

Ottawa, Thursday, September 3, 1992

Appeal No. 2798

IN THE MATTER OF an appeal heard on August 13, 1992,  
under section 81.19 of the *Excise Tax Act*, R.S.C., 1985,  
c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of  
National Revenue dated December 15, 1986, relating to a  
notice of objection served under subsection 81.15(5) of the  
*Excise Tax Act*.

**BETWEEN**

**M. BROWN & SONS LIMITED**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Arthur B. Trudeau  
Arthur B. Trudeau  
Presiding Member

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member

Desmond Hallissey  
Desmond Hallissey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. 2798**

**M. BROWN & SONS LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The appellant cuts steel to size, but does not bend, punch, form or weld it. It was assessed based on the sale price of the goods. The appellant claimed that it is not a manufacturer or producer. The appellant also argued that it falls within the terms of the exception contained in the definition of "manufacturer or producer" set forth in paragraph 2(1)(f) of the Excise Tax Act, as it sells only to consumers in a retail store. The respondent is of the view that the appellant is a manufacturer or producer and that it does not sell its goods in a retail store. The sole issue to decide is whether the appellant was correctly assessed.*

**HELD:** *The appeal is dismissed. The cutting of steel to specific measurements constitutes production activities. Furthermore, the appellant has not substantiated its claim that it is not a manufacturer or producer under the Excise Tax Act.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: August 13, 1992*  
*Date of Decision: September 3, 1992*

*Tribunal Members: Arthur B. Trudeau, Presiding Member*  
*Robert C. Coates, Q.C., Member*  
*Desmond Hallissey, Member*

*Counsel for the Tribunal: Gilles B. Legault*

*Clerk of the Tribunal: Janet Rumball*

*Appearance: Howard A. Baker, for the respondent*

**Appeal No. 2798**

**M. BROWN & SONS LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member  
ROBERT C. COATES, Q.C., Member  
DESMOND HALLISSEY, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) from a decision of the Minister of National Revenue under subsection 81.15(5) of the Act.

The appellant cuts steel to size, but does not bend, punch, form or weld it. On May 16, 1986, the appellant was assessed for \$723.98 including unpaid taxes, penalty and interest. The assessment was based on the sale price of the goods according to subsection 27(1) of the Act (now subsection 50(1)). The appellant filed a notice of objection claiming that it is not a manufacturer or producer and that it sells directly to consumers. The appellant also argued that it falls within the terms of the exception contained in the definition of "manufacturer or producer" in paragraph 2(1)(f) of the Act that states:

*"manufacturer or producer" includes*

...

*(f) any person who, by himself or through another person acting for him, prepares goods for sale by assembling, blending, mixing, cutting to size, diluting, bottling, packaging or repackaging the goods or by applying coatings or finishes to the goods, other than a person who so prepares goods in a retail store for sale in that store exclusively and directly to consumers. (Emphasis added)*

The respondent denied the appellant's claim on the grounds that it does not operate in a "retail store" as prescribed in paragraph 2(1)(f) of the Act.

Three other assessments, also made on May 16, 1986, ultimately resulted in appeals that are still pending before the Tribunal. However, the hearing held on August 13, 1992, dealt exclusively with Appeal No. 2798. The sole issue in this case is to decide whether the appellant was correctly assessed.

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1. R.S.C., 1985, c. E-15, as amended.

The appellant did not submit a brief nor did it attend the hearing. Counsel for the respondent argued that the appellant is a manufacturer or producer under the Act. Counsel affirmed that the mere cutting of steel meets the criteria adopted by the Supreme Court of Canada in *The Queen v. York Marble, Tile and Terrazo Limited*<sup>2</sup> to qualify as a manufacturer or producer under the Act. Moreover, counsel added that the appellant cannot benefit from the exception from marginal manufacturing set forth in the definition of "manufacturer or producer" in paragraph 2(1)(f). There is no evidence, indeed, that the appellant operates in a retail store. Finally, counsel relied upon the decision of the Supreme Court of Canada in *Johnston v. The Minister of National Revenue*,<sup>3</sup> and argued that the appeal should be dismissed since the appellant neglected to submit any evidence establishing that the assessment is incorrect.

The Tribunal agrees with the respondent. At the very least, indeed, the cutting of steel to specific measures constitutes production activities within the meaning of the *York Marble* decision citing the Ontario Supreme Court in *Gruen Watch Company of Canada Ltd. et al. v. Attorney-General of Canada*.<sup>4</sup> Furthermore, given that the appellant has not substantiated its claim that it is not a manufacturer or producer under the Act, the Tribunal is of the view that the appeal should be dismissed in accordance with the *Johnston* case and the Tribunal's own decision in *A.S. 4 Steel Industries Ltd. v. The Minister of National Revenue*.<sup>5</sup>

In light of the foregoing, the appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member

Desmond Hallissey

Desmond Hallissey  
Member

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2. [1968] S.C.R. 140.

3. [1948] S.C.R. 486.

4. [1950] 4 D.L.R. 156.

5. Canadian International Trade Tribunal, Appeal No. AP-89-132, June 11, 1992.