

Ottawa, Monday, June 5, 1989

Appeal No. 3031

IN THE MATTER OF an application heard  
March 16, 1989, pursuant to section 51.21 of the  
*Excise Tax Act*, R.S.C. 1970, c. E-13 (the Act) as  
amended;

AND IN THE MATTER OF a determination of the  
Minister of National Revenue dated April 22, 1988,  
pursuant to subsection 51.1(5) of the Act.

**BETWEEN**

**THE GEO. CLUTHÉ MANUFACTURING  
COMPANY LIMITED**

Appellant

**AND**

**THE MINISTER OF NATIONAL REVENUE**

Respondent

**DECISION OF THE TRIBUNAL**

The appeal is dismissed. The Tribunal declares that during the period between December 1, 1983, to December 31, 1987, the retail price at which Cluthé Sales (Waterloo) Ltd. sold products manufactured by The Geo. Cluthé Manufacturing Company Limited must be the sales price used for the calculation of the federal sales tax liability of The Geo. Cluthé Manufacturing Company Limited.

John C. Coleman  
John C. Coleman  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

W. Roy Hines  
W. Roy Hines  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. 3031**

**THE GEO. CLUTHÉ MANUFACTURING COMPANY LIMITED** Appellant

**and**

**THE MINISTER OF NATIONAL REVENUE** Respondent

*Excise Tax Act - Sales Tax - Whether sales tax levied on The Geo. Cluthé Manufacturing Company Limited must be calculated on the price at which the appellant corporation provides its goods to its corporate retailer [Cluthé Sales (Waterloo) Ltd.] or whether, on the price at which the retailer sells the appellant corporation's goods to the public.*

**DECISION:** *The appellant manufacturer and its corporate retailer are an economic or commercial entity where the appellant manufactures hardware products and the retailer sells those products. The retail price for the hardware products must be the sale price for the calculation of the appellant's sales tax liability. Appeal dismissed.*

*Place of Hearing:* Ottawa, Ontario

*Date of Hearing:* March 16, 1989

*Date of Decision:* June 5, 1989

*Panel Members:* John C. Coleman, Presiding Member  
Sidney A. Fraleigh, Member  
W. Roy Hines, Member

*Counsel for the Tribunal:* Clifford Sosnow

*Clerk of the Tribunal:* Janet Rumball

*Appearances:* R. Fortune for the Appellant  
J. Fitzgerald for the Respondent

**Cases Cited:** *Attorney General of Canada v. Coleman Products Co. [1929] 1 D.L.R. 658; Canada Rice Mills Ltd. v. the King [1939] 3 D.L.R. 577; Colgate-Palmolive-Peet Co. Ltd. v. The King [1933] S.C.R. 131; TWC Furniture Limited v. The Minister of National Revenue (Appeal No. 2880); Vanguard Coatings and Chemicals Ltd. v. The Minister of National Revenue [1987] 1 F.C. 367; [1988] 1 T.S.T. 2025.*

**Statutes Cited:** *Excise Tax Act, R.S.C. 1970 c. E-13 - ss. 27, 34, 51.21; Canadian International Trade Tribunal Act, S.C. 1988, c. 56 - ss. 54(2), 60.*

**Appeal No. 3031**

**THE GEO. CLUTHÉ MANUFACTURING COMPANY LIMITED**

**Ap**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: JOHN C. COLEMAN, Presiding Member  
SIDNEY A. FRALEIGH, Member  
W. ROY HINES, Member

**REASONS FOR DECISION**

**SUMMARY**

The appellant, The Geo. Cluthé Manufacturing Company Limited (subsequently referred to as Cluthé Manufacturing), is a manufacturer of tools, plastic hardware products and custom injection mouldings. Cluthé Manufacturing is a licensed manufacturer under section 31 of the *Excise Tax Act*<sup>1</sup> (the Act).

George Cluthé owns the majority (50.5 per cent) of Cluthé Manufacturing's issued common shares. Richard Cluthé, William Cluthé and Gerald Cluthé, three sons of George Cluthé, each own 16.5 per cent of the remaining issued common shares of Cluthé Manufacturing.

Cluthé Sales (Waterloo) Ltd. (subsequently referred to as Cluthé Sales) is a corporate retailer which sells goods produced by the appellant. George Cluthé owns 100 per cent of the issued common shares of Cluthé Sales.

George Cluthé and his three sons participate in the management and day-to-day operations of both companies: George, as the Executive Director of both Cluthé Manufacturing and Cluthé Sales; Gerald, as the two companies' Administrative Director; William, as the person in charge of costing and price quotations; and Richard, as a "tool and dye man."

The appellant is seeking a declaration by the Tribunal that the sales tax it pays on its manufactured goods be determined, pursuant to section 34<sup>2</sup> of the Act, on the fair price of goods it claimed to have sold to Cluthé Sales. The respondent is asking the Tribunal to declare that no sales have taken place between Cluthé Manufacturing and Cluthé Sales because the two companies are in fact one and the same economic and commercial entity. Thus, the sales tax payable must be based on the retail price at which Cluthé Sales sells Cluthé Manufacturing's goods to the public.

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1. R.S.C. 1970, c. E-13; now R.S.C. 1985, c. E-15, s. 54.

2. Ibid., s. 58.

The appeal is made pursuant to section 51.21<sup>3</sup> of the Act from a Notice of Determination (No. SWO 37713) of the Minister of National Revenue (the Minister) dated April 22, 1988, that a refund of federal sales tax is not payable to the appellant for the period between December 1, 1983, to December 31, 1987. The refund claimed is for the sum of \$369,500. The claim was made on January 27, 1988.

The appeal is not allowed. The two companies are in fact one and the same commercial entity. There are no sales between Cluthé Manufacturing and Cluthé Sales. The latter company only acts as a conduit between Cluthé Manufacturing and its customers. Therefore, the price at which the public buys Cluthé Manufacturing's goods from Cluthé Sales is the price on which sales tax is to be calculated.

### THE LEGISLATION

The relevant statutory provisions of the Act, as they read during the period at issue, are as follows:

27.(1)<sup>4</sup> *There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sale price or on the volume sold 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,*

...

34. *Where goods subject to tax under this Part or under Part III are sold at a price that in the judgement of the Minister is less than the fair price on which the tax should be imposed, the Minister has the power to determine the fair price and the taxpayer shall pay the tax on the price so determined. R.S., c. 100, s. 37.*

The appeal was originally commenced before the Tariff Board. However, under subsection 54(2) and section 60 of the *Canadian International Trade Tribunal Act*,<sup>5</sup> the appeal was taken up and continued by the Canadian International Trade Tribunal (the Tribunal).

### THE FACTS

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3. Ibid., s. 81.21.

4. Ibid., ss. 50(1).

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

Mr. Gerald Cluthé and Mr. Robert Fortune, a sales tax consultant who acted as both a witness and an agent for the appellant at the hearing, provided the following testimony in support of the appellant's contention that Cluthé Sales and Cluthé Manufacturing constitute two independent companies between whom sales have occurred:

1. Invoice forms (Exhibit A-21) with the letterhead "Cluthé Sales (Waterloo) Ltd." that Cluthé Sales uses when it ships to its customers goods produced by Cluthé Manufacturing.
2. A bill of lading (Exhibit A-8) with respect to goods produced by Cluthé Manufacturing and shipped to a customer of Cluthé Sales, indicating Cluthé Sales as the shipper and the customer as the consignee.

Thus, when a customer places an order to Cluthé Sales for goods produced by Cluthé Manufacturing, Cluthé Sales will ship the goods and invoice the customer. Payment for the goods is to the order of Cluthé Sales.

3. A series of documents whose letterhead is "Cluthé Sales (Waterloo) Ltd., Makers of Plastic Products." and that purport to show that Cluthé Sales acts on its own behalf, i.e. as an independent company, when it conducts its business affairs. These documents are a contract between Cluthé Sales and another company (Exhibit A-1), indicating that the company is to be the exclusive agent for Cluthé Sales in a certain region; a form used by Cluthé Sales in soliciting orders (Exhibit A-2); and a quotation form used by Cluthé Sales when quoting prices to prospective customers (Exhibit A-3). A fourth document, a purchase order, indicates Cluthé Sales as the vendor (Exhibit A-7).
4. Financial statements (of Cluthé Manufacturing and of Cluthé Sales for the years 1983-87 inclusive) which purport to show that sales have occurred between Cluthé Manufacturing and Cluthé Sales. The financial statements show that the figure for Cluthé Manufacturing's revenue from goods "sold" to Cluthé Sales is identical to Cluthé Sales' figure for the cost of goods "bought" from Cluthé Manufacturing (Exhibits A-11 to A-20).

Through the cross-examination of the appellant's witnesses and through the evidence presented by the witness for the respondent, Mr. Michael Chivas, a senior sales tax auditor with Revenue Canada assigned to review the appellant's refund claim, the following testimony was provided in support of the respondent's position that Cluthé Sales and Cluthé Manufacturing are one and the same commercial enterprise:

1. The manufacturing, shipping and inventory storage facilities are based in the same building in which the two companies are located. There is no physical separation of Cluthé Sales' premises from those of Cluthé Manufacturing. Both companies have the same address and use the same phone number.

2. All assets of both companies (including equipment, inventories, building, etc.), located at the common premises, are insured in the name of Cluthé Manufacturing. The liability declaration on the insurance policy (Exhibit B-3) states "Business Conducted by Insured: Mfg., Sale & Distribution of Plastic & Associated Products."
3. Cluthé Manufacturing and Cluthé Sales share the responsibility of paying the salaries of George, Gerald and William Cluthé. T4/T4A slips issued to employees of both Cluthé Sales and Cluthé Manufacturing indicate Cluthé Manufacturing as the payer. Cluthé Manufacturing submits T4/T4A summaries of remuneration paid to employees of both companies (Exhibit B-4).
4. Payments to suppliers of goods ordered by Cluthé Manufacturing are made using both Cluthé Manufacturing's and Cluthé Sales' cheques (Exhibit B-5).
5. A memorandum of agreement between Cluthé Sales and Cluthé Manufacturing (Exhibit B-1) designates Cluthé Sales as the exclusive distributor and sales agent of Cluthé Manufacturing's goods. The financial statements also indicate that Cluthé Sales acts as exclusive distributor and sales agent for Cluthé Manufacturing's entire line of products.
6. Only Cluthé Sales' financial statements indicate "accounts receivable." There is no such account in Cluthé Manufacturing's statements for goods "sold" to Cluthé Sales. Only Cluthé Manufacturing's statements indicate "inventory." Cluthé Sales maintains no inventory of goods "purchased" from Cluthé Manufacturing.
7. Cluthé Manufacturing has a demand loan with the Bank of Nova Scotia. Collateral for the loan is Cluthé Sales' accounts receivable and Cluthé Manufacturing's inventory.
8. There is no sales invoice or intercompany document indicating that a sale has occurred between Cluthé Manufacturing and Cluthé Sales because transfer of ownership in the goods between the two companies only occurs at the time that ownership in the goods passes to a customer of Cluthé Sales.
9. At the time an individual item is "sold" by Cluthé Manufacturing to Cluthé Sales, the sale price of that item is not known. The sale price of goods sold by Cluthé Manufacturing to Cluthé Sales is only determined at the end of each fiscal year by taking Cluthé Sales' revenues from sales to the public and deducting Cluthé Sales' operating expenses in making those sales.
10. All proceeds from the sale of Cluthé Manufacturing's goods are deposited to the account of that company after Cluthé Sales has deducted amounts necessary for covering the costs of making the sales (e.g. commission, advertising, etc.) (Exhibit B-2).

## ISSUE

The question at issue is whether the sales tax, which the appellant must pay on its manufactured goods, should be determined under section 34 of the Act and thus, on the fair price for goods that purportedly have been sold by Cluthé Manufacturing to Cluthé Sales, or on the retail price at which Cluthé Sales sells Cluthé Manufacturing's goods to the public.

Counsel for the appellant argued that Cluthé Manufacturing and Cluthé Sales are two companies that act independently of each other. Cluthé Manufacturing manufactures a product; Cluthé Sales sells a product. The audited financial statements indicate that sales have occurred between the two companies. Although the two companies share the same premises and some personnel, this is done merely to reduce administrative costs.

Counsel argued that since there are sales between the two companies, the Minister, in determining the price on which Cluthé Manufacturing is to be assessed sales tax, must use a fair price pursuant to section 34 of the Act. That price should be determined by employing the criteria set out in the case of *Vanguard Coatings and Chemicals Ltd. v. The Minister of National Revenue*,<sup>6</sup> which sets out the variables that the Minister must examine in determining a fair price pursuant to section 34 of the Act.

Counsel for the respondent argued that section 34 of the Act is only applicable if there has been a sale of goods. The appellant has not proven that such a sale has taken place between Cluthé Manufacturing and Cluthé Sales. The two companies constitute a single business entity sharing common managerial and financial control. The figures in the financial statements, which purport to evident sales between the two companies, are mere notational bookkeeping entries.

Based on the foregoing, counsel for the respondent argued that Cluthé Manufacturing's sales tax must be assessed on the price at which Cluthé Sales sells Cluthé Manufacturing's goods to the public. As authority for this proposition, counsel relied on the Tariff Board case of *TWC Furniture Ltd. v. The Minister of National Revenue* (Appeal No. 2880); *Canada Rice Mills Ltd. v. The King*;<sup>7</sup> *Colgate-Palmolive-Peet Co. Ltd. v. The King*;<sup>8</sup> and *Attorney General of Canada v. Coleman Products Co.*<sup>9</sup>

## DECISION

According to section 27 of the Act, federal sales tax is payable on the sale price of taxable goods produced or manufactured in Canada. For sales tax to be imposed, there must be a sale between the manufacturer or producer and the purchaser. Section 34 of the Act comes into play only if two conditions have been met: (1) there is a sale of taxable goods and (2) that sale occurs at a price that the Minister considers to be less than the fair price on which sales tax should be imposed.

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6. [1987] 1 F.C. 367 (F.C.T.D.; affirmed in part [1988] 1 T.S.T. 2025 [F.C.A.]).

7. [1939] 3 D.L.R. 577 (P.C.).

8. [1933] S.C.R. 131.

9. [1929] 1 D.L.R. 658 (Ont. S.C.).

The Tribunal concludes that there have been no sales between Cluthé Sales and Cluthé Manufacturing; therefore, there is no need to consider the question as to whether the sales have occurred at a fair price.

In 1933, Mr. Justice Cannon of the Supreme Court of Canada said at page 139 of the Colgate-Palmolive-Peet case (cited above), a sales tax case which examined whether a sale had taken place between a manufacturing company and a distributing company: "In order to effect a sale, it is manifest from the general principles which govern all contracts that it requires two parties capable of giving, freely, a mutual assent" (emphasis added). Although Cluthé Manufacturing and Cluthé Sales are two separate legal entities, the Tribunal considers that they are not, for the purposes of determining whether sales have occurred between them, two parties capable of giving, freely, a mutual assent. To quote the words of Mr. Justice Cannon again (at p. 140) "While the two companies are separate legal entities, yet in fact, and for all practical purposes, they are merged...."

In addition to the Colgate-Palmolive-Peet case (cited above), the Tribunal considers that the other cases cited by the respondent's counsel also show that, where the circumstances warrant, separate legal entities can be treated as integral elements of one commercial enterprise in determining at what point a sale has occurred for the purpose of levying sales tax.

In this case, there is an abundance of evidence to indicate that Cluthé Sales and Cluthé Manufacturing are in fact one and the same company. They share the same premises, phone number and address; Cluthé Manufacturing produces T4/T4A slips for employees of both companies; Cluthé Manufacturing insures the assets of both companies (indeed that company is described as conducting the business of manufacturing, sale and distribution); if Cluthé Manufacturing purchases supplies, Cluthé Sales often pays for those goods; only one company, Cluthé Manufacturing, maintains an inventory of goods and only Cluthé Sales maintains accounts receivable in respect of the sale of those goods; finally, documents used by Cluthé Sales when quoting prices, soliciting orders and designating distributing agents for Cluthé Sales' line of goods represent Cluthé Sales as a maker of plastic products.

The manner in which goods are purportedly "sold" by Cluthé Manufacturing to Cluthé Sales is a further factor in determining that the two companies are one and the same, and that there has been no sale of goods between the two companies. The appellant admitted that ownership in Cluthé Manufacturing's goods does not transfer to Cluthé Sales unless, and until, ownership in those goods is transferred to a customer of Cluthé Sales. Thus, Cluthé Sales must first sell Cluthé Manufacturing's products before Cluthé Sales is considered to have purchased Cluthé Manufacturing's goods. Second, at the time of the purported sale between the two companies, neither company knows the price at which that item is purchased by Cluthé Sales. That determination must wait until the end of the fiscal year when Cluthé Sales' total revenues from sales of Cluthé Manufacturing's goods to the public and the total operating expenses incurred by Cluthé Sales in selling these goods are known. The price at which Cluthé Manufacturing "sells" its goods to Cluthé Sales is, therefore, dependent on the revenues garnered and the operating expenses incurred by another company (Cluthé Sales). And finally, Cluthé Sales' net revenues on goods produced by Cluthé Manufacturing are transferred to Cluthé Manufacturing's bank account.



While none of the factors cited above, by itself, would be conclusive, taken together, they convince the Tribunal that, for the purposes of sales tax assessment, Cluthé Manufacturing and Cluthé Sales are one and the same commercial entity. Cluthé Sales does not purchase Cluthé Manufacturing's goods. Rather, because Cluthé Sales is the sole outlet to the public for Cluthé Manufacturing's goods, the Tribunal considers Cluthé Sales to be a conduit between Cluthé Manufacturing and its customers who are the purchasers of those goods.

CONCLUSION

Because sales tax is levied on the sale price of the goods, the Tribunal considers that the price at which sales are made to customers is the price on which sales tax is to be calculated.

The appeal is dismissed.

John C. Coleman  
John C. Coleman  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

W. Roy Hines  
W. Roy Hines  
Member