



Ottawa, Thursday, November 21, 1991

Appeal No. AP-89-158

IN THE MATTER OF an appeal heard on
September 16, 1991, under section 81.19 of the
Excise Tax Act, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of
National Revenue dated September 6, 1988, with respect to a
notice of objection filed under section 81.15 of the
Excise Tax Act.

BETWEEN

DURE FOODS

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that the appellant was the manufacturer of the goods during the assessment period and that the sale price on which tax should be paid was the price charged to Biway.

W. Roy Hines
W. Roy Hines
Presiding Member

John C. Coleman
John C. Coleman
Member

Michèle Blouin
Michèle Blouin
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-158

DURE FOODS

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant, Dure Foods, was blending and packaging dishwashing liquid for Esquire Sales and Marketing Co. (Esquire) under the latter's own label, OMNI 2, to be delivered exclusively to Biway stores. Under the arrangement, the appellant had to use a specific label supplied by Esquire and a bottle of specific size, shape and colour that could be obtained from a single supplier which had the mould supplied by Esquire. The bottle had a specific cap. The dishwashing liquid had a specific scent, dye and concentration of active ingredients, all specified by Esquire. The appellant delivered a particular quantity of the goods only when requested by Esquire to fill an order from Biway.

Until June 1984, Esquire paid the appellant, and Biway paid Esquire directly. Under the arrangement, the appellant delivered the goods to Biway when it received payment for any outstanding invoices from Esquire. However, in June 1984, the parties rearranged their affairs whereby the appellant began invoicing Biway directly. It would thereafter pay Esquire the difference between the price charged to Biway and the price charged by it to Esquire. The amount charged to Esquire included the federal sales tax, based on that price.

The issue before this Tribunal is whether the appellant was the legal manufacturer and vendor of the OMNI 2 dishwashing liquid and, as such, liable for the consumption or sales tax based on the sale price of the goods; also, whether the sale price was that charged to Esquire or that charged to Biway.

HELD: *The appeal is dismissed. The Tribunal finds that the appellant was the manufacturer of the goods and that the sale price on which tax should be paid was the price charged to Biway.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 16, 1991
Date of Decision: November 21, 1991

Tribunal Members: W. Roy Hines, Presiding Member
John C. Coleman, Member
Michèle Blouin, Member

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Janet Rumball

Appearances: P.B. Forbes, Q.C., for the appellant
L.J. Wall, for the respondent

Appeal No. AP-89-158

DURE FOODS

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: W. ROY HINES, Presiding Member
JOHN C. COLEMAN, Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act* (the Act) from a decision of the Minister of National Revenue, confirming that the appellant was the legal manufacturer and vendor of a certain dishwashing liquid and, as such, liable for the sales tax imposed on manufacturers based on the sale price of the goods. The appellant has appealed on the basis that it is more properly characterized as an agent of Esquire Sales and Marketing Co. (Esquire) which, it claims, is the true manufacturer or producer of the goods in issue.

The appellant, S.D. Malcolm Company Limited operating as Dure Foods, was incorporated in 1978. Its primary business is packaging coffee whitener, sugar and hot chocolate as well as blending and packaging dishwashing liquid. Since its inception, the appellant has packaged under 52 different labels for various parties. During the assessment period, the appellant was blending and packaging dishwashing liquid for Esquire under the latter's own label, OMNI 2, to be delivered exclusively to Biway stores.

Mr. Peter Beit, a principal of Esquire, testified that his company started manufacturing dishwashing liquid in 1980 or 1981 under the brand name OMNI. Three or four years later, Esquire started selling OMNI 2 exclusively to Biway stores. However, in 1983 or 1984, it experienced severe financial difficulties and lost its manufacturing equipment. As the OMNI 2 dishwashing liquid was a successful and lucrative product, Mr. Beit wished to continue having it manufactured and sold to Biway.

An agreement was reached whereby the appellant would blend, package, label and deliver the dishwashing liquid for Esquire under the OMNI 2 label to Biway. Under the arrangement, the appellant had to use a specific label supplied by Mr. Beit and a bottle of specific size, shape and colour that could be obtained from a single supplier which acquired the mould from Mr. Beit. The bottle had a specific cap. The dishwashing liquid had a specific scent, dye and concentration of active ingredients, all specified by Mr. Beit. The appellant delivered a particular quantity of the goods only when requested by Esquire to fill an order from Biway.

Until June 1984, Esquire paid the appellant, and Biway paid Esquire directly. Under the arrangement, the appellant delivered the goods to Biway when it received payment for any outstanding invoices from Esquire. However, this arrangement created supply shortages and general inconvenience. In June 1984, the parties rearranged their affairs whereby the appellant began invoicing Biway directly. It then paid Esquire the difference between the price charged to Biway, as arranged by Mr. Beit, and

the price charged to Esquire. The amount charged to Esquire included the federal sales tax, based on that price. This change in procedure did not change the amount that Esquire charged Biway nor did it change the amount charged by the appellant to Esquire. Mr. Scott D. Malcolm, principal of the appellant, stated that the new arrangement served to correct the supply problems and protect the receivables from Esquire's creditors.

The issue is whether the appellant was the legal manufacturer and vendor of the OMNI 2 dishwashing liquid during the assessment period and, as such, liable for the consumption or sales tax based on the sale price of the goods; also, whether the sale price on which tax is payable was that charged to Esquire or that charged to Biway.

Counsel for the respondent has referred the Tribunal to the following provisions of the Act:

2. (1) *In this Act,*

...

"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,

...

42. *In this Part,*

...

"sale price," for the purpose of determining the consumption or sales tax, means

(a) except in the case of wines, the aggregate of

(i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,

(ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, ...

There is no question that the activities of the appellant include blending, mixing, diluting, bottling and packaging of the OMNI 2 dishwashing liquid. As such, it clearly falls within the wording of paragraph (f) of the definition of "manufacturer or producer."

The appellant claimed that it was merely the agent of Esquire and that the actual sale occurred between Esquire and Biway. In this regard, the appellant introduced evidence of the apparent control that Mr. Beit had over the characteristics of the finished product, e.g., ownership of the name OMNI 2 and the formulation of the finished product, including the amount of active ingredients and design of the bottle. However, the Tribunal was not offered any evidence to the effect that Esquire had patent or trademark rights to the goods being produced, that it owned any of the raw materials except for the labels that it supplied, that it had any right to inspect the manufacturing process or that it had any control over the manufacturing process. There was no evidence that Esquire had any proprietary rights to the goods being manufactured. The invoice from Dure Foods to Biway, provided to the Tribunal by the appellant, states that the dishwashing liquid was sold to Biway. Therefore, the Tribunal concludes that it was the appellant that manufactured the goods and sold them to Biway.

It is apparent to the Tribunal that Parliament intended that the sale price on which taxes are to be paid includes "any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale.... " This, clearly, is the total amount that Biway paid for the goods.

The Tribunal finds that the appellant was the manufacturer of the goods and that the sale price on which tax should be paid was that price charged to Biway. Accordingly, the appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

John C. Coleman
John C. Coleman
Member

Michèle Blouin
Michèle Blouin
Member