returns of the Sales Company only amounted to 3½% of the milling company's total sales must be considered in determining whether or not they are allied.

30 Mr. Griffin: That is all I have to ask the witness.

Mr. McAlpine: Now, my Lord, I will put in the Declaration of Partnership as EXHIBIT No. 4. Statement of Division of Profits or Losses of The Canada Rice Sales Company as EXHIBIT No. 5, and the Admission of Facts as EXHIBIT No. 6. I will read them:

His Lordship: Do not take up the time of the Court reading them. You have filed them as an exhibit.

40 Mr. McAlpine: Then, my Lord, I will put in part of the Examination for Discovery of Duncan Gavin, President of the Defendant company:

QUESTION No. 1 AND THE ANSWER THERETO:

1. Q. Mr. Gavin, you are the President of the Canada Rice Mills Limited? A. Yes.

QUESTIONS No. 9 to 21 INCLUSIVE AND
THE ANSWERS THERETO:

RECORD
In the
Exchequer Court
of Canada

Respondent's
Case
Extracts
Exam for
Discovery

Q. Who of those gentlemen, if any, were not members of the Canada Rice Mills Limited? A. Well, Mr. Ranking was not a member.

10. Q. Was he a shareholder? A. Ranking is a member of the Sales Company, but not of the Mills Company.

11. Q. Was he a shareholder of the Mills Company? A. No.

12. Q. Is he the only one? A. Yes, he is the only one. 10

13. Q. The others that you mentioned were and are directors or shareholders of the Rice Mills Limited? A. Yes.

14. Q. Now you say that was Ranking? A. Yes, J. C. Ranking.

15. Q. What position does J. C. Ranking hold in the Sales Company? A. Well, he is a salesman.

16. Q. Is he employed by the Canada Rice Mills Limited? A. He is employed by the Sales Company.

17. Q. Who pays his wages? A. The Sales Company.

18. Q. Is he the only employee of the Sales Company? 20
A. Mr. Sachs—no, Lauchland is an employee of the Sales Company.

19. Q. And is he paid by the Sales Company? A. He is paid by the Sales Company. And A. S. Gavin is employed by the Sales Company.

20. Q. And paid by the Sales Company? A. And paid by the Sales Company.

21. Q. Anyone else? A. E. D. Dowler is not and I am not. I don't get anything, but everything in connection with the sales is—there are clerks, you know, in connection with the Sales 30
Company, but those are the members of the partnership that are employed.

His Lordship: Did the milling company pay any of the wages of the selling partnership?

Mr. McAlpine: I have no information as to that. Then, my Lord, I put in Questions Nos. 46 to 50 inclusive and the answers thereto:

46. Q. I don't care about your rights. Is this not the fact, that Canada Rice Sales Company has obtained its rice from this firm only, from the Canada Rice Mills? A. No, that is not cor- 40
rect.

47. Q. How much rice have they obtained from other than the Canada Rice Mills? A. Just one purchase.

48. Q. And when was that? A. I have not got the date of that.

49. Q. Was it after this information was laid, or before this information was laid?

Mr. Griffin: If you will say when this action began.

Mr. McAlpine: Perhaps he didn't understand.

The Witness: I would not be quite sure of that, but I think it would be after. We ran out of some rice and we had to buy it. The mills could not supply it, and we had to get it elsewhere.

50. Q. You mean Canada Rice Mills could not supply it?

A. Canada Rice could not supply it.

THEN QUESTIONS Nos. 59 to 61 INCLUSIVE AND
THE ANSWERS THERETO:

10 59. Q. The rice sold by the Limited Company to the Sales Company during this period was sold at a price less than the wholesale price? A. What do you call the wholesale price?

60. Q. That, I presume, was the price prevailing— A. The price that the Sales Company purchased the rice from the mill, the Canada Rice Mills, was lower than the Sales Company sold to the wholesale trade.

61. Q. And during the period in question the Canada Rice Mills Limited sold its total output to the Sales Company; that is right, is it not? A. Yes.

20 Mr. McAlpine: That is the case for the Plaintiff, my Lord.

No. 14

DEFENDANT'S CASE

DUNCAN GAVIN, a witness called on behalf of the Defendant,

SWORN. EXAMINED BY MR. GRIFFIN, K.C.:

Q. You are President of the Defendant Company? A. Yes.

Q. And that company or its predecessor has been in business for how many years? A. Since 1907.

Q. Have you a mill on the Fraser River where you manufacture and clean rice? A. Yes.

30 Q. And an office on Alexander Street in Vancouver? A. Yes.

Q. And it is an incorporated company? A. Yes.

Q. Is Mr. A. S. Gavin a Director and Secretary-Treasurer as well? A. Yes.

Q. The Defendant company was incorporated on the 2nd of January, 1929? A. Yes.

Q. Under the Companies' Act of British Columbia? A. Yes.

40 Q. And the business of the company is the buying of rice, the cleaning and the selling of it? A. Yes.

RECORD

In the
Exchequer Court
of Canada

Respondent's
Case
Extracts
Exam for
Discovery
(Contd.)

No. 14
Appellant's
Case
Duncan
Gavin
Direct Exam
Sept. 27, 1937

RECORD
 In the
 Exchequer Court
 of Canada
 No. 14
 Appellant's
 Case
 Duncan
 Gavin
 Direct Exam
 Sept. 27, 1937
 (Contd.)

Q. Are there any rice mills in British Columbia other than your own? A. Yes, there are a few Japanese mills.

Q. Any mills other than those run by Orientals? A. No.

Q. Are the Japanese mills comparable to your mill to the extent that any deduction might be drawn from them? A. No, sir, they are small; they are usually located behind a store and the work is done by the store clerks.

Q. The capacity is small? A. Yes.

Q. Is it a fact that they confine themselves mostly to sales made to their own countrymen? A. Yes, but they have entered 10 the wholesale field too.

Q. Do they cover all or only parts of the rice manufacture? A. Do you mean that there is competition from the importation of foreign manufactured rice?

Q. Yes? A. Yes, there is competition from all over the Orient but more so from Siam and Burma.

Q. Is that competition, in your opinion, a fair and just one as against yourself?

Mr. McAlpine: I object to that.

His Lordship: The tariff, the regulations and what not are 20 matters for the Department to deal with.

Q. (Mr. Griffin): Is the Defendant company licensed as a manufacturer under the provisions of the Special War Revenue Act? A. Yes.

Q. When did this proposal or idea of organizing this sales company first come up; when did it first enter your mind or claim your attention? A. In June, 1932.

Q. Did the sales tax provisions previous to that apply to rice in any way? A. No, sir.

Q. When did the sales tax first become applicable to rice? 30 A. At the end of March, 1933.

Q. What was the motive of creating this sales company in the month of June, 1932?

Mr. McAlpine: I object to that.

Mr. Griffin: My friend put in a letter and I want this witness to give the Court his view as against what is put in in writing to be used against him.

His Lordship: You say the sales tax did not apply to rice in 1932.

The Witness: It came into effect at the end of March, 1933. 40

His Lordship: When did you first consider this?

The Witness: In June, 1932, we had it under consideration.

Q. (Mr. Griffin): And the purpose of it at that date was what? A. Our mill was 16 miles from the office and we had to maintain an office and some stock in town and it was considered advisable, in order to keep a close record on production, to form

a company for the purpose of selling our product and keeping complete records down at the mill and other records at the office in Vancouver. We had, as a matter of fact, drawn plans for the erection of an office but the depression came on and the erection of the office was delayed.

Q. At that time had the sales tax anything whatever to do with it? A. It was not in my mind at all.

Q. Now the letter written in August makes some reference to a sales tax provision in the statute—but in the letter this is not made plain; please explain? A. I was in Ottawa in June, 1935, and when I came back I put the matter on record but I admit that it is not very plain. When I was in Ottawa I explained the matter very clearly to the Commissioner, Mr. Sim. In 1932 we decided to form the company but it is not set out very clearly in that letter, but Mr. Sim understood it thoroughly from our conversation.

Q. What was your object in writing that letter? A. My object was this: At the time I wrote that letter a difficulty had arisen and I thought it would be well to point out to Mr. Sim how the formation of that company arose. I was in Europe and was delayed there. When I came back we considered the formation of this company. In considering it, we noted the difficulty we would be in in connection with Chinese importations and we concluded that in forming that company we would be within the provisions of the Act and that in no sense would we be evading the provisions of the Act, but this would give the Minister a reasonable time within which to consider his power given under the Act and that he would be able to adjust our difficulties. That was really the object of my writing that letter in that way.

Q. You wanted him to use the power which Section 98 gives him to fix what would be a fair price for the incidence of this tax? A. Yes, that is what the letter was written for.

Q. Were you successful in getting him so to do? A. No.

Q. Now was that partnership declaration form duly filed in the office of the County Court at Vancouver by your Solicitors? A. Yes.

Q. Now tell His Lordship when the Defendant company can or does exercise any control over this selling company and to what extent it is an independent concern; that is one of the fundamental things in the case and I want the information? A. It is an absolutely independent concern; the books are entirely separate and the witness for the Department was wrong; we keep separate books, a ledger, cash book, sales sheets, etc., everything complete to cover the business and are at the office of the milling company on Railway Street.

Q. Two sets of books are kept? A. Yes.

RECORD
 In the
 Exchequer Court
 of Canada
 No. 14
 Appellant's
 Case
 Duncan
 Gavin
 Direct Exam
 Sept. 27, 1937
 (Contd.)

RECORD
 In the
 Exchequer Court
 of Canada

No. 14
 Appellant's
 Case
 Duncan
 Gavin
 Direct Exam
 Sept. 27, 1937
 (Contd.)

Q. The two companies are separate and distinct? A. Yes, we have a separate set of books and the wages of the employees of the sales company are paid by the sales company and not by the milling company.

His Lordship: You hand your rice over to the selling company without making a profit?

The Witness: No; we make a profit by adding to our cost and the sales company makes a profit too but a comparatively small one, really $\frac{1}{2}\%$ of the output, but the concerns are entirely apart from each other. 10

Q. Does the milling company through its Board of Directors, or in any other way, interfere with the selling company in any particular? A. No, sir.

Q. Who is the Managing Director of the Milling Company? A. It is managed by a Board of Directors; there is a great deal of work to be done. We decide in regard to our purchases and we decide on the prices to be charged from day to day.

Q. Do you mean the prices you pay or the prices you receive? A. The prices we pay and what we are going to sell at to the sales company. 20

His Lordship: Do you sell to anybody else?

The Witness: No, my Lord, the milling company does not, except the rough rice which it sells to the breweries; that is outside the operation.

Q. (Mr. Griffin): Is the milling company prepared, if somebody else will take the same quantity as the sales company will, to sell the rice at the same price as the selling company charges?

Mr. McAlpine: The witness is going to give an opinion on what the company would do. 30

The Witness: If a customer offered us the same price, or even a little lower on the same terms, we would accept the order at once.

His Lordship: But you, being a shareholder in the selling company, would get a smaller dividend.

The Witness: It would be of more advantage to the milling company as the tonnage would be up.

Q. (Mr. Griffin): To whom does the selling company sell? A. To wholesalers, retailers, Department Stores and in fact anybody who has the money. 40

Q. Does the selling company sell on any basis fixed by the milling company? A. No.

Q. Are they bound, in any way, as to the whole or any part of the product? A. No.

Q. Do they sell it all at the same price? A. No.

Q. What is the motive which governs its action when it

sells the rice to these various classes of people; what determines what it will ask from the various people to whom it sells? A. To get as much as we can for it.

Q. On practically the same day have you been forced to sell at different prices the same thing to different people? A. Yes, it depends on the customers.

Q. I show you now three invoices which you brought here. Now to what class of person do these invoices relate? A. Retailers.

10 Q. Is the product sold in each case the same? A. Yes.

Q. Is the price charged in each case the same? A. No.

Q. Give the dates and prices? A. We sold 40 bags of No. 2—weight 50 lbs.—at \$106.00—on September 17th, 1937. On September 11, 1937, we sold 20 Bags No. 2—weight 100 lbs.—at \$89.40, and again on September 17, 1937, we sold 40 bags No. 2—weight 50 lbs.—at \$81.50. That would probably be on contract.

Q. Those are drawn from dates outside the dates referred to in the case? A. Yes.

20 A. Yes. Q. Did that system prevail during the whole of this period?

A. Yes. Q. You would be selling to anybody at the price you could get? A. Yes, at the best price we could get.

Q. Is there any one besides yourself engaged in the milling of rice in Vancouver except the Japanese we have been discussing? A. No, sir.

Q. And you have no local competition in manufacture except the Chinese? A. That is all we have; no other.

Q. And their price is fixed by the Minister for sales tax purposes? A. Yes.

30 Q. Do you know of any arrangement, Mr. Gavin? A. Mr. Hill, Mr. Thorburn's successor, has been to our office quite frequently since 1935 and he came and consulted us in regard to this circular. There was some suggestion made of making 10% but I thought that was not enough. He explained to us that he had great difficulty in obtaining revenue from the Japanese as they would not keep books in English and their records were incomplete and incorrect; as soon as they straightened up one transaction they began another. We tried to get protection and that is when they added this arbitrary 15%. This is not a profit but is an arbitrary
40 figure to correct what they thought they were short in their collections.

Q. Now just at this point let me clear up what may lead to a misunderstanding; the milling company's office is at 343 Railway Street—not Alexander Street? A. Yes.

Mr. Griffin: I think you said it was on Alexander Street, through error.

RECORD
In the
Exchequer Court
of Canada
No. 14
Appellant's
Case
Duncan
Gavin
Direct Exam
Sept. 27, 1937
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada
 No. 14
 Appellant's
 Case
 Duncan
 Gavin
 Direct Exam
 Sept. 27, 1937
 (Contd.)

The Witness: I appreciate that action very much. It was a great help to us.

Q. (Mr. Griffin): Now is there any arrangement of Agency between the two companies; is the sales company the agent of the milling company?

Mr. McAlpine: I object to that.

His Lordship: The witness in the box is very frank and the letter written the Department is a very frank one, but it indicates the sales company was organized for a purpose, to minimize some disadvantage they were at as compared with the Japanese. The witness has been very frank about it. He did it for a purpose and I do not see how his good faith can be questioned. 10

Mr. Griffin: He considered the Crown should exercise the powers conferred by Section 98 and fix the price for sales tax purposes—the same as it did in the case of the Japanese.

His Lordship: This was done for the benefit of The Canada Rice Mills Limited. That is what Mr. Gavin says; that is where the circular originated and he says he appreciates its effect.

The Witness: It did not go as far as I would have liked it to go but still I appreciate it very much. 20

Mr. Griffin: But you suggested a purpose, my Lord. Now how could we have had sales tax in mind in 1932 when we did not know whether it was going to be in effect or not?

The Witness: All I can say about it is that our Auditors recommended this as a common practice and as a very feasible one.

His Lordship: I must admit that the largest companies in the world do it. The most auspicious example is the United States Steel Corporation. They do not handle their products at all; they are handled by U.S. Steel Products Company. Great advantages are obtained in having a manufacturing and a selling company 30 but, of course, in this case this is just a moderate business and perhaps it could be carried on without having the two companies. I am not speaking now in an offensive way.

The Witness: The mill was 16 miles from the office and we found it hard to keep a check on the expenses, but if you have separate accounts you can put your finger on the revenue and expenditure immediately.

His Lordship: What was the idea?

The Witness: We charter ships and bring our rice right up to the mill on the Fraser River. 40

His Lordship: Why is it there?

The Witness: To keep down expenses. There is wharfage, cartage, etc.

His Lordship: The Fraser River is a cheaper port?

The Witness: Yes, my Lord.

Q. (Mr. Griffin): There is no connection between the ownership and the partnership shares in the sales company? A. No.

His Lordship: Is the capital of the two companies the same?

The Witness: The sales company does not require capital. That is a partnership.

His Lordship: They do not pay you for the rice you sell them until they have been paid?

The Witness: We make drafts on the rice sold. When the rice is shipped we make drafts at 60 or 90 days; this is a convenience from the Bank's point of view.

CROSS-EXAMINED BY MR. McALPINE, K.C.

10 Q. It was the Directors of the Milling Company who conceived the idea of forming this partnership? A. They did not conceive the idea. The suggestion came from our Chartered Accountants.

Q. From Mr. Rathie the Chartered Accountant of the Milling Company? A. Yes.

Q. And the Directors thought that was the proper thing to do; that is, the Directors of the Milling Company thought it the proper thing to do, and before the partnership was formed the only persons interested were the directors of the milling company?

20 A. Yes.

Q. And they decided to create this sales company? A. But not as directors.

Q. I do not care whether as directors or as individuals? A. But I do.

Q. The same individuals were directors? A. Yes, with the exception of one.

Q. So that the directors of the company decided to enter into this partnership? A. As individuals.

Q. Rather than in their corporate capacities? A. Yes.

30 Q. And they signed the declaration of partnership? A. Yes.

Q. And the only one who is not a shareholder is Mr. Ranking? A. Yes.

Q. And he was, before the partnership, a salesman of the milling company? A. Yes.

Q. And he continued in that capacity? A. No, sir, as a salesman of the selling company, ceasing his employment with the milling company.

Q. No partnership agreement was drawn up? A. Merely a declaration.

40 Q. No provision was made in writing for a division of the profits or a division of the losses? A. Yes, an arrangement was made.

Q. But I said in writing? A. I have a copy of a writing. This is the way the profits were distributed.

Q. This is the way you distributed your profits? A. Yes.

RECORD
In the
Exchequer Court
of Canada
No. 14
Appellant's
Case
Duncan
Gavin
Cross Exam
Sept. 27, 1937

RECORD
 In the
 Exchequer Court
 of Canada
 No. 14
 Appellant's
 Case
 Duncan
 Gavin
 Cross Exam
 Sept. 27, 1937
 (Contd.)

Q. You have no document signed by the partners? A. Yes, I think so; Mr. Griffin has it.

Q. This covers a division of profits and losses? A. Yes.

Q. Mr. Loescher is a shareholder in the milling company?
 A. Yes.

Q. And his profits represent exactly the same—42.74%, yours 17.22% of the partnership, and that represents the holding in the milling company? A. Yes, all the way down the list.

Q. Dowler 17.21%? A. Yes.

Q. Ranking 5.19%? A. Yes; he is in the firm of Martin 10
 & Robinson Limited.

Q. What does he hold in the milling company? A. I think 50%.

Q. I want to be clear on this—now who does? A. Martin & Robinson Limited.

Q. Who represents Martin & Robinson Limited in the sales company; I understood you to say that Mr. Ranking did? A. I said he got his revenue through his interest in Martin & Robinson Limited.

Q. 5.19% of the capital stock of the milling company and 20
 also of the partnership? A. Yes.

Q. So that in effect we have this, that all the shareholders of the milling company are members of the partnership or their representatives are? A. Yes. On the formation of the selling company we found it would be rather difficult to split up the profits, that it could only be done in one way and that was the way we adopted. The partnership is an entirely different entity.

Q. But the membership in it is the same as in the case of the milling company? A. Yes.

Q. The members hold their interest in exactly the same 30
 proportion as they do in the milling company? A. No, sir, as between three companies. For instance, Mr. Ranking does not appear in it until the profits to Martin & Robinson Limited are distributed.

Q. Now you said Martin & Robinson Limited held 50% of the shares of the milling company; now let us see who, in the partnership, besides Mr. Ranking represent Martin & Robinson Limited? A. I am a shareholder in them and so is Mr. A. S. Gavin.

Q. And also a shareholder in the milling company? A. 40
 Yes.

Q. This is so, is it not: The members of the partnership divide the profits and losses in the same way and in the same proportions as the shareholders of the milling company; they share the profits and losses in the same proportion? A. Yes.

His Lordship: Martin & Robinson Limited is a shareholder to the extent of 50%, but they are not shareholders at all in the partnership, but you say they are represented?

Mr. McAlpine: Yes, my Lord.

His Lordship: Why do you say that?

Mr. McAlpine: I will ask the witness a question.

Q. Who are shareholders in Martin & Robinson Limited?

A. Mr. E. D. Dowler, Mr. A. S. Gavin, Mr. J. C. Ranking, and there is an interest belong to my deceased brother's estate.

10 Q. Those are the only shareholders in Martin & Robinson Limited? A. Yes.

Q. You are a shareholder too? A. Yes.

Q. And these gentlemen are all directors and shareholders in the milling company, are they not? A. Not all directors.

Q. All shareholders? A. Yes, with the exception of Mr. Ranking.

Q. Now Mr. Ranking, in the partnership, is entitled to 5.19% of the profits? A. Yes.

20 Q. I am trying to show that the shareholders in Martin & Robinson Limited, in proportion to their shares, are also members of the partnership and share in the profits and losses; is it not so that there is no foreign blood in the partnership at all? A. There does not have to be.

Q. Just answer my question; that there is no foreign blood in the partnership at all? A. It was open and above board right from the start. Why would we do anything else?

His Lordship: Better cut out that foreign blood question. Do the persons who are shareholders in Martin & Robinson Limited appear as partners in the sales company and do they hold 50% 30 interest in that partnership?

The Witness: Yes, my Lord, 50%.

Q. (Mr. McAlpine): And you also say, Mr. Gavin, that the salaries paid to Mr. Ranking and Mr. Lauchland are paid to them in their capacities of salesmen? A. Yes, as employees of the sales company for clerical work and salesmanship.

Q. And you are the Managing Director of the milling company? A. No, sir, I am a director.

Q. But you are President of the milling company? A. Yes.

Q. And Mr. Mason is the Vice-President? A. Yes.

40 Q. And neither you nor Mr. Mason draw any salary from the partnership? A. Mr. Mason does.

Q. What does he draw it for? A. Clerical work.

Q. And Mr. A. S. Gavin was Secretary-Treasurer and a director of the milling company and also the book-keeper for the sales company and he draws a salary as book-keeper for such company? A. Yes.

RECORD
In the
Exchequer Court
of Canada
No. 14
Appellant's
Case
Duncan
Gavin
Cross Exam
Sept. 27, 1937
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada
 No. 14
 Appellant's
 Case
 Duncan
 Gavin
 Cross Exam
 Sept. 27, 1937
 (Contd.)

Q. What of Mr. Sachs? A. He gets paid by the milling company and not by the partnership.

Q. And Mr. E. D. Dowler likewise? A. He is not paid by either of them. He is in Martin & Robinson Limited.

Q. Now the offices of the milling company and the sales company are in the same premises in Vancouver? A. Yes.

Q. And Mr. Mason is the book-keeper for both the sales and the milling company? A. No, sir, Mr. A. S. Gavin, my brother is.

Q. I understood you to say that this partnership was formed so that you would come within the Act? A. I said that the original idea of forming the sales company was that and we checked up to see that we were within the Act and found out that we were within the Act and that the Minister would have full power to act and relieve us from the unfair position we were then in in regard to sales tax and we found in organizing the Company it would place him in a position to act under the section of the Act. 10

Q. You thought you would get away from the unfairness of the Act, as you saw it? A. Yes, and that it would automatically have that effect. 20

Q. And one of the unfair things was the imposition of the 8% sales tax? A. We did not object to the imposition of the tax but we objected to the way the provisions of the Act were administered.

Q. Is that right? A. Yes.

His Lordship: You did not consider the imposition of the sales tax as unfair but you did consider as unfair the way in which it fell upon you as compared to your competitors?

The Witness: Yes, my Lord. We were willing to pay the sales tax but we objected to having it applied to us in such a way that we paid it the rate of about \$1.25 per ton more. We are in this position. If we sell rice today, of the same quality as the Chinese rice, we pay \$1.50 more sales tax per ton than do the Chinese. 30

Q. That is the imported rice? A. Yes.

His Lordship: I can understand that.

Q. (Mr. McAlpine): There is no contract, Mr. Gavin, is there, between the partnership and the milling company? A. None whatever.

Q. But, as a matter of fact, since the formation of the partnership, you have sold or transferred to the partnership your total output of manufactured rice? A. Yes. 40

Q. And at a price that has been less than the wholesale price from time to time? A. Yes.

Q. Now prior to the formation of this partnership you sold on the open market to wholesalers direct, did you not? A. Yes.

Q. And you received for your product the going wholesale prices? A. Yes, the prices prevailing from day to day.

Q. But prior to the formation of the partnership the price that you got was the current wholesale price? A. Yes.

Q. There is a current price from the manufacturer to the wholesaler from time to time? A. The only way I can answer that is to say that I cannot quote a price unless the purchaser describes what he wants and I am in a position to give him a price on it.

Q. Now the price you were obtaining for the rice was the wholesale price obtaining in Vancouver; that is the price the sales company was obtaining? A. Yes, the best price we could get.

Q. And the transfer or sales price from the mill to the partnership has been somewhat less? A. Yes, somewhat less.

His Lordship: When you make your drafts on the companies, does the Bank require you to guarantee the payment?

The Witness: No, my Lord, I do not think so. It comes under Section 88 of the Bank Act. The sales company has not a Bank account but the milling company has. We use the same warehouse.

His Lordship: The rice which you mill is in your warehouse until the selling company sells to a purchaser.

The Witness: Yes, my Lord, until the sales company sends an order down to the mill. As soon as the order comes down it is delivered by truck and as soon as that order is delivered it is in our possession and at our risk.

His Lordship: You only deliver when the sales company makes a sale.

The Witness: Yes.

His Lordship: How is it arranged with the Bank as to re-lease?

The Witness: It is arranged to the Bank's satisfaction. I do not just know how that is done.

Q. (Mr. McAlpine): You get no money until the sales company has received its money? A. That is right.

Q. And there is a book-keeping entry showing the sales? A. Yes.

His Lordship: You make drafts on the sales company?

The Witness: No. The sales company makes drafts on the buyers.

Q. (Mr. McAlpine): The milling company does not make any drafts on the sales company but the sales company makes drafts on the customers and they turn those drafts over to the milling company? A. Yes.

Q. And you get a draft not only for the transfer price but for the partnership wholesale price? A. Yes, and we get a cheque for the balance.

RECORD
In the
Exchequer Court
of Canada
No. 14
Appellant's
Case
Duncan
Gavin
Cross Exam
Sept. 27, 1937
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada
 No. 14
 Appellant's
 Case
 Duncan
 Gavin
 Cross Exam
 Sept. 27, 1937
 (Contd.)

Q. And that cheque is deposited in what account? A. In the milling company's account.

Q. The sales company has no banking account? A. That is right.

Q. And the milling company then divides the difference between the two prices? A. No, sir, they do not divide it, but they pay the balance; when we want it we get it and the milling company then writes a cheque for it and passes it to the account of the sales company.

Q. How do they pay the money? A. By cheque. 10

Q. To whom? A. To the individual members of the sales company.

His Lordship: The milling company forwards to the selling company the difference between the milling company's price to the selling company and the amount received by the selling company from the customer.

The Witness: Yes; there is a balance accruing to the credit of the sales company and the milling company pays the sales company by cheque.

His Lordship: That cheque would be made payable to the 20 partners and not the shareholders.

Mr. McAlpine: To the individual members of the partnership and not the partnership.

The Witness: That is right.

Q. What you do is forward the difference between the transfer price and the wholesale price to these individuals in the proportions set out there? A. That is it exactly.

Q. So that there is no cash at any time paid to the sales company, that is, to the partnership itself? A. That is right. The members of the selling company ask the milling company to make 30 the cheques out in this way.

Q. Now who issues the cheques covering wages to the partners, that is, in the cases in which wages are paid? A. The milling company advances the amount and charges it up.

Q. They are paid by a cheque of the milling company? A. Yes, and it is charged up to the sales company.

Q. Out of the balance coming to them from the proceeds of these drafts? A. Yes, out of moneys paid by the sales company to the milling company.

Q. And if the Directors of the milling company decide to 40 break their contract with the partnership all they have to do is do it? A. Like any other firm. They sell to us—that is all.

Q. The same people control it; the same interests; the milling company controls the partnership? A. Yes.

Q. Does the milling company's price for the manufactured rice vary from time to time? A. Yes.

Q. And that depends on your cost of production? A. Yes.

Q. Would I be correct in saying that the milling company sells to the selling company at the cost of production plus a profit?

A. Yes.

Q. And that profit is always stable? A. Not necessarily so; it might not be.

Q. Tell me what profit you add? A. The milling company is in touch with the markets and know what can be obtained for rice and they put a charge on it accordingly and make secure that profit.

10 His Lordship: In actual practice what is that profit?

The Witness: 10%.

His Lordship: You add 10% to your price to the sales company?

The Witness: Yes, my Lord, 5% or 10%.

His Lordship: In your price to the sales company there would be included your profit of 5% or 10%.

The Witness: About 5% to 10%.

Q. (Mr. McAlpine): But your price to the partnership depends upon the wholesale price in the open market? A. Yes, 20 taking into consideration the price that can be secured.

Q. And if the wholesale price of the manufactured rice drops then the cost to the selling company is less than it would be if it were higher or more stable? A. Yes, if the market drops the sales company cannot get the price and they come to the milling company and say the price is too high to sell at a profit and force them to drop the price.

Q. And actually take a loss? A. It certainly has to reduce its price but I cannot say it takes a loss.

Q. The price from the milling company to the partnership 30 depends on the wholesale price on the market? A. Yes, on market conditions.

Mr. Griffin: I put in the 3 invoices as EXHIBIT "B." Evidence concluded. Judgment reserved. Argument follows:

RECORD
In the
Exchequer Court
of Canada

No. 14
Appellant's
Case
Duncan
Gavin
Cross Exam
Sept. 27, 1937
(Contd.)

PART II.

EXHIBIT No. 4

RECORD

*In the
Exchequer Court
of Canada*Appellant's
Exhibit

No. 4

Declaration of
Partnership
Oct. 2, 1933

DECLARATION OF PARTNERSHIP

PROVINCE OF BRITISH COLUMBIA: }
 COUNTY OF VANCOUVER: }
 CITY OF VANCOUVER: }

WE, DUNCAN GAVIN, of 1149 West 57th Avenue in the City of Vancouver, Province of British Columbia, Rice Merchant, ERNEST DAVID DOWLER, of 3790 Alexandra Street in the City of Vancouver, British Columbia, Merchandise Broker, JOHN C. RANKING, of 4957 Angus Avenue in the City of Vancouver, British Columbia, Rice Merchant, ALEXANDER STRACHAN GAVIN, of Suite 23, 1160 Nicola Street in the City of Vancouver, British Columbia, Accountant, F. A. LOESCHER, of 910 East Chapman Avenue in the Town of Orange in the State of California, one of the United States of America, Retired Rice Merchant, ALFRED EFFINGHAM MASON, of 2590 West 2nd Avenue in the City of Vancouver, British Columbia, Rice Merchant, NORMAN LEE LAUHLAND, of 1907 Colligwood Street in the City of Vancouver, British Columbia, Rice Merchant, and JACOB FREDERICK SACHS, of 2546 West 7th Avenue in the City of Vancouver, British Columbia, Rice Miller, HEREBY CERTIFY:

1. That we intend to carry on trade and business as buyers and marketers of Rice and Rice Products at 339-345 Railway Street, in the City of Vancouver in the Province of British Columbia in partnership, under the name and firm of "The Canada Rice Sales Company."

2. That the said partnership has subsisted since the 2nd day of October 1933.

3. And that we are the only members of the said Partnership.

30

WITNESS our hands at the City of Vancouver in the Province of British Columbia this Second day of October in the year of our Lord One thousand nine hundred and thirty-three.

Messrs. D. Gavin, E. Dowler Ranking, A. Gavin, Sachs, Mason and Lauchland

10 Signed in the presence of
"E. Fox"
"E. K. Weiss"

D. Gavin
E. D. Dowler
J. C. Ranking
A. S. Gavin
J. F. Sachs
A. E. Mason
N. L. Lauchland
F. A. Loescher

RECORD
In the
Exchequer Court
of Canada
Appellant's
Exhibit
No. 4
Declaration of
Partnership
Oct. 2, 1933
(Contd.)

EXHIBIT A

MEMORANDUM OF AGREEMENT made this Second day of October in the year of our Lord One thousand nine hundred and thirty-three:

Appellant's
Exhibit A
Agreement
D. Gavin et al
Oct. 2, 1933

BETWEEN:

20 DUNCAN GAVIN, of 1149 West 57th Avenue in the City of Vancouver, Province of British Columbia, Rice Merchant, both for himself and on behalf of the wife and children of the late George D. Gavin, ERNEST DAVID DOWLER, of 3790 Alexandra Street in the said City of Vancouver, Merchandise Broker, JOHN C. RANKING, of 4957 Angus Avenue in the said City of Vancouver, Rice Merchant, ALEXANDER STRACHAN GAVIN, of Suite 23, 1160 Nicola Street in the said City of Vancouver, Accountant, F. A. LOESCHER, of 910 East Chapman Avenue in the Town of Orange in the State of California, one of the United States of America, Retired Rice Merchant, ALFRED EFFINGHAM MASON, of 2590 West 2nd Avenue in the said City of Vancouver, Rice Merchant, NORMAN LEE LAUHLAND, of 1907 Collingwood Street in the said City of Vancouver, Rice Merchant, and JACOB FREDERICK SACHS, of 2546 West 7th Avenue in the said City of Vancouver, Rice Miller:

WITNESSETH that it has been agreed by and between the parties hereto as follows:

1. The parties hereto agree to become and be partners in
40 the business of buying and selling Rice and Rice Products, upon

RECORD
In the
Exchequer Court
of Canada

Appellant's
 Exhibit A
 Agreement
 D. Gavin et al
 Oct. 2, 1933
 (Contd.)

and subject to the terms, conditions and stipulations herein set forth and said partnership shall be registered as a General Partnership under the Partnership Act of British Columbia.

2. The partnership shall commence on the 2nd day of October, 1933, and shall continue until terminated in the manner hereinafter provided.

3. The firm name and style of the partnership shall be CANADA RICE SALES COMPANY and none of the partners shall enter into any engagements on behalf of the firm except in the firm's name. 10

4. The firm shall have its officers and carry on the business at 339-345 Railway Street in the City of Vancouver and at such other place or places as shall from time to time be agreed upon.

5. The profits earned in the said business shall belong to the partners in the following shares and any losses shall be borne and paid by the partners in the same proportions, that is to say:

Duncan Gavin	17.22/2300
E. D. Dowler	17.21/2300
J. C. Ranking	5.19/2300
A. S. Gavin	5.19/2300

20

Duncan Gavin on behalf
 of the wife and children
 of the late George D.

Gavin	5.19/2300
F. A. Loescher	42.74/2300
A. E. Mason	4.48/2300
N. L. Lauchland	1.39/2300
J. F. Sachs	1.39/2300

6. The partnership may be dissolved at any time by partners representing a majority in interest upon giving thirty (30) days' notice in writing to the other partners and such notice may be personally delivered to the other partners or may be sent to them by registered mail addressed to them at their respective addresses as hereinbefore set out and shall be deemed to have been delivered on the day following the day on which they are posted. 30

7. Meeting of the partners shall be held from time to time as occasion requires and shall be called and conducted in the manner in which meetings of shareholders of private companies are commonly called and conducted and the Articles of Association of Canada Rice Mills Limited may be referred to as a guide. Votes shall be given in accordance with the interest of the partner voting and a majority in interest shall govern and the decision of any such meeting shall be binding upon all members of the partnership. 40

8. In the event of any proposal being made in the conduct of the affairs of the Canada Rice Sales Company and being supported by four of the partners and opposed by four of the partners the Chairman of any meeting shall not have the right to exercise a casting vote until the matter in difference shall be settled by arbitration as hereinafter provided. In the event of such a proposal being proposed and supported by four of the partners and opposed by four of the partners as aforesaid, the matter in difference shall be submitted to arbitration under the Arbitration
- 10 Act of British Columbia, to a single arbitrator if unanimously agreed upon by the partners or otherwise to three arbitrators, one to be chosen by the four partners supporting the proposal and one to be chosen by the four partners opposing the proposal and the third by the two arbitrators so appointed. The question to be submitted to the arbitrator or arbitrators shall be. "Is the proposal in the best interests of the partnership?" The decision of the arbitrator or arbitrators shall be final and conclusive on said question and when the arbitrator or arbitrators shall have made their
- 20 award a meeting of the partners shall immediately be convened and the proposal again submitted and the Chairman of the meeting shall declare it to be carried or not carried in accordance with the decision of the arbitrator or arbitrators.

9. In the event of the death of any partner the business of the partnership shall (subject to the dissolution at an earlier date pursuant to clause 6 hereof) be continued by the surviving partners until the end of the then current fiscal year of the partnership operations, and the Estate of the deceased partner shall have the benefit of all profits earned and shall contribute to all losses incurred during the whole of the current fiscal year or until the
- 30 partnership is dissolved at an earlier date under said clause 6.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

SIGNED, SEALED and DELIVERED

In the presence of:

Duncan Gavin
Ernest David Dowler
John C. Ranking
Alexander Strachan Gavin
F. A. Loescher
Alfred Effingham Mason
Norman Lee Lauchland
Jacob Frederick Sachs

RECORD

*In the
Exchequer Court
of Canada*

Respondent's
Exhibit
No. 5
Statement of
Division of
Profits and
Losses
Canada Rice
Mills

EXHIBIT No. 5

THE CANADA RICE SALES COMPANY
DIVISION OF PROFIT OR LOSSES

F. A. Loescher	42.74%
Duncan Gavin	17.22%
E. D. Dowler	17.21%
J. C. Ranking	5.19%
A. S. Gavin	5.19%
Duncan Gavin on behalf of the wife and children of the late George D. Gavin	5.19%
A. E. Mason	4.48%
N. L. Lauchland	1.39%
J. F. Sachs	1.39%

10

Respondent's
Exhibit
No. 1
Regulations
Under
Special War
Revenue Act
(Extract)
Jan. 1, 1935

EXHIBIT No. 1

REGULATIONS
DEPARTMENT OF NATIONAL REVENUE, CANADA
EXCISE DIVISION

Effective on and after January 1, 1935.

6. COMPUTATION OF TAX.

20

LICENSED MANUFACTURERS:

In respect of goods subject to Consumption or Sales Tax sold by retail by the manufacturer or producer thereof in Canada, the value of the goods for purposes of the tax will be determined by the Minister of National Revenue in each class of cases.

In respect of goods subject to Consumption or Sales Tax, sold to retailers only, by the manufacturer thereof in Canada, the wholesale price for purposes of transfer by the manufacturer to his wholesale branch(es) will be determined by the Minister of National Revenue in each class of cases.

30

In respect of goods subject to Consumption or Sales Tax sold or transferred by the manufacturer or producer thereof in Canada, to his own wholesale branch(es), the value for purposes of the tax shall not be less than the wholesale price.

The "Wholesale Price," for purposes of this Regulation, shall be the price at which the goods are regularly sold in representative quantities in the ordinary course of business to bona fide independent wholesalers.

In cases where vendor and purchaser are inter-related, associated, or affiliated concerns, or where one is subsidiary to the other, the price at which the goods are regularly sold to bona fide independent wholesalers by either of them, in the ordinary course of business, shall be the value upon which the tax is payable.

- 10 Where a manufacturer operates an unlicensed wholesale branch and transfers his goods thereto for Sales Tax purposes, the tax applies on shipment of the goods from his factory premises, whether on sale, consignment, or for stock in his own branch or branches.

Where a manufacturer transfers his products to his unlicensed wholesale branch(es) the tax payable on such goods shall be accounted for on the manufacturer's tax return on or before the last day of the month succeeding the month during which the transfer was made.

- 20 Where a manufacturer has transferred his products to his unlicensed wholesale branch(es) and paid the prevailing tax thereon, no allowance will be permitted in respect of fluctuations in the rate of the tax on the goods previously transferred.

- If a manufacturer accounts for tax on the transfers of his products from his factory to his unlicensed wholesale branch(es) and deducts the discount fixed by the Minister as applicable to that class of goods, the discount so fixed includes all other discounts of any nature whatsoever, i.e., no cash, quantity or other special discounts may be deducted from the list prices of the goods in
30 addition to the discount fixed by the Minister.

The preceding paragraph applies to all classes of goods, where discounts being used are those fixed by the Minister as applicable to such classes of goods, but does not apply to those cases where manufacturers are transferring their goods to their wholesale branch(es) at wholesale prices fixed by regular sales to bona fide independent wholesalers in the ordinary course of business.

RECORD
In the
Exchequer Court
of Canada

Respondent's
Exhibit
No. 1
Regulations
Under
Special War
Revenue Act
(Extract)
Jan. 1, 1935
(Contd.)

EXHIBIT No. 2
(COPY)

August 6th, 1935.

RECORD
In the
Exchequer Court
of Canada

Respondent's
Exhibit
No. 2
Letter
Canada Rice
Mills

D. Sim, Esq.,
Commissioner of Excise,
Dept. of National Revenue,
Ottawa, Ontario.

to
Commissioner
of Excise
Aug. 6, 1935

Dear Sir:

Referring to the interview the writer had with you regarding The Canada Rice Sales Co., when he was in Ottawa recently. 10

I think I stated that before this Company was formed our Accountant interviewed your Department here and advised him what we proposed doing. I now find I was not correct in this. What I had in mind was a previous suggestion somewhat along the same lines but which was given up at that time.

The formation of The Canada Rice Sales Co., arose in this way. Our Chartered Accountants, Messrs. A. H. Rathie & Co., advised us that in their opinion it would be of advantage to the Company if a more accurate system of production costs were kept separating the selling costs entirely from the cost of Rice plus 20 landing and milling charges. In discussing this suggestion the question of selling operation then arose and upon looking up The Canadian Manufacturers Association's Sales Tax Pamphlet dated February 1st, 1932, on page 3 the following clause appears "Fair Price-Power of Minister to determine": Section 98 of the Act provides that where goods subject to Sales Tax are sold at a price which in the judgment of the Minister is less than the fair price on which Sales Tax should be imposed the Minister shall have the power to determine the fair price and tax shall be payable on the price so determined. 30

"The explanatory note, published when this legislation was introduced stated that this provisions was designed particularly to cover those cases where the vendor and the purchaser are inter-related associated or affiliated concerns or where one is subsidiary to the other. It stated that it had been found by experience that in such cases the price at which one concern sells to the other and on which Sales Tax is computed has been at times set at a figure very much below even the cost or production. The provision was designed to check the evasion of Sales Tax in this or similar ways by giving the Minister in such cases power to determine and set a fair 40 price on which Sales Tax shall be computed and paid."

The foregoing seems to set up a situation permitting the method we adopted but subject to the Minister's approval so that this should not be unfairly used. For this reason we did not actually call the attention of your Department to our intention because it did not occur to us that there was a question as to its legality but the spread of the profit if any between the two companies was under the act subject to your approval and this would be dealt with upon the regular inspections. Upon looking up the Act itself this appeared to confirm the information contained in The Canadian Manufacturers' Assn. pamphlet. We may say that upon reading the Act we could not see any definition of the term "Sales Price" other than that contained in Part XIII Clause 85 which certainly did not convey to us the idea that the 'Sales Price' must be the price which the Wholesale trade was in the habit of paying. We are calling your attention to this so that you will appreciate the fact that insofar as we were aware our methods were strictly in accordance with what we believed to be the meaning and intention of the Sales Tax Act.

We find that the net returns of the Sales Co. was only 3½% of our total sales. This is certainly not an excessive profit. This would be reduced if the writer had drawn any salary, although giving his full time in the interest of the Company he does not draw any salary whatever as owing to the severe competition of Orientals he considers it essential to the safety of the Company to build up a sound financial position.

When the writer saw you he was on his return from a trip to Quebec and other Canadian Wholesale centres in the interests of the Sales Company.

We trust that you, if our understanding of the powers given you by the Act is correct, will see your way to give our method of operation your approval.

We have referred to Oriental competition and although they cannot now bring in Japanese rices owing to the recent Surtax which has been made effective it is too late to do us any good as not being able to foresee the future we decided to contract all buyers until December 31st upon this grade, and we may say it was necessary to do this business at a loss to meet the Japanese competition. This will show you the difficult position we are in.

We also wish to show you the way the Sales Tax operates to our disadvantage in the case of Importation of white rices. On February 25th, 1935, we received a cable from Messrs. A. B. Moulder & Co., in Hongkong, quoting White Siam Rice @ \$U.S. 1.87 f.o.b. Hongkong. The laid down cost on this would be as follows:

RECORD
 In the
 Exchequer Court
 of Canada
 Respondent's
 Exhibit
 No. 2
 Letter
 Canada Rice
 Mills
 to
 Commissioner
 of Excise
 Aug. 6, 1935
 (Contd.)

RECORD
In the
Exchequer Court
of Canada
 Respondent's
 Exhibit
 No. 2
 Letter
 Canada Rice
 to
 Commissioner
 of Excise
 Aug. 6, 1935
 (Contd.)

Cost—\$1.87 per 100 lb.	\$37.40 per ton
Duty	20.00 “ “
Sales Tax 6%	3.45 “ “
Excise 3%	1.73 “ “
Freight	4.00 “ “
Terminal Charges at Vancouver approx.	1.50 “ “
	<u>\$68.08</u>

(Local Wholesale)—Prices for this grade ruled about \$74.00 per ton when the rice would arrive which price included Sales Tax. In our case it was Sales Tax @ 6%—\$4.20 per ton as compared with the sales tax of \$3.45 paid by Chinese importers. In view of these exceedingly small margins we are at times compelled to accept, sometimes even having to sell at a loss as in the case of Japans mentioned. This discrepancy in favour of Importers is a serious handicap.

We feel that in view of the above facts we have set out something should be done by your Department to relieve the situation. 20

Yours very truly,

THE CANADA RICE MILLS LTD.,

Duncan Gavin
 President.

DG/F

EXHIBIT No. 3

November 13th, 1935.

Respondent's
 Exhibit
 No. 3
 Letter
 Griffin, Mont-
 gomery &
 Smith
 to
 Commissioner
 of Excise
 Nov. 13, 1935

The Hon. J. E. Ilsley, K.C., M.P.,
 Minister of National Revenue,
 Ottawa.

Sir:

Canada Rice Mills Limited
 re Sales Tax Assessment

30

We have been instructed by the above Company to submit to you for favourable reconsideration the assessment in respect of sales taxes recently levied against our clients by the Collector of National Revenue at Vancouver, of which the particulars are as follows:

Oct. 23/35.- Sales Tax arrears per Audit No. 51—L. J. Thorburn:	\$5500.63
Penalty, Interest to Oct. 31/35:	503.03
	<u>\$6003.66</u>

40

The position taken by your Department is discussed in a letter to our clients from the Excise Division, Ottawa, dated October 19th, 1935, and in a letter from the Collector of National Revenue at Vancouver to our clients dated October 23rd, 1935. Briefly, the point at issue is that our clients have accounted for sales taxes on the basis of sales of cleaned rice by them to a firm called Canada Rice Sales Co., whereas your Department takes the position that sales taxes must be based on the prices charged by Canada Rice Sales Co. to wholesalers or other independent purchasers.

10 Our clients feel that they are entitled to a favourable reconsideration of the whole matter upon the following facts and grounds:

1. Prior to the month of October 1933 when the Canada Rice Sales Company was formed our clients found that they were operating under a very serious handicap for reasons of competition and otherwise, and after a careful consideration of the Special War Revenue Act and the Regulations issued thereunder in connection with sales tax it was decided to form a separate organization to carry on the selling end of the business. In making this
20 decision our clients considered that the proposed selling scheme was fully justified by the Statute and they appreciated that with regard to sales taxes it would be subject to the approval of the Minister which in view of all the circumstances they thought and still think should not be withheld.

2. The letter of October 19th, 1935, from the Excise Division at Ottawa contains the statement that the basis used by our clients when accounting for sales tax on their products was not first discussed with the Departmental officers in Vancouver. In reply to this suggestion our clients wish to point out that at the
30 beginning of this year they both verbally and in writing requested the Vancouver office of your Department to send an official to check their records. It was not, however, until the end of June that an official visited the Company and all the records both of the Manufacturing Company and the Sales Company were then placed before him. In these circumstances our clients feel that their course of action should not be criticised and they do not know of any regulation which requires a proposed scheme to be submitted to the Department before being put into effect, and their records of course have been always open for examination at
40 any time.

3. The ruling of your Department in the present case that the sale price on which sales tax is based must be the price to the wholesale trade does not take into account the fact that there are a large number of traders or jobbers who either buy goods in Canada from Manufacturers or import them and then resell

RECORD
—
In the
Exchequer Court
of Canada
—
Respondent's
Exhibit
No. 3
Letter
Griffin, Mont-
gomery &
Smith
to
Commissioner
of Excise
Nov. 13, 1935
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada
 Respondent's
 Exhibit
 No. 3
 Letter
 Griffin, Mont-
 gomery &
 Smith
 to
 Commissioner
 of Excise
 Nov. 13, 1935
 (Contd.)

substantially to the wholesale trade. In other words, such firms are interposed between manufacturer and wholesaler and the sales tax paid by the Manufacturer is based on a price substantially less than the price paid by the wholesaler. These intermediate traders in effect occupy the same relative position as Canada Rice Sales Company in the present case. This has an important bearing on the question of competition and the following is an instance: The Globe Trading Company of Montreal which purchases large quantities of cleaned rice and sells to the wholesale trade have stated that our clients could not compete with European mills and that our clients had lost a great deal of business accordingly. Many of these European shipments get the benefit of one-half of the regular duty and there is a corresponding advantage in the amount of sales taxes which places our clients at a serious disadvantage. 10

4. The position from the point of view of Oriental competition is possibly even more serious. Before the Canada Rice Sales Co. was formed the loss suffered by our clients in relation to sales taxes as compared with sales taxes paid by Chinese Importers amounted to \$8000.00 per annum based upon a tonnage of 7000 tons at \$1.15 per ton. The following example shows how this worked out: 20

An entry was passed through the Vancouver Customs House recently clearing 200 mats of Chinese cleaned rice containing 8500 lbs. of rice. The value of this rice on the dock to the importer would be as follows:

8500 lbs.	\$329.46	
Add cartage, say	3.25	
Gross Profits, say 15%	46.00	
(Off this must come rent, insurance and selling costs and overhead, leaving a net of not more than 10%)		30
	<u>\$378.71</u>	

The sales tax charged against the Chinese importer on this shipment was as follows:

Cost f.o.b. Hongkong	\$213.00	
Duty	85.00	
	<u>\$298.00</u>	40
	at 6%:	\$17.88

This should be compared with the sales taxes charged against our client on a sale of an equal quantity at the same price, i.e. \$378.71 at 6%: \$22.72.

The difference to the disadvantage of our clients on 8500 lbs. of rice would therefore be \$4.84 or \$1.15 per ton.

5. We are instructed that there are many thousand tons of this white or cleaned rice imported by Orientals according to Government Statistics, and our clients are competing against these Oriental imports through the Port of Vancouver, and the same situation exists in connection with imports through Halifax, St. John, Montreal and Quebec.

6. This disadvantage (if our clients have to pay the sales tax based on the price to the wholesale trade) is caused by the necessary inclusion in all sales of such overhead items as the following:

Annual depreciation (say 5%) on Dock, Warehouse, Mill, etc.	\$8000.00
Bank interest on loans, say,	7664.00
Wages and salaries for milling	30000.00
Insurance	4053.00
	<hr/>
	\$49717.00

20

These items of expense are in addition to any items which have to be borne by Orientals in connection with importation of white rice but according to the position taken by your Department they must be added to the price on which sales tax is calculated against our clients. This is submitted in support of our clients' contention that in their case the basis of sales tax should be the actual selling price to the Canada Rice Sales Co.

7. Our clients point out that the position presently taken by your Department discriminates seriously against them in the matter of freight, as Oriental shippers do not have to pay sales tax on this item. They instruct us that a fair estimate of their imports would be 12000 tons of rough rice per annum upon which they pay freight at an average of \$4.25 per ton, or \$51,000.00 per annum. Our clients have to pay sales tax on this large sum whereas their Oriental competitors escape it.

8. Our clients respectfully submit that you should also take into account the fact that when they sell to wholesalers they must base their price on sales of rice on which they often have to give long datings running from 30 to 120 days terms. They cannot afford to do this without extra charge and they submit that they should not be called upon to pay sales taxes which are based on such prices, in other words, they are not strictly speaking market prices at which the commodity can usually be purchased for cash.

RECORD
In the
Exchequer Court
of Canada
Respondent's
Exhibit
No. 3
Letter
Griffin, Mont-
gomery &
Smith
to
Commissioner
of Excise
Nov. 13, 1935
(Contd.)

RECORD
 In the
 Exchequer Court
 of Canada
 Respondent's
 Exhibit
 No. 3
 Letter
 Griffin, Mont-
 gomery &
 Smith
 to
 Commissioner
 of Excise
 Nov. 13, 1935
 (Contd.)

9. Your Department has taken the position that our clients have failed to account for proper sales taxes to an amount of about \$3300.00 for the year 1934 upon a tonnage of approximately 7000 tons of rice. This shows that the advantage which our clients are obtaining through the operation of the Sales Co. is less than one-half of what would be necessary to put them upon an equal competitive basis with Oriental importers in the light of the figures given in clause 4 hereof. The existing assessment if enforced against our clients would in their view penalize them because they have made heavy investments and employ Canadian labour, as 10
 against Oriental importers who do nothing of this kind in the way of building up permanent industries in Canada.

Our clients' records show that during the past three years they have paid the following amounts for sales taxes:

1933: (6 months' period April to September).	
With selling expenses included in the sale price and therefore taxed:	\$8,327.13
1934: (same 6 months' period).	20
With selling expenses eliminated from the sale price on which sales tax is based:	\$11,290.51
1935: (same 6 months' period).	
With selling expenses eliminated from the sale price on which sales tax is based:	\$12,915.61

This shows that as a result of our clients' selling scheme they 30
 have been able to compete on more favourable terms (particularly
 with Orientals) with a consequent increase in volume of business
 and a corresponding advantage to the Government in the amount
 collected for sales tax.

10. Our clients quite appreciate that under the Statute and 40
 Regulations you are given wide powers and discretion in the way
 of determining a fair price on which sales tax shall be imposed
 and they have carefully studied and considered the explanatory
 notes published in the Sales Tax Pamphlet issued by the Canadian
 Manufacturers' Association. They respectfully submit that Sec-
 tion 98 of the Statute and certain of the Regulations were passed
 in consequence of certain situations in which it was found that
 the price on which sales tax was based was fixed by the seller at

a figure below even cost of production and the provisions in question were enacted or passed for the purpose of preventing the evasion of sales taxes in this or similar ways. It is submitted, however, that this is very far from being the present case and that our clients have never had the slightest intention of evading the payment of sales tax on a fair and equitable basis. Their intention has been to remain strictly within the operation of the Statute and at the same time to enable them to compete fairly with oriental and other shippers and importers, and they have made no attempt
 10 to devise a scheme which would give them an advantage over other vendors in relation to sales tax.

11. During the recent years of depression our clients have spent about \$180,000.00 on plant and machinery and have constructed a deep water dock having a frontage of 500 feet and capable of accommodating modern freight steamers of the largest type. They have installed up to date machinery for producing table rices imported from all rice producing countries and in demand by Canadian consumers and also machinery for the production of rice flour and ground rice. They have also recently
 20 completed a plant for the manufacture of Rice Starch so that all broken rices can be made use of. The expenditure which they have made in these ways and also in connection with regular current pay rolls has been extremely heavy. Our clients have done all of this with the idea of building up a substantial and permanent industry for the future, and they submit with all respect that they should not be unduly hampered by the operation of regulations and the exercise of powers to a greater extent than is necessary to comply strictly with the Statute. In other words, our clients do not seek any unfair advantage over their competitors
 30 and do not wish their competitors to have any unfair advantage over them.

12. Our clients point out that at various times during recent years and particularly during the period when rice has been subject to sales tax they have represented to the Authorities that one method of placing all importers on an equal basis (and it must be remembered that all rice consumed in Canada has to be imported in one form or another) would be to make rice subject to payment of sales tax when cleared through the Customs. The Canadian Government however has not seen fit to adopt this plan.

40 On the above facts we bespeak your favourable consideration.

We have the honour to be,

Sir,

Your obedient servants,

GRIFFIN, MONTGOMERY & SMITH,

DSM/R.

Per D. S. Montgomery

RECORD
 In the
 Exchequer Court
 of Canada
 Respondent's
 Exhibit
 No. 3
 Letter
 Griffin, Mont-
 gomery &
 Smith
 to
 Commissioner
 of Excise
 Nov. 13, 1935
 (Contd.)

RECORD

*In the
Exchequer Court
of Canada*Appellant's
Exhibit
No. 1A
Letter
Asst.
Supervising
Auditor of
Dept. of
National
Revenue to
K. Takahashi
May 15, 1936

EXHIBIT 1A

NATIONAL REVENUE, CANADA

K. Takahashi, Esq.,
620 Alexander Street,
Vancouver, B.C.Room 312 Custom House,
Vancouver, B.C.
15th May 1936.

Dear Sir:

I have pleasure to advise that the Department has approved the basis for tax that Japanese rice millers may use from the 1st November 1935 in accounting for the sales tax on their sales of cleaned rice, which shall be as follows: 10

Cost of Brown or Paddy Rice (including draft in Canadian or U.S. funds, special excise tax and transportation charges known as cost, insurance and freight—the foregoing may be known as cost of draft)	xxxx	
Handling and Harbour dues	xxxx	
Commissions	xxxx	
Cartage	xxxx	
Milling, per ton	3.00	
	—	

Plus 15%

xxxx	20
xxxx	
—	
xxxx	

Tax on the total at 6% up to and including 1st May 1936 and 8% from May 2nd onwards

xxxx

This amount to be returned to the Department on Forms B.93 and B93A before the last day of the month following that during which the raw material was cleared through Customs and on the total weight imported, with the undernoted exceptions. 30

On Sales at special prices, the selling price of which would be less than the above computation, you will be permitted to pay tax on the actual selling price at the rate of tax in effect at the date of sale providing adequate records are maintained in English to permit these transactions to be checked in your regular books of account. The quantities thus sold may be deducted from the quantity imported before computation of the tax under the method prescribed. You will be held strictly accountable for the total weight of rice imported.

If the foregoing instruction is not clear I shall be pleased to give you further advice and guidance as it is desired there shall be no misundersanding in respect of this matter. 40

Yours truly,

A. J. W. PAGE,
ASST. SUPERVISING AUDITOR

EXHIBIT B

RECORD
 In the
 Exchequer Court
 of Canada
 Appellant's
 Exhibit B
 Appellant's
 Invoices of
 Rice Sales (3)
 Sept. 11, 1937
 Sept. 17, 1937

Our Order No. The Canada Rice Sales Co. Invoice No.
 Distributors for 3689
 The Canada Rice Mills Ltd.
 Vancouver, B.C.

Sold to James Mah Broker Terms
 Address 404 Princess Ave. Ship to
 Route by Call Address
 Date Sold Sept. 11/37 Date Delivered Date Billed Ledger Folio

Quantity	Description	Weight			
20	Bags No. 2 Simm	100	89.40		89.40

Our Order No. The Canada Rice Sales Co. Invoice No.
 7395 Distributors for 3719
 The Canada Rice Mills Ltd.
 Vancouver, B.C.

Sold to United Fraser Growers Broker Terms
 Address 331 Georgia St. E. Ship to
 Route by Deliver Address
 Date Sold Sept. 17/37 Date Delivered Date Billed Ledger Folio

Quantity	Description	Weight			
40	Bags No. 2 Simm	50	81.50		81.50

Our Order No. The Canada Rice Sales Co. Invoice No.
 7405 Distributors for 3720
 The Canada Rice Mills Ltd.
 Vancouver, B.C.

Sold to W. Wong Broker Terms
 Address 8675 Logan St. Ship to
 Route by Deliver Address
 Date Sold Sept. 17/37 Date Delivered Date Billed Ledger Folio

Quantity	Description	Weight			
40	Bags No. 2 Simm	50		106.00	

C.O.D.

RECORD

*In the
Privy Council*No. 17
Registrar's
Certificate
Apr 24 1939

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN :

CANADA RICE MILLS LIMITED,

(Defendant) Appellant,

AND

HIS MAJESTY THE KING, on the informa-
tion of the Attorney-General of Canada,

(Plaintiff) Respondent.

I, the undersigned Registrar of the Supreme Court of Canada, 10
DO HEREBY CERTIFY that the foregoing printed document
from Page 1 to Page 70 inclusive constitutes the Record of Pro-
ceedings in the above cause.

DATED at Ottawa, this 24TH day of April, A.D. 1939.

J. F. Smellie

Registrar of the Supreme
Court of Canada

No. 18.

**ORDER IN COUNCIL granting Special Leave to Appeal
to His Majesty in Council.**

AT THE COURT OF SAINT JAMES.

The 25th day of May, 1939.

Present :

HIS ROYAL HIGHNESS THE DUKE OF GLOUCESTER.

HIS ROYAL HIGHNESS THE DUKE OF KENT.

HER ROYAL HIGHNESS THE PRINCESS ROYAL.

10 HER ROYAL HIGHNESS PRINCESS ARTHUR OF CONNAUGHT.

LORD PRESIDENT.

LORD MACMILLAN.

LORD CHATFIELD.

MR. CHANCELLOR OF THE DUCHY OF LANCASTER.

WHEREAS His Majesty, in pursuance of the Regency Act, 1937, was pleased, by Letters Patent dated the fifth day of May, 1939, to delegate and grant unto Her Majesty The Queen, His Royal Highness The Duke of Gloucester, K.G., K.T., K.P., G.C.M.G., G.C.V.O., His Royal Highness The Duke of Kent, K.G., K.T., G.C.M.G., G.C.V.O., Her Royal Highness
20 The Princess Royal, C.I., G.C.V.O., G.B.E., and Her Royal Highness Princess Arthur of Connaught, or any two of them, as Counsellors of State, full power and authority during the period of His Majesty's absence from the United Kingdom to summon and hold on His Majesty's behalf His Privy Council and to signify thereat His Majesty's approval of any matter or thing to which His Majesty's approval in Council is required :

AND WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 5th day of May 1939 in the words following, viz. :—

30 " WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Canada Rice Mills Limited in the matter of an Appeal from the Supreme Court of Canada between the Petitioners Appellants and Your Majesty Respondent setting out (amongst other matters) that the Petitioners pray special leave to appeal from a Judgment of the Supreme Court pronounced on the 20th February 1939 dismissing an Appeal of the Petitioners from a Judgment of the Exchequer Court of Canada pronounced on the 13th August 1938 whereby the
40 Petitioners were adjudged liable to Sales Tax amounting to \$9,741.55 and penalty interest \$1,258.2 in respect of sales of rice

RECORD.
—
In the Privy
Council.
—
No. 18.
Order in
Council,
granting
Special Leave
to Appeal to
His Majesty
in Council,
25th May,
1939.

L.S.

RECORD.

In the Privy
Council.

No. 18.
Order in
Council,
granting
Special Leave
to Appeal to
His Majesty
in Council,
25th May,
1939.

made by the Petitioners between October 1933 and August 1936 : that the arrears of Sales Tax were levied in purported pursuance of Sections 85 and 86 (1) of The Special War Revenue Act Cap. 179 R.S.C. 1927 as amended by Section 11 of Cap. 54 S.C. 1932 as further re-enacted and amended by Section 5 Cap. 45 S.C. 1936 : that pursuant to a decision in June 1932 the shareholders of the Petitioners in October 1933 by a declaration of partnership under the Partnership Act of British Columbia (Cap. 191 R.S.C. 1924) set up a partnership called the Canada Rice Sales Company for the purpose of buying selling and otherwise dealing in rice and other products of a similar nature : that the decision to form the Canada Rice Sales Company was arrived at without reference to any prospective liability of the Petitioners to Sales Tax : that the Collector of National Revenue at Vancouver in October 1935 assessed the Petitioners to arrears of Sales Tax such arrears being computed by reference to the difference between the prices received by the Petitioners pursuant to the contracts of sale made with the Canada Rice Sales Company and the higher prices received by the Canada Rice Sales Company from its customers upon resale of the rice purchased by the Company from the Petitioners : that the Petitioners appealed to the Exchequer Court : that the Exchequer Court delivered judgment on the 13th August 1938 dismissing the Appeal : that the Petitioners appealed to the Supreme Court : that on the 20th February 1939 the Supreme Court unanimously dismissed the Appeal : that by reason of the nature both of the subject matter and of the questions of law involved the Appeal raises issues of far reaching importance likely to affect the liability of large numbers of taxpayers in Canada both in relation to Sales Tax and other taxes and is of great public interest : And humbly praying Your Majesty in Council to grant to the Petitioners special leave to appeal from the Judgment of the Supreme Court of the 20th February 1939 or for such other Order as to Your Majesty in Council may seem fit :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 20th day of February 1939 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs :

“AND THEIR LORDSHIPS do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal.”

10 NOW, THEREFORE, His Royal Highness The Duke of Gloucester, His Royal Highness The Duke of Kent, Her Royal Highness The Princess Royal and Her Royal Highness Princess Arthur of Connaught, being authorised thereto by the said Letters Patent, have taken the said Report into consideration and do hereby, by and with the advice of His Majesty's Privy Council, on His Majesty's behalf approve the same and order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

RUPERT B. HOWARTH.

RECORD.
In the Privy Council.
No. 18.
Order in Council, granting Special Leave to Appeal to His Majesty in Council, 25th May, 1939.