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Customs Duties—Deductions--Tariff Act—Statutory Construction.—International Packers, Limited v. United States.

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interests are untouchable by subsequent legislation, has succumbed by attrition from within Delaware, and disrepute from without as in New York.

The *Coyne* decision is of importance in the corporate world, as significant of the growing receptiveness of courts towards the simplification of holding and operating company relationships. Despite the fact that it will undoubtedly be accepted by most jurisdictions,[10] it fails to appreciate the tenuous position of minority shareholders. These minority shareholders do not seek to enjoin the merger simply because they disfavor merger; on the contrary, merger to them is immaterial. They seek only to remain within the corporate structure. Cash, even where the consideration is indisputably fair, is of no comfort to these shareholders who, having perhaps suffered through the lean years, now seek to reap the benefits of plentiful years to come.

Coyne, furthermore, is distinguishable from the *McNulty* situation in that the plaintiffs' interest in *Coyne* does not serve a legitimate corporate purpose. In *McNulty,* cancellation of the cumulative preferred stock does so since the corporation seeks to initiate a stable dividend policy with respect to the common stock thereby increasing its marketability.

Another factor to be considered with respect to the *Coyne* decision is the tax consequence to the shareholders. Shareholders, forced to terminate their interest, may be subject to substantial capital gain taxes. To subject these shareholders to substantial taxes, in the absence of a legitimate corporate purpose, is patently unfair. Although one obviously assumes the risk of having his shareholder's interest terminated in furtherance of a legitimate purpose, he does not assume such risk in its absence.

LEON ARONSON

Customs Duties—Deductions—Tarriff Act—Statutory Construction.— ***International Packers, Limited v. United States.***[1]—Plaintiff, an importer of canned meat, brought this action in the United States Customs Court from a reappraisement of the value of imported corned beef under the Tariff Act.[2] This merchandise had been valued at the United States sales price less certain deductions[3] allowable under the statute in order to arrive at the United States value for the purpose of applying § 1402(e) of the Tariff Act.[4]

[10] Beloff v. Consolidated Edison Company of New York, 300 N.Y. 11, 87 N.E.2d 561 (1949).

[1] 171 F. Supp. 834 (Cust. Ct. 1959).

[2] 46 Stat. 708, amended, 19 U.S.C. § 1402(a, d-f) (1958).

[3] The deductions that were allowed included certain allowances for ocean freight, insurance, general expenses, profits, loading permits, stamp on bill of lading, Argentine statistical charges, exchange, and placing on board charge.

[4] § 402 of the Tariff Act of 1930, as amended by § 1402(e), in effect during February 1956, at the time of the exportation of this merchandise, provided: "The United States value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale for domestic consumption packed ready for delivery, in the principal market of the United States to all purchasers,

Plaintiff had no quarrel with the use of the United States sales price as the basis for an appraisement value but contended that the retention by the Argentine Government of fifteen per centum of the purchase price paid by the exporter, which payment was a condition precedent to the licensing and exportation of this merchandise was a "necessary expense" from the place of shipment to the place of delivery and thus should have been allowed as a deduction. *HELD,* that such a charge by the Argentine Government was deductible as a "necessary expense" from the place of shipment to the place of delivery.

Although neither this Argentine retention charge nor any similar charge had ever been presented before the Customs Court as regards the precise issue as to whether it would be deductible as a "necessary expense," there are cases which have dealt with similar charges in determining whether such expense incurred by the purchaser should be added to the market value of the goods in order to determine export value under § 1402(d).[5] It has been held than an export tax assessed upon merchandise at the time of exportation is not a part of the market value, for the reason that the tax did not accrue when the manufacturer sold such or similar merchandise but accrued only in case the merchandise was exported.[6] Therefore, where the payment of an export tax depends wholly upon whether the merchandise is exported from the country in which it is purchased, it is no part of the market value thereof for the purpose of applying § 1402(d). This is especially true when the tax is not an excise upon the purchase but rather is an extra charge on the privilege of exporting.[7] This rule is based upon the reasoning that the Export Value section of the Tariff Act seeks to ascertain the market value of goods in the foreign market at the time when such goods are "packed ready for shipment to the United States," i.e. prior to shipment. Consequently when such export taxes are levied at the time of the exportation they form no part of the market value of the merchandise in the foreign market as contemplated by the valuation statute.[8]

The Customs Court relied heavily upon its more recent decision in *United States v. International Commercial Co., Inc.*[9] There again the basis of valuation was not United States value, but value f.o.b. Buenos Aires. The

at the time of exportation of the imported merchandise, in the usual wholesale quantities and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery. . . ."

5 § 1402(d) of the Tariff Act, in substance provides that the export value of imported merchandise shall be the market value or the price which similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, for exportation to the United States plus all costs and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States. § 1402(e) is applied for Tariff Act purposes only in the event that either § 1402(c) or § 1402(d), whichever is higher, is inapplicable.

6 Sternfeld v. United States, 12 Ct. Cust. App. 172 (1924).

7 51 Treas. Dec. 9 (1927).

8 Gee Co. v. United States, 24 Cust. Ct. 508 (1950).

9 26 Cust. Ct. 607 (1951); aff'd, 28 Cust. Ct. 629 (1952).

Court held that a "charge" of twenty per centum imposed by the *Institute Argentino de Promocion del Intercambio* (Corporation for the Promotion of Trade) did not accrue until the merchandise was about to be exported and therefore was a charge or expense that accrued after the merchandise was packed, ready for shipment, and as such could not be added to the export price for the purpose of determining export value.

In order to render a decision in this case, it was necessary for the court to interpret governing Argentine law, and in construing such the Court found that in October 1955, the Argentine Government found it necessary to readjust foreign exchange controls in order to gradually work toward a free market. It was decreed that part of the proceeds from the negotiation of foreign exchange, arising from the controlled exports should be retained by the Government.[10] Accordingly, the Argentine Central Bank regulations provided that all official market exports from the country were to be made against pre-payment or an irrevocable letter of credit opened before shipment. These shipments were made against a revolving irrevocable letter of credit. Before the bank could certify the *Solicitud de Embarque* (application for shipment), it would liquidate the letter of credit by converting the United States dollars to Argentine pesos at the rate of eighteen pesos to one United States dollar and would then deduct the fifteen per centum retention tax from the total peso equivalent. Without the bank's certification of the *Solicitud de Embarque* it would be impossible for the purchaser to export the merchandise.

The Customs Court in the present case reasoned as follows. Inasmuch as the *Commercial Company* case held that the Argentine charge did not accrue until after the merchandise was packed ready for shipment, and, hence, this sum should not be added to the export value, and since the Argentine Retention tax was not a charge after delivery into the United States as an United States Internal Tax would be;[11] and considering that it would be impossible to export the merchandise without having made the payment, it must necessarily follow that such a charge is a "necessary expense" from the place of shipment to the place of delivery.

This case illustrates the type of problem that the Customs Court is faced with when litigation before it requires construction of foreign laws and their operation in relation to the exportation of goods to the United States. Where the laws and official documents in original text are in another language, and are in evidence in the English translation only, the opportunities for confusion, contradiction, and misunderstanding are considerable. In such a case it is important to resolve any conflict that may appear as to foreign law, according to the legislative intent.

The decision in the present case seems fair enough if the Customs Court is to be consistent. Having previously established that similar retention charges are not to be included in determining Export Value

[10] Decree of Argentine Gov't 2002/55 (Oct. 27, 1955), see International Packers supra note 1 at 856.

[11] Burleigh Brooks v. United States, 69 Treas. Dec. 1404 (1936).

specifically because they are levied on the act of exportation itself, it must logically follow that if the expense is "necessary" it must be allowable as a deduction in applying § 1402(e) of the Tariff Act.

EDWARD D. SULLIVAN

Indemnity Contracts—Express Provisions Required for Indemnification for Negligence.—***Metropolitan Paving Co. v. Gordon Herkenhoff & Assoc.***[1]—A property owner brought an action against the city and a road contractor for damages to his property caused by their alleged negligence in the construction of a detour in preparation for the building of a bridge by the contractor. The city filed a third party complaint against the engineering firm which had prepared the plans alleging that the engineer's negligence was the proximate cause of the damage. Thereafter, the contractor filed a counterclaim against the engineer. The engineer, filed a motion to dismiss the third party complaint and counterclaim or, in the alternative for summary judgment, on the grounds that a contract entered into between the engineer and the city with the road contractor contained a provision by which the contractor indemnified the city and the engineer against all claims arising out of any act of omission, misfeasance, malfeasance by the contractor. The trial court granted the engineer's motion for summary judgment. On appeal, the Supreme Court of New Mexico affirmed. Held: It is not necessary to expressly provide for indemnification against negligence in the indemnity contract since the contract clause was broad enough to encompass protection against claims arising out of the indemnitor's negligent acts.

The validity of contracts indemnifying against loss caused by negligence is universally recognized.[2] However, difficulties are encountered in the construction of indemnification agreements wherein the parties fail to refer expressly to negligence. The cardinal rule of interpretation of these contracts is the same as that encountered in any other type of contract, namely the ascertainment of the intention of the parties.[3] In the overwhelming majority of cases, the result reached by the court's interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract, such evidences the parties' intention not to provide for indemnification against negligent acts.[4] This appears to be the

1 66 N.M. 41, 341 P.2d 460 (1959).

2 Sinclair Prairie Oil Co. v. T. Stuart & Son Co., 260 Mass. 242, 177 N.E. 540 (1927); Thompson-Starett v. Otis Elevator Co., 271 N.Y. 36, 2 N.E.2d 35 (1936).

3 In First Trust Co. v. Arcdale Ranch & Cattle Co., 136 Neb. 521, 531, 286 N.W. 766, 772 (1939); the court held: "The general rules which govern the construction and interpretation of other contracts apply in construing a contract of indemnity and in determining the rights and liabilities of the parties there under."

4 Cacey v. Virginia R. Co., 85 F.2d 976 (4th Cir. 1936); Southern Bell Tel. & Tel. Co. v. Meridan, 74 F.2d 983 (5th Cir. 1935); Boston & M. R. Co. v. T. Stuart