CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, September 18, 1990

Appeal No. 3094

IN THE MATTER OF an appeal heard on March 7, 1990, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15 as amended;

AND IN THE MATTER OF a notice of decision by the Minister of National Revenue dated September 23, 1988, with respect to a notice of objection filed under section 81.17 of the *Excise Tax Act*.

BETWEEN

B.E.A. PER CAPITA CONSULTING CORPORATION **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

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

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. 3094

B.E.A. PER CAPITA CONSULTING CORPORATION **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Whether a retail health food chain that imports vitamins in bulk from the United States and bottles the product in Canada is a manufacturer, and on what basis the liability for tax should be determined.

This is an appeal under section 51.19 (now 81.19) of the Excise Tax Act (the Act) of Notice of Decision No. 70437AE by the Minister of National Revenue (the Minister) dated September 23, 1988, with respect to a notice of objection filed pursuant to section 51.17 (now 81.17) of the Act.

The appellant considers that the interim determined discount of 30 percent from the tax-included selling price to consumers, as established by the Minister, is too low.

The basis of the appeal is not a matter that is within the jurisdiction of the Tribunal to adjudicate.

Held: *The appeal is dismissed.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*March 7, 1990*
Date of Decision:	*September 18, 1990*
Tribunal Members:	*Robert J. Bertrand, Q.C., Presiding Member* *Kathleen E. Macmillan, Member* *Sidney A. Fraleigh, Member*
Clerk of the Tribunal:	*Molly Hay*
Appearances:	*Terry M. Amisano, for the appellant* *Bruce S. Russell, for the respondent*
Statutes Cited:	*Canadian International Trade Tribunal, S.C. 1988, c. 56; Excise Tax Act, R.S.C., 1985 (as amended), c. E-15, subsections 2(1) and 27(1).*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3094

B.E.A. PER CAPITA CONSULTING CORPORATION **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT J. BERTRAND, Q.C., Presiding Member
KATHLEEN E. MACMILLAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under section 51.19 (now 81.19) of the *Excise Tax Act* (the Act) of Notice of Decision No. 70437AE by the Minister of National Revenue (the Minister) dated September 23, 1988, with respect to a notice of objection filed pursuant to section 51.17 (now 81.17) of the Act.

The appellant seeks to have the respondent's assessment revoked in its entirety.

FACTS

The appellant, B.E.A. Per Capita Consulting Corporation (B.E.A.), is a corporation that owns a retail health food chain of nine stores, a mail order division and a central warehouse.

The appellant is a licensed manufacturer with its facilities located in Vancouver, British Columbia. B.E.A. bottles and labels, for subsequent retail sale, vitamins and health food produced locally or imported from the United States.

The appellant was audited by the respondent for the period March 1 to November 30, 1986, and was assessed on June 17, 1987, for a total of $10,184.32, including tax, interest and penalty to June 30, 1987 (Notice of Assessment No. PAC 3201).

On September 10, 1987, the appellant filed a notice of objection to the notice of assessment pursuant to section 51.17 of the Act.

By Notice of Decision No. 70437AE dated September 23, 1988, the appellant's objection was allowed, in part, and the assessment was varied downward to $3,215.07.

On December 6, 1988, the appellant filed an appeal of the Minister's decision with the Tariff Board pursuant to section 51.19 of the Act.

The appeal was originally filed with the Tariff Board. Pursuant to section 60 of the *Canadian International Trade Tribunal Act*,[1] the appeal is taken up and continued by the Canadian International Trade Tribunal (the Tribunal).

The appeal was heard in Vancouver, British Columbia, on March 7, 1990.

ISSUE

This appeal initially raised the issue of whether a retail health food chain that imports vitamins in bulk from the United States, bottles the product in Canada and sells it in its retail stores is a manufacturer under the Act and, subsequently, on what basis the liability for tax should be determined.

LEGISLATION

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

Excise Tax Act

> *2 (1) ...*
>
> *"manufacturer or producer" includes*
>
> *...*
>
> *(f) any person who, by himself or through another person acting for him, assembles, blends, mixes, cuts to size, dilutes, bottles, packages, repackages or otherwise prepares goods for sale, other than a person who so prepares goods in a retail store for sale in that store exclusively and directly to consumers;*
>
> *27 (1) There shall be imposed, levied and collected a consumption or sales tax of nine per cent on the sale price of all goods*
>
> *(a) produced or manufactured in Canada*
> *(i) payable ... 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* (Emphasis added)

1. S.C. 1988, c. 56.

FINDING OF THE TRIBUNAL

The appellant admitted at the hearing that it was a manufacturer under the Act as the extended definition of those words, contained in paragraph 2(1)(*f*), encompasses its activities and that it was liable for sales tax under paragraph 27(1)(*a*) [now 50(1)(*a*)]. The appellant remitted federal sales tax on the basis of its cost for the goods sold (direct cost + labour costs) rather than on the wholesale price to retailers.

During an audit by the Department of National Revenue (the Department), it became evident that the absence of detailed sales records for the manufactured goods required the sales price to be estimated. The estimate by the Department led to the Notice of Assessment of June 17, 1987, to which the appellant objected, submitting subsequently a more representative sample of gross margins on products sold and estimating the average gross margin at 41.4 percent. The appellant, in its submission, also discounted in accordance with Excise Communiqué 112/TI those retail sales by 30 percent in order to determine the tax-included sales prices on which tax had to be remitted.

The Department accepted the appellant's submission, and, consequently, the estimated volume of retail sales is not in dispute. The appellant, however, subsequently objected to that level of discount arguing that it was the application of an inconsistent and unfair assessment policy of the Department.

The Act, at paragraph 27(1)(*a*) [now 50(1)(*a*)], imposed a sales tax on the sales price of all goods produced in Canada payable by the producer at the time the goods are delivered to the purchaser or at the time the property in the goods passes. The law is clear: the tax is payable on the sales price and a strict application would result in the appellant having to account for the tax on its retail sales price since it is at that time that the goods are sold. Such a result would undoubtedly put the appellant at a disadvantage vis-à-vis its competitors that sell to wholesalers or retailers.

In order to take into account sales at different levels of distribution by manufacturers, the Department has adopted an assessment policy embodied in a number of memoranda, such as ET202 and in Excise Communiqué 112/TI, allowing taxpayers, who meet the conditions enunciated, to account for tax on amounts that are less than actual sales prices. The taxpayer may elect to pay tax on that lesser amount, computed in accordance with the rules contained in such memoranda or communiqué, and the Department will accept remittance of such tax in settlement of the taxpayer's liability. This administrative concession is widely known and available.

B.E.A., accordingly, has the option of remitting tax on the products' actual sales prices even if the sales are made directly to consumers or to take a discount of 30 percent on such sales prices since the appellant cannot avail itself of the concession contained in memorandum ET202 available to manufacturers that sell to retailers and consumers. The appellant does not have the option of taking a larger discount.

The only ground of complaint remaining is the appropriateness of the administrative policy of using a sales price discounted by 30 percent as basis for assessment or tax collection. The

Tribunal must interpret the law as it stands and, consequently, if asked to determine the tax liability of the appellant in the present circumstances, it would have to assert that the tax has to be computed on the actual sales prices, disregarding any discount. If the Department is willing to accept a lesser amount in full settlement of the appellant's tax liability, it is not within the Tribunal authority to determine what that lesser amount should be.

In the absence of any evidence demonstrating a capricious implementation of such policy that would negate the right of a taxpayer to avail himself or herself of a well established and publicized administrative concession, the Tribunal has no authority to refer the matter back to the Department for reassessment or for re-examination of such concession.

CONCLUSION

The basis of the appeal is not a matter that is within the jurisdiction of the Tribunal to adjudicate. The appeal should be dismissed.

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

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
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