CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, September 6, 1990

Appeal No. 2940

IN THE MATTER OF an appeal heard on February 5, 1990, pursuant to 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 November 5, 1987, with respect to a notice of objection filed pursuant to section 81.17 of the *Excise Tax Act*.

BETWEEN

SHAKLEE CANADA INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal declares that the diet supplements products -- vitamins, minerals and fibre -- sold by the appellant are not "food" within the ordinary meaning of the word and cannot be considered "Food ... for human consumption ... " as intended in section 1 of Part V of Schedule III of the *Excise Tax Act*. Therefore, they do not qualify for exemption from federal sales tax under Schedule III of the *Excise Tax Act*.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. 2940

SHAKLEE CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act -- Schedule III -- Meaning of the word "food" -- Diet supplement products, vitamins, minerals and fibre -- Whether they qualify for exemption from federal sales tax as "Food ... for human consumption ... " under section 1 of Part V of Schedule III of the Excise Tax Act.

Held: *The appeal is dismissed. The Canadian International Trade Tribunal (the Tribunal) finds that the diet supplement products -- vitamins, minerals and fibre -- sold by the appellant are not "food" within the ordinary meaning of the word and cannot be considered "Food ... for human consumption ... " as intended in section 1 of Part V of Schedule III of the Excise Tax Act. Therefore, they do not qualify for exemption from federal sales tax under Schedule III of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 5, 1990*
Date of Decision:	*September 6, 1990*
Tribunal Members:	*Robert J. Bertrand, Q.C., Presiding Member* *Sidney A. Fraleigh, Member* *W. Roy Hines, Member*
Clerk of the Tribunal:	*Molly C. Hay*
Appearances:	*Andrew J. Roman and* *Susan M. Manwaring, for the appellant* *Geoffrey Lester, for the respondent*
Cases Cited:	*The King v. Planters Nut and Chocolate Co., Ltd., (1951) Ex.C.R. 122; Lor-Wes Contracting Ltd. v. The Queen, (1983) 2 F.C. 11 and (1986) 1 F.C. 346; Canterra Energy Ltd. v. Her Majesty The Queen, (1985) 1 C.T.C. 329; Abbott Laboratories, Limited v. Her Majesty The Queen, (1971) C.T.C. 26; Thompson v. Canada, (1988) 3 F.C. 108; The Attorney General of Canada v. Royden Young et al., unreported, F.C.A., July 31, 1989, Court No. A-978-88.*

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***Statutes and Regulations Cited**:*	*Excise Tax Act, R.S.C., 1985, c. E-15, subss.2(1), 50(1), 51(1); ss. 1 and 2 of Part V and s. 1 of Part VIII of Schedule III; Food and Drugs Act, R.S.C., 1985, c. F-27; Canadian International Trade Tribunal, S.C. 1988, c. 56, s. 60.*
***Dictionaries Cited**:*	*The Oxford English Dictionary, 2nd Edition, Clarendon Press, Oxford, 1989; New Lexicon Webster's Dictionary of English Language, Lexicon Publications, Inc., New York, 1987; Le Grand Robert de la langue française, 2e édition, Le Robert, Paris, 1987; Encyclopaedia Universalis, Corpus, Encyclopaedia Universalis, France, 1989.*
***Memoranda Cited**:*	*Excise Communiqués 112/TI and 113/TI.*

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 2940

SHAKLEE CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT J. BERTRAND, Q.C., Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

SUMMARY

This is an appeal pursuant to section 81.19 of the *Excise Tax Act* (the Act). Shaklee Canada Inc. (Shaklee) is a manufacturer and distributor of a range of nutritional products. The goods in issue are diet supplements -- vitamins, minerals and fibre -- sold by Shaklee. The appellant contends that these products are "food" as identified in the Act and as such should be exempt from tax under section 1 of Part V of Schedule III of the Act.

The question for determination in this appeal is whether the goods in issue are "food" within the meaning to be given to that word in the schedule.

The Act contains no definition of "food" or of the other words mentioned in Schedule III. Furthermore, the word "food" is not defined in any other taxing statute. There was no unanimity among the expert witnesses on the meaning of the word "food." The experts' conception of what constitutes food is helpful, but it is not conclusive, particularly in such a case when there are conflicting definitions. The Canadian International Trade Tribunal (the Tribunal) is of the view that the words found in the schedule and in the Act are to be construed as they are understood in common language.

The Tribunal concludes from its examination of the evidence, the dictionary definitions, the labels of the products and the appellant's promotional literature that the goods in issue are not food, but supplements designed to prevent or correct dietary deficiencies in humans. Furthermore, while from a nutritionist point of view the vitamins, minerals and fibre sold by the appellant might be included in the word "food," they are not included in the common understanding of that word. It is clear to the Tribunal that when the word "food" is used, its popular meaning would not include the goods in issue.

As well, considering the evidence and the legislative history, the Tribunal has come to the following conclusions. First, Parliament never intended to encompass the goods in issue in the exempting provision for "foodstuffs." Second, the goods in issue were encompassed under the language that used to be found in section 1 of Part VIII of Schedule III before May 23, 1985, and that is now found in the definition of "health goods" in subsection 2(1) of the Act. Third, the repeal of the specific exemption for "health goods" removed that class of goods from the scope of Schedule III.

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Accordingly, the appeal is not allowed.

THE LEGISLATION

The statutory provisions, as they read at the time relevant to this appeal, are as follows:

Excise Tax Act[1]

> *2(1) ...*
> *"health goods" means any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, sold or represented for use in the diagnosis, treatment, mitigation or prevention of a disease, a disorder, an abnormal physical state or the symptoms thereof in human beings or animals or for use in restoring, correcting or modifying organic functions in human beings or animals;*[2]
>
> *...*
> *"manufacturer or producer" includes*
> *...*
> *(i) any person who sells health goods, other than a person who sells such goods exclusively and directly to consumers, and*[3]
> *...*
>
> *50(1) There shall be imposed, levied and collected a consumption or sales tax at the rate specified in subsection (1.1) on the sale price of all goods*
> *(a) produced or manufactured in Canada*
> *(i) payable, in any case other than a case mentioned in subparagraph (ii) or (iii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,*
> *...*
> *51(1) The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III, other than those goods mentioned in Part XIII of that Schedule that are sold to or imported by persons exempt from consumption or sales tax under subsection 54(2).*

1. R.S.C., 1985, c. E-15, as amended.
2. Definition added by R.S.C., 1985, c. 7 (2nd Supp.), subs. 1(4), which came into force on July 1, 1985.
3. Definition added by R.S.C., 1985, c. 7 (2nd Supp.), subs. 1(1), which came into force on July 1, 1985.

SCHEDULE III

PART V

FOODSTUFFS

1. Food and drink for human consumption (including sweetening agents, seasonings and other ingredients to be mixed with or used in the preparation of the food and drink), other than
(a) wine, spirits, beer, malt liquor and other alcoholic beverages;
(b) non-alcoholic malt beverages;
(c) carbonated beverages and goods for use in the preparation of carbonated beverages;
(d) non-carbonated fruit juice beverages and fruit flavoured beverages, other than milk-based beverages, containing less than twenty-five per cent by volume of
(i) a natural fruit juice or combination of natural fruit juices, or
(ii) a natural fruit juice or combination of natural fruit juices that have been reconstituted into the original state,
and goods that, when added to water, produce a beverage described in this paragraph; and
(e) candies, confectionery that may be classed as candy, and all goods sold as candies, such as candy floss, chewing gum and chocolate, whether naturally or artificially sweetened, and including fruits, seeds, nuts and popcorn when coated or treated with candy, chocolate, honey, molasses, sugar, syrup or artificial sweeteners.[4]

THE FACTS

This is an appeal pursuant to section 81.19 of the *Excise Tax Act* (the Act) by Shaklee to set aside the decision of the Minister of National Revenue, No. 70054RE, dated November 5, 1987. The appellant seeks a declaration by the Tribunal that the goods in issue, sold during the period July 1, 1985, to September 30, 1986, were exempt from federal sales tax as "Food ... for human consumption ... " under section 1 of Part V of Schedule III of the Act.

Shaklee is a corporation that carries on the business of the manufacture, distribution and sale of a variety of products including nutritional products.

The goods in issue in this appeal are eight different diet supplement products -- vitamins, minerals and fibre -- that are sold in different forms under twenty different product numbers. The eight different products with their twenty product numbers, their name and their ingredients were listed in Schedule A to the appellant's brief under the following eight categories: VITA-C PRODUCTS, VITA-LEA, VITA-E, B-COMPLEX TABLETS, VITA-CAL, IRON, ZINC TABLETS and FIBRE.

During the period July 1, 1985, to September 30, 1986, Shaklee sales revenue for these products was $16,948,970.65 on which it reported and paid federal sales tax totalling $1,180,402.82.

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4. Section 1 of Part V of Schedule III was amended by R.S.C., 1985, c. 7 (2nd Supp.), subs. 55(2), which came into force on July 1, 1985.

On December 8, 1986, Shaklee submitted a refund claim for the full amount of the federal sales tax it had paid. By Notice of Determination No. SWO 10865, dated February 20, 1987, the respondent rejected the appellant's claim. On April 14, 1987, Shaklee submitted a notice of objection to the respondent's determination on the basis that the goods in issue were exempt from federal sales tax as "foodstuffs" under Part V of Schedule III of the Act.

By Notice of Decision No. 70054RE, dated November 5, 1987, the respondent disallowed the notice of objection on the basis that the goods in issue were "health goods" as defined in subsection 2(1) of the Act. In the reasons for decision, the respondent added that the goods in issue are sold and represented for use in the treatment or prevention of a disease, disorder or abnormal physical state or for use in restoring organic functions in human beings.

In a letter dated January 21, 1988, the appellant gave notice of appeal from the respondent's decision to the Secretary of the Tariff Board pursuant to section 81.19 of the Act.

The appeal, being a continuation of proceedings commenced before the Tariff Board, was taken up and continued by the Tribunal by virtue of section 60 of the *Canadian International Trade Tribunal Act*.[5]

THE ISSUE

At the beginning of the hearing, the appellant's counsel urged the Tribunal to make a ruling that there is only one issue in this appeal, namely, whether the products in question are food. Counsel further submitted that the issue of whether they are health goods is irrelevant and that the appellant bears no onus to prove that its products are not health goods.

On the other hand, the respondent's counsel submitted that the question of whether the products in issue are food cannot be answered on the facts of this case without also considering whether they are health goods. That submission, counsel said, rests simply on the history of the legislation. Counsel explained that, until 1985, "health goods" were part of section 1 of Part VIII of Schedule III of the Act and that this section was removed from the exempting schedule and put into section 2 with taxation consequences. Therefore, the scope of the language "Food ... for human consumption ... " in section 1 of Part V of Schedule III is governed by the other exemptions or the other parts of the taxing statute and the Act has to be construed as a whole. Counsel further explained that the intricate structure of the Act is such that health goods may be taxed at the wholesale level as distinct from a manufacturer level, if they are in fact health goods. Therefore, counsel concluded that, under the circumstances of this case, the appellant also has to show why they are not health goods.

On the appellant's preliminary submission, the Tribunal ruled at the hearing that, in this case, the primary issue is undoubtedly whether the products in question are "Food ... for human consumption ... " within the meaning of section 1 of Part V of Schedule III. However, because the Tribunal has to interpret the words "Food ... for human consumption ... ," recourse might be had to the legislative history of the exempting provision. For that purpose, the Tribunal was of the opinion that the issue of whether the products in issue are health goods would become a secondary issue and that evidence and arguments relative to health goods would be relevant in terms of legislative interpretation.

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5. S.C. 1988, c. 56.

Before calling evidence, the appellant's counsel went through the history of the legislation relevant to this appeal. Counsel explained that Schedule III of the *Special War Revenue Act*, 1915, which became later the *Excise Tax Act*, contained a list of foodstuff items that were exempt from tax. That list was expanded over the years until repealed in 1973-74 and replaced by the present general foodstuffs exemption. Subsequent amendments, which have expanded the list of excepted items, have been made to the general foodstuffs exemption in Part V of Schedule III. Counsel submitted that this list of excepted items indicates the fact that Parliament has turned its mind to the items that should be excepted from the general exemption for foodstuffs and that none of the appellant's goods in issue are found in this list of excepted items.

Counsel for the appellant further explained that, prior to May 23, 1985, Part VIII of Schedule III contained a general exemption provision for "health related products." The 1985 amendments removed the general exemption for health goods and replaced it with a specific list of exempt health related products. These amendments also shifted the payment of tax on the health goods to the wholesale level. Counsel submitted that the effect of the 1985 amendments was not to make health goods taxable, but to limit the list of health related products that qualified as exempt.

Counsel drew the attention of the Tribunal to Excise Communiqués 112/TI and 113/TI, issued by Revenue Canada, Customs and Excise, on May 23, 1985. These communiqués state that, as of July 1, 1985, "health goods" will become subject to federal sales tax unless they qualify for sales tax exemption under the new provisions or under one of the other exempting provisions of the Act. Counsel further pointed out that, on a review of the various parts of Schedule III, one can find numerous examples of items or goods that may qualify for exemption under more than one part. Therefore, counsel submitted that a product can be exempt from taxation under more than one part of Schedule III.

In support of the appellant's position that the goods in issue are "food" within the meaning of section 1 of Part V of Schedule III, counsel for the appellant called Dr. David W. Stanley, who has a Ph.D. in Food Science. Dr. Stanley has taught at the University of Toronto and is currently teaching at the University of Guelph. A long list of publications and articles written by the witness was presented to the Tribunal to establish Dr. Stanley's expertise in the food science area. The witness explained to the Tribunal that, in his view, the goods in issue are food. He said that the definitions of "food" are numerous in common usage, but they share a commonality that food is understood to be what is taken into the body to maintain life and growth. In his view, food exists to provide nutrients in order to maintain life and growth; therefore, it would follow that what supplies nutrients for life and growth is food. Based on his examination of the ingredients and the labels of the goods in issue, the witness testified that all of these goods contain nutrients and, therefore, are food.

Invited to comment on some statements of facts contained in the respondent's brief, the witness made the following comments. First, he disagreed with the idea that food is taken to assuage hunger; in his view, food is ingested to ensure the proper intake of nutrients. Second, because people are not always able to eat the proper meals that they should and, therefore, are not ensuring themselves the proper intake of various nutrients, they chose to supplement their diets with products such as those in issue. This constitutes a very first-rate solution where a diet is deficient and not a second-rate solution as stated in the respondent's brief. Third, concerning the potential harmful effect of the goods in issue, the witness stated that at the use level recommended there is no data to indicate that these goods could in any way be harmful. Fourth, the witness

disagreed with the statement that the basic requirement of food is to supply energy; in his view, there are many nutrients that are required beside simply energy, such as certain fatty acids, amino acids, vitamins, minerals, water and fibre. Fifth, he strongly objected to the statement that the only legitimate use of the goods in issue is for the treatment or prevention of a disease or disorder in humans; unlike the respondent, he believes that the goods in issue are designed to maintain life and growth and have a function much beyond that of treatment or prevention of a disease or disorder.

On cross-examination, the witness admitted that the goods in issue could be called "diet supplements." He also admitted that the energy requirements met by Shaklee products are minimal. He said that, in terms of calorific values, these products do not contribute much to the amount of energy that we consume, but that they are extremely important in dictating how the energy that we consume is used. As to the vitamins and minerals occurring naturally in food, the witness said that they are in fact called "micronutrients," because they are present in such small quantities. The function of vitamins, as the witness understand it, is that they are biological catalysts required for metabolism; as catalysts, they are not consumed in the chemical reaction; the excess is excreted through the urine or stored in the fat.

Queried by the Tribunal on the definition of the word "nutrient," the witness answered that it is something like an amino acid, a vitamin or a mineral that has to be ingested and that is required for certain bodily functions; in his opinion, water and fibre would be included in the definition of "nutrient" even if they do not have any calorific value. With regards to the nutrient value of the food basket that most Canadians would buy, the witness admitted that normal persons consuming a normal diet probably do not need supplements for their diets and that there are enough vitamins and minerals in most Canadian food baskets to properly metabolized the food that a person takes in.

Evidence of behalf of the respondent was given by Dr. John Patrick, a doctor of medicine and of philosophy who holds the position of associate professor at the Departments of Biochemistry and Paediatrics at the University of Ottawa. He is specialized in the biochemistry of nutrition, particularly clinical nutrition. He is also a consultant to the Children's Hospital of Eastern Ontario, where he is concerned with children who are malnourished in one form or another.

The essence of his testimony is summarized as follows. Obviously, he disagreed with Dr. Stanley on the principal reasons for taking food; in Dr. Patrick's opinion, most people eat to appetite. He testified that foods contain nutrients, but added that the nutrients are a smaller component, that the food is a bigger component and that the diet is an even bigger component. In his view, food is what people eat, meal by meal; diet is what people eat over a period of time.

Dr. Patrick said that the human appetite varies from person to person, but that most of us feed to satiation that relates best to our total energy intake. He further testified that the recommended nutrient intakes are designed for governmental purposes. The primary function of the recommended nutrient intakes is to make sure that food supply is adequate. When asked to comment on the statement that nutrients such as those in issue, when extracted from a food, have no significant energy content and are no longer controlled by appetite, the witness replied that this is the reason they have to be protected from children because they cannot distinguish them from sweets. Contrary to these supplements, food has its own built-in safety mechanisms. Dr. Patrick agreed with Dr. Stanley's statement that the average normal person does not need supplements and added that, in his view, the goods in issue have no use in the absence of a diagnosis.

When the Tribunal asked Dr. Patrick if anything that is ingested is food or not, he replied that it depends on how it is presented, in what dosage it is taken and for what purpose. He said that if a plate of vitamins was offered to the ordinary man in the street, he would not accept that as food and certainly not as substitutionary food. He did not deny that food contains vitamins and, in a sense, would be ready to accept the appellant's position that vitamins are food. However, he qualified that statement by adding that the way the products in issue are presented, the dosage recommended and the way in which they are used make it more appropriate to deal with them under a different category. He said that if people do not have an adequate food supply, then they might be forced to take some vitamins, for example, in cases where children have anorexia nervosa. That would, in his opinion, constitute a second-rate solution and, at that point, he would describe these vitamins as food. But, he added that it would be easier and more precise to refer to these vitamins as nutrients.

On cross-examination, Dr. Patrick admitted that the definition of "food" proposed by Dr. Stanley is not an incorrect definition. However, he said that it is an incomplete definition that needs the following qualifiers: food is something that can be bought in a food shop, that is not processed to the extent that the products in issue are and that contains basic food components. In his opinion, most Canadians have a normal and healthy diet. The addition of vitamins to a food makes it an enriched food with a potential of toxicity. On this point, he admitted that if an adult takes the dosage recommended for Shaklee products, there is very little chance of toxicity.

When questioned on his statement that definitions of "food" are varied because the usage of substances as food varies from place to place and from culture to culture, he agreed that the taking of vitamins pills is now part of North American culture. He also agreed that the term "health products" is not a medical term; he would nevertheless make a distinction between those things that are taken as drugs and should not be given under any circumstances without proper direction and those things that can be bought over the counter, that he would call "health products." Finally, it was his evidence that no one should take daily vitamins without a doctor's recommendation or prescription.

Following Dr. Patrick's testimony, counsel for the respondent filed material in relation to the drug identification numbers (DIN) of the goods in issue. Counsel gave the following reasons for submitting that material into evidence: the description or definition of a "drug" under the *Food and Drugs Act*[6] is very similar to the description of a "health product" under the Act; even if both statutes are not *in pari materia*, counsel said that the evidence is relevant in view of the representations made by the appellant to the Health and Welfare Department to the effect that the goods in issue are sold or represented for the use in the treatment, mitigation or prevention of a disease. Counsel for the respondent further asked counsel for the appellant to admit that the fact that the goods in issue carry DIN amounts to an admission that they are sold or represented for the purposes stated in the Act.

Counsel for the appellant refused to make that admission and objected to the presentation of the evidence concerning DIN generally. Counsel argued that the fact that the two statutes are not *in pari materia* is conclusive. Counsel stated that because the appellant imports the goods in issue and want to be able to sell them in Canada, it voluntarily gets a DIN as a matter of convenience; that does not constitute an admission that the information that is put on the labels of

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6. R.S.C., 1985, c. F-27.

the products is correct and an indication that the product is a drug. However, counsel admitted that the appellant has DIN certificates.

The Tribunal took note of the objection of counsel for the appellant and invited counsel for the respondent to introduce evidence concerning the significance of DIN.

On this point, Mrs. Micheline Ho, testified for the respondent. She has been the chief of the product regulation division at the Bureau of Non-prescription Drugs at Health and Welfare for the past five years and has a B.S. in chemistry. In her present position, she receives applications from drug manufacturers who wish to put product on the Canadian market, whether they are manufactured or imported into Canada, and wish to sell them as non-prescription drugs in Canada. She reviews these applications according to the *Food and Drugs Act*, determines whether the product is a drug and complies with the legislation and recommend the issuance of DIN on that basis.

The witness gave the definition of a "drug" in the *Food and Drugs Act*. It is a substance or mixture of substances used or represented for the prevention or treatment of either disease or for modifying an organic function or an abnormal physical condition. She stated that, if a product is a drug, a manufacturer must obtain a DIN prior to marketing the drug in Canada. In her view, the compliance with the *Food and Drugs Act* is not voluntary. To determine if a product is a drug under the *Food and Drugs Act*, the Department looks at the formulation of the product, its label, its intended use, its composition and the dosage recommended. In Mrs. Ho's opinion, the issuance of a DIN signifies that the applicant has satisfied the Department that the product is not only a drug, but also a safe and effective drug.

Considering the evidence of Mrs. Ho, counsel for the appellant called Dr. Donald Morison Smith who has a Ph.D. in organic chemistry and who did a post-doctoral fellowship at Harvard University. It was his evidence that the purpose of a DIN is to make sure that the products are labelled with the correct warnings and cautions; these provisions are added to warn people that the products may be hazardous if consumed in large quantities; the presence of a DIN does not show that the product is necessarily a drug.

THE ARGUMENTS

In argument, counsel for the appellant drew the attention of the Tribunal on the labels of the Shaklee products and on the Shaklee magazine called Signal. Counsel submitted that they show that the goods in issue are essentially food products. They are advertised and described as such.

Secondly, counsel made the point that, before the Act was amended, effective July 1, 1985, the goods in issue were sold without sales tax being imposed, but there was no authoritative ruling by any court or tribunal that they were not taxed because they were health goods. In the counsel's view, Excise Communiqués 112/TI and 113/TI merely announce that health goods are taxable goods, at the rate of 10 percent, unless the goods can qualify for an exemption.

Furthermore, counsel argued that the list of goods contained in the commmuniqués is merely illustrative of what the Department thought was on the list formerly and concluded that these policy statements are irrelevant and need not be looked at because the expression "Food ... for human consumption ... " is clear.

Thirdly, counsel submitted that the only issue of law is whether the goods in issue are exempted. If the products are in Schedule III, whether they are in one or more places, they are exempt, unless there is some exclusion in the exemption that removes them. Referring to the list of exclusions contained in section 1 of Part V of Schedule III, counsel stated that it does not exclude the goods in issue.

Counsel further submitted that the onus of the appellant is to show, on a balance of probabilities, that the goods in issue are exempt from tax because they are "food" in the context of the Act. It bears no onus to prove that the products are appetizing or necessary. The Act says nothing about necessary or desirable food; it just says "food" without qualification. Counsel argued that the definition of "food" given by Dr. Stanley is the correct one because he based his on the ordinary meaning of the word, as opposed to the definition of Dr. Patrick, which is a medical definition.

Fourthly, it was submitted that, in the context of a taxing statute, the ordinary meaning is to be preferred over the specialized meaning. On that point, the appellant's counsel relied on the case *The King v. Planters Nut and Chocolate Co., Ltd.*[7]

Turning to the evidence concerning DIN, counsel submitted that these DIN are designed to protect consumers from misleading advertising. In counsel's view, that evidence is irrelevant because the *Food and Drugs Act* is not drafted for the same legislative purposes as the taxing legislation in issue. Counsel added that definitions in other statutes that are not *in pari materia* may not be looked at because they may lead to the wrong conclusion and cited in support the case *Miln-Bingham Printing Company Limited v. Her Majesty The King*.[8]

Moreover, counsel referred to the decision *Cooper Laboratories Limited v. The Deputy Minister of National Revenue for Customs and Excise*[9] where the Tariff Board held that the fact that products are registered and are assigned DIN under the *Food and Drugs Act* lacks relevance since that Act is not *in pari materia* with the Act. Counsel pointed out that Shaklee products are not marketed or advertised through professional journals and are not sold in drugstores. Therefore, there is absolutely no basis for arguing that they are sold or advertised as health products.

Counsel put emphasis on a case coming from the United States, the *Board of Pharmacy v. Quackenbush & Co.*,[10] where it was decided that " 'Vitamins Plus,' whether called an accessory food factor or a dietary supplement, is still essentially a food product.... " Counsel stated that the only case in which the present law's general exemption for food and drink has been considered is the decision of the Tariff Board in *Weetabix of Canada Ltd. v. The Deputy Minister of National*

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7. (1951) Ex.C.R. 122.
8. [1930] S.C.R. 282.
9. 1 C.E.R. 300.
10. 39 Atlantic Reporter, 2nd series, 28 at p. 30.

Revenue for Customs and Excise[11] involving a beer home brew kit. Although the decision in relation to that product has no direct application to the present case, counsel argued that the Board, in holding that a beer home brew kit was exempt, made the following relevant conclusion:

> *The Board concludes that the legislator clearly intended the most extensive exemption of foodstuffs and all possible ingredients that could be mixed with or used in their preparation and intended to except only end-use alcoholic beverages and the solitary not-quite-yet potable or ready for prime consumption, malt liquor, because it had alcoholic content.*

Finally, counsel stated that if something can be legally sold for human consumption and meets the dictionary definition of "food," then it is food. It is no less food because it is in pill form; in the 1990s, there is no doubt that in a society in which we have processed food and in which 40 percent of the population consumes these products, it is part of our culture. It was counsel's conclusion that there is no real doubt about the meaning of the word "food;" there may be a doubt as to whether the goods in issue are food, but that is a question of fact, not of law.

On the other hand, counsel for the respondent made the following submissions. Firstly, counsel said that there is a sense in which the goods in issue can be regarded as food; however, that is not the issue. The issue is whether they are "food" within the meaning of section 1 of Part V of Schedule III. There is a crucial relationship between the question whether the goods in issue best answer the description of "food" or whether they best answer the description of "health goods."

Secondly, counsel submitted that the Act has to be construed as a whole. Prior to the amendments in 1985, the Act exempted "food" and "health goods." In 1985, the legislature took out section 1 of Part VIII of Schedule III and transposed it, word for word, in subsection 2(1) of the Act and called it "health goods." Counsel stressed the fact that the cases having dealt with the meaning of "food" and "pharmaceuticals" have proceeded on the basis that an exemption must be strictly construed. In counsel's view, that is still clear law that taxation is the rule and exemption is the exception. That rule applies notwithstanding the more liberal approach to statutory interpretation under which the words of a taxing statute should be given their ordinary meaning. Where there is a doubt, the rule is taxation, unless an exception applies.

With respect to the burden of proof, counsel submitted that the only way in which the appellant can succeed in this appeal is if the Tribunal comes to the clear and unequivocal conclusion that the goods in issue properly come within the description of "Food ... for human consumption ... " on the balance of probabilities. If the evidence is balanced, it should be concluded that the appellant has not discharged its burden of proof.

Thirdly, the respondent's counsel submitted that there is an unresolved conflict in the law whether the goods in issue are food only, health goods only or both food and health goods, resulting from inconsistent decisions of the Exchequer Court in 1965 concerning slimming biscuits. In the two decisions referred to by counsel, the goods in issue, sold as dietary aids to weight control, were practically the same. In the decision *Her Majesty The Queen v. Mead Johnson of Canada Ltd.*,[12] the Exchequer Court held that "Metrecal" in its various forms was a

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11. (1984) 9 T.B.R. 151.
12. (1966) Ex.C.R. 325.

"foodstuff" within the meaning of Schedule III and not a "pharmaceutical" within the meaning of ss. 2(1)(*cc*) as contended for by the Crown. The definition of "pharmaceuticals" was then similar to the present definition of "health goods."

Then in the decision *Pfizer Corporation et al. v. Her Majesty The Queen,*[13] the Exchequer Court held that "Limmits" biscuits were a pharmaceutical and not a foodstuff. The Court hold that it was not necessary for Schedule III to exclude "pharmaceuticals" from the category of "foodstuffs" to render them taxable. On the contrary, to exempt pharmaceuticals that were also foodstuffs it would have been necessary to refer to foodstuffs "even though pharmaceuticals."

Both cases went on appeal to the Supreme Court of Canada.[14] In the *Mead Johnson* case, the Court held that Metrecal was not exempt on the ground that it could not be brought within a specific heading in the list of foodstuff exemptions, and therefore was not a foodstuff. The Court upheld the decision in the *Pfizer* case. However, the Court did not discuss the basic inconsistencies in the approach to the underlying problem of interpretation of the Act. Therefore, counsel concluded that where there is a possibility of having a foot in both camps, the decision should be in favour of taxation.

Fourthly, with respect to DIN, counsel argued that they are necessary when a product is a drug and that the appellant applied for it because it was selling or representing the goods in issue for the use in the treatment, prevention and mitigation of a disease. That constitutes, in counsel's submission, the very reason the goods in issue answer the description of "health goods." In support of that position, counsel also referred to the literature and promotional material filed by the appellant and argued that this literature simply makes health claims.

In addition, counsel argued that, by Excise Communiqué No. 112/TI dated May 23, 1985, issued by Revenue Canada, Customs and Excise, the Department considered taxable health goods to include, inter alia, food supplements and substitutes, vitamins and minerals. On this point, counsel relied on the decision *Nowegijick v. The Queen*[15] and submitted that administrative policy and interpretation are not determinative, but are entitled to weight and can be an important factor if there is a doubt about the meaning of legislation.

Finally, counsel argued that the evidence showed that the goods in issue are not "food" within the meaning of the Act. By looking at the goods excepted in section 1 of Part V of Schedule III, counsel said that even if they are goods of no nutritional value, they are food that are taxed; the exceptions indicate that food itself does not have to contain nutrients. Counsel submitted that this conclusion undermines most of Dr. Stanley's evidence. Moreover, counsel pointed out that Shaklee's literature talks about supplements to diet when it refers to the goods in issue. In drawing that distinction between food and supplement to food, it may be concluded that the two phenomena have different attributes and require two different words to describe them. It was counsel's submission that Parliament has turned its mind to the problem of supplements: in section 2 of Part V of Schedule III, supplements for addition to the feeds for animals (...) raised to produce (...) food for human consumption are exempted.

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13. (1966) Ex.C.R. 125.
14. *Her Majesty The Queen v. Mead Johnson of Canada Ltd.,* [1966] S.C.R. 457*; Pfizer Corporation et al. v. Her Majesty The Queen,* [1966] S.C.R. 449.
15. (1983) 1 S.C.R. 29 at 37.

Counsel for the respondent conceded the fact that the word "food" has to be given a very broad meaning, but saw no reason to suppose that Parliament has necessarily intended to bring in food supplements into section 1 of Part V. Therefore, what has been considered as health goods, including vitamins and minerals supplements, is now taxable at the wholesale level. In conclusion, counsel submitted that there is a doubt about the meaning of the word "food" and that, on balance, the goods in issue more properly answer the description of "health goods" because they are basically sold or represented to prevent a dietary deficiency.

FINDING OF THE TRIBUNAL

Section 51 of the Act provides that the tax imposed by section 50 shall not apply to the sale or importation of the goods mentioned in Schedule III thereto. In section 1 of Part V of that Schedule, under the heading "Foodstuffs," the following are exempted:

> *1. Food and drink for human consumption (including sweetening agents, seasonings and other ingredients to be mixed with or used in the preparation of the food and drink), other than ...*

The question for determination in this appeal is whether the diet supplements -- vitamins, minerals and fibre -- so sold by the appellant are "food" within the meaning to be given to that word in the Schedule. If the appellant's products were found to be "food" within that meaning, they would be exempt from the tax. Therefore, the Tribunal has to determine, firstly, the meaning of the word "food" within that section and, secondly, whether the goods in issue fall within that meaning.

The Act contains no definition of "food" or the other goods mentioned in Schedule III. Furthermore, the word "food" is not defined in any other act *in pari materia*. The Tribunal is of the view that the words found in the Schedule and in the Act are to be construed as they are understood in common language. This principle was expressed by Cameron J. in the aforementioned decision *The King v. Planters Nut and Chocolate Co., Ltd.*[16] as follows:

> *The words of the Act and of the Schedule are not applied to any particular science or art, and, in my opinion are therefore to be construed as they are understood in common language....*

There was no unanimity among the expert witnesses on the meaning of the word "food." Dr. Stanley said that the definitions of "food" share a commonality that food is understood to be what is taken into the body to maintain life and growth. He stated from his experience that the products in issue are food. On the other hand, Dr. Patrick said that food is what is taken into the body to assuage hunger and that, in his opinion, the goods in issue did not fall within the definition of "food." He admitted that the definition of "food" given by Dr. Stanley is not incorrect, but stated that it is an incomplete definition that needs the following qualifiers: food is something that can be bought in a food shop, that is not processed as extensively as the goods in issue are and that contains basic food components.

The Tribunal is of the view that the experts' conception as to what constitutes food is helpful, but it is not conclusive, particularly in such a case when there are conflicting definitions.

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16. Supra, footnote 7, p. 127.

In determining ordinary meaning, the use of dictionaries is permissible and helpful. In fact many dictionary definitions of the word "food" were cited in the parties' briefs, some of which suggested that any material that performed the function of food was, in fact, food. The Tribunal examined the following definition of the word "food" and of its French equivalent *"aliment"* used in section 1 of Part V of Schedule III.

> The following definition of "food" appears in The Oxford English Dictionary:[17]
>
> *What is taken into the system to maintain life and growth, and to supply the waste of tissue; aliment, nourishment, provisions, victuals.*
>
> In the New Lexicon Webster's Dictionary of the English Language,[18] "food" is defined as:
>
> *Any substance which, by a process of metabolism, a living organism can convert into fresh tissue, energy etc.; a solid substance eaten for nourishment (opp. DRINK), esp. this as served at a meal ...*
>
> In *Le Grand Robert de la langue française*,[19] the word "*aliment"* means:
>
> *1. Substance qui nourrit, sert ou peut servir à la nutrition d'un être vivant.*
>
> (Any substance that provides nourishment that is used or can be used in nourishing a living organism.) (Translation)
>
> In the Encyclopaedia Universalis,[20] the word *"aliment"* is defined as follows:
>
> *... une denrée comportant des nutriments, donc nourissante, susceptible de satisfaire l'appétit, donc appétente, et habituellement consommée dans la société considérée, donc coutumière.*
>
> (... foodstuff that contains nutrients, therefore nutritional, that is likely to satisfy the appetite, therefore appetent, and that is usually consumed by the population under consideration, therefore customary.) (Translation)

The Tribunal is of the opinion that these definitions are broad and provide support for both points of view. However, they state that the essential elements of the word "food" is a substance that contains nutrients, that is nourishing, that maintains life and growth, that supplies energy and the waste of tissue, that satisfies hunger and that is normally consumed by the population under consideration. There remains to determine whether the goods in issue fall within that description.

At the hearing, the various witnesses called the goods in issue many things such as food, nutrients, food supplements and dietary supplements. They were also referred to generally as vitamins, minerals and fibre. An examination of the labels of each product reveals that they are all

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17. 2nd Edition, Clarendon Press, Oxford, 1989.
18. Lexicon Publications, Inc., New York, 1987.
19. 2e édition, Le Robert, Paris, 1987.
20. Corpus, Encyclopaedia Universalis, France, 1989, vol. I, p. 825.

described as dietary supplements. The word "supplement" is defined as follows in The Oxford English Dictionary:[21]

> *1. Something added to supply a deficiency; an addition to anything by which its defects are supplied; an auxiliary means, an aid ...*

Furthermore, the Tribunal notes that there is a DIN on each label of the goods in issue, that the recommended daily intake is as stated on the label or as recommended by a physician, that some products are for therapeutic use only, that several products operate by releasing their ingredients into the human system over a sustained period of time and that several products are to be kept out of the reach of children.

The Tribunal also examined the promotional literature filed by Shaklee and contained in their magazine called Signal. The goods in issue are generally promoted as nutrients or supplements that, combined with the normal diet, provide an excellent formula for good health and nutrition. The literature suggests that the diet of Canadians is deficient and that the solution of that dietary deficiency is to consume the goods in issue.

The Tribunal concludes from its examination of the evidence, the dictionary definitions, the labels of the products and the appellant's literature that the goods in issue are not food, but are supplements designed to prevent or correct certain dietary deficiencies in humans. The evidence has revealed that normal persons consuming a normal diet probably do not need supplements for their diets and that there are enough vitamins, minerals and fibre in most Canadian food baskets to properly metabolized the food that a person takes in. It was also established that the goods in issue contribute very little to the amount of energy that people consume and are not controlled by appetite. Moreover, the evidence showed that the consumption of the goods in issue is a solution where the diet is deficient.

The Tribunal is further of the view that, while from a nutritionist point of view, the vitamins, minerals and fibre sold by the appellant might be included in the word "food," they are not included in the common understanding of the word "food." It is clear to the Tribunal that when the word "food" is used, its popular meaning would not include the goods in issue. On this point, the Tribunal agrees with Dr. Patrick that if a plate of vitamins was offered to the ordinary man on the street, he would not accept that as food. It is not something that would normally be served at a meal or used in the preparation of ordinary staple table foods.

The legislative history of section 1 of Part V of Schedule III reinforces the conclusion that the goods in issue are not "food" within the common understanding of the word. The Tribunal recognizes, as stated in the case *Lor-Wes Contracting Limited v. The Queen*,[22] that, while the rule still remains that legislative history is not admissible to show the intention of the Legislature directly, the Supreme Court of Canada has nevertheless increasingly looked to the legislative history for related purposes, not only in constitutional cases but also in relation to the interpretation of statutes generally.

In this case, a review of the legislative history of the "foodstuffs" exemption shows that

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21. Supra, footnote 17.
22. (1986) 1 F.C. 346, p. 355.

Schedule III of the *Special War Revenue Act, 1915*,[23] which became later the *Excise Tax Act*, contained, under the heading "Foodstuffs," a list of foodstuffs items that were exempt from tax. This list expanded over the years and, in the *Revised Statutes of Canada, 1970*, it contained 30 different foodstuffs items. However, the Tribunal notes that the goods in issue were never listed under the foodstuff exemption nor encompassed by any item in that list. To be exempt under that foodstuffs examination, a product had to be brought within a specific item in the list of foodstuff exemptions. In 1972,[24] the Act was amended and the list was replaced by the present general foodstuffs exemption.

The budget speech of the then Minister of Finance on February 19, 1973, describes the perceived need to which this amendment to the Act was the response:

> *Commodity Taxes*
>
> ...
>
> *First, I propose to remove the sales tax on confectioneries, chocolate bars, soft drinks, fruit drinks and other similar near-food products. The effect of this measure will be to exempt from sales tax all food and drink except alcoholic beverages.*

In the Supplementary Information on the Budget issued simultaneously, the following explanation was provided for the budget proposal:

> *Foods and Beverages*
>
> *Most foods are already exempt from the federal sales tax. The budget proposals extend the exemption to all foods and non-alcoholic beverages....*
>
> *The measures eliminate many inconsistencies arising from fine distinctions between foods and the so-called "near-foods"....*

The Supplementary Information on the Budget further listed the major items exempted: soft drinks, confectioneries and chocolate bars, fruit drinks, nuts including peanuts, diet foods, sugar and cream substitutes, dessert toppings.

A similar reference to the budget speech was made in the aforementioned case *Lor-Wes*[25] where the Federal Court of Appeal referred, as an aid to interpretation, to the budget statement of the then Minister of Finance on June 23, 1975, to establish the need to which a particular amendment to the *Income Tax Act* was the response. About the admissibility of the budget papers, the Federal Court in the case *Canterra Energy Ltd. v. Her Majesty The Queen*[26] allowed a reference to the budget documents and stated as follows:

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23. S.C. 1915, c. 8; the heading "Foodstuffs" was first inserted in 1945 by S.C. 1945, c. 30, s. 8 when the items exempt under Schedule III were classified under different headings.
24. S.C. 1973-74, c. 24, subs. 5(5), Schedule III.
25. Supra, footnote 22.
26. (1985) 1 C.T.C. 329, at p. 331. (F.C.T.D.)

> *Also, it is clear that opinions of the Department of National Revenue are admissible in the form of Interpretation Bulletin ... If this is so why should the courts refuse to admit budget documents of the kind in question here. Interpretation Bulletins, of course, are issued after the legislation is enacted (or the regulations promulgated) and for that reason they may have more weight; but in the light of the practice respecting these "opinion" documents emanating from the Department of Revenue, I find it hard to conclude that the budget documents are inadmissible per se.*

In the Tribunal's view, there are no reasons for supposing that when Parliament amended Part V of the Schedule that it intended a radical change in what would be brought within that language. What was contemplated is items included within the former itemized list, to which the amendment added the so-called "near-foods," i.e., the soft drinks, fruit drinks, confectionaries and chocolate bars. The Tribunal finds nothing in that former itemized list that corresponds to the goods in issue.

On the other hand, an examination of the legislative history of the "health goods" exemption reveals that the definition of "pharmaceuticals" -- that is similar to the present definition of "health goods" as found in subsection 2(1) of the Act -- was first inserted in subsection 2(1) of the Act in 1959.[27] The 1959 amendments extended the definition "producer or manufacturer" to include any person who packages pharmaceuticals. In 1968, amendments were made to the Act to repeal the definition of "pharmaceuticals" and to add the content of that definition in section 1 of Part VIII of Schedule III[28] under the heading "Health." This latter amendment was made in response to a recommendation by the Special Committee of the House on Drugs and Prices for the removal of the sales tax on drugs as part of a major government attack on high drug prices.[29]

Then, in 1985,[30] the Act was amended by Bill C-80 to repeal the content of section 1 of Part VIII of Schedule III and to put it back in the definition of "health goods" added thereby in subsection 2(1) of the Act. The effect of this last amendment was to render the goods exempt as health goods taxable at the wholesale level, effective July 1, 1985, unless, as stated in Excise Communiqué 112/TI, dated May 23, 1985, the goods can qualify for federal sales tax exemption as scheduled control drugs ... or one of the other exempting provisions of the Act.

Communiqué 112/TI further establishes that the definition of "health goods" that parallels section 1 of Part VIII of Schedule III of the Act has a very broad meaning and encompasses the majority of materials, mixtures, compounds or preparations sold or represented as health goods. The Communiqué contained a non-exhaustive list of goods to provide an indication of the types of goods considered by the Revenue Canada, Customs and Excise, to be taxable health goods. The Tribunal notes that, among the list, were food supplements and substitutes, and vitamins and minerals.

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27. S.C. 1959, c. 23, s. 1.
28. S.C. 1967-68, c. 29, ss. 1 and 11.
29. House of Common Debates, June 1, 1967, p. 869; see also *Abbott Laboratories, Limited v. Her Majesty The Queen*, (1971) C.T.C. 26, p. 36.
30. Bill C-80; S.C. 1986, c. 9, ss. 1 and 55.

Recent jurisprudence has clearly indicated that courts are entitled to look at the Debates of the House of Commons, as an aid to interpretation, to ascertain the mischief, evil or condition that a particular enactment was designed to correct.[31] In the present case, the Tribunal is of the view that the following relevant extracts of the House of Commons Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-80[32] provide further assistance in identifying the intention of Parliament when it repealed section 1 of Part VIII of Schedule III in 1985:

> *Mr. de Jong: ... What types of health goods are going to be taxed now that were not taxed before?*
>
> *Mrs. McDougall: ... The goods affected include things -- in addition to the medicated shampoos are laxatives, vitamins, lozenges, medicated bandages. There is a fairly broad range of goods involved.*
>
> *Mr. de Jong: That are now going to be taxed.*
>
> *Mrs. McDougall: That are now going to be taxed.*
>
> *Mr. de Jong: Including vitamins.*
>
> *Mrs. McDougall: Including vitamins.*
>
> ...
>
> *Mrs. McDougall: I might point out that food is the basic source of vitamins and it remains exempt.*

It is apparent from these portions of the Debates of the Legislative Committee that the goods sold by the appellant were encompassed by the "health goods" exemption that was being repealed in 1985 and that the government's intention was to tax the vitamins and minerals as well as the food supplements and substitutes.

In light of the evidence and the legislative history set out above, the Tribunal comes to the following conclusions. First, Parliament never intended to encompass the goods in issue in the exempting provision for "foodstuffs." Second, the goods in issue were encompassed under the language that used to be found in section 1 of Part VIII of Schedule III before May 23, 1985, and that is now found in the definition of "health goods" in subsection 2(1) of the Act. Third, the repeal of the specific exemption for "health goods" removed that class of goods from the scope of Schedule III.

Considering all the evidence, the Tribunal concludes that the appellant has failed to establish that the vitamins, minerals and fibre in issue are "food" within the meaning of section 1 of Part V of Schedule III.

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31. See *Thompson v. Canada*, (1988) 3 F.C. 108 at p. 133; *The Attorney General of Canada v. Royden Young et al.*, unreported, F.C.A., July 31, 1989, Court No. A-978-88, p. 9.

32. House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-80, *An Act to amend the Excise Tax Act and to amend others acts in consequence thereof*, 1st session of the 33rd Parliament, 1984-85, pp. 1:23-24.

CONCLUSION

Accordingly, the Tribunal declares that the diet supplements -- vitamins, minerals and fibre -- sold by the appellant are not "food" within the ordinary meaning of the word and cannot be considered "Food ... for human consumption ... " as intended by section 1 of Part V of Schedule III of the Act. Therefore, they do not qualify for exemption from sales tax under Schedule III of the Act. The appeal is dismissed.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member