CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, August 22, 1991

**Appeal No. AP-89-271**

IN THE MATTER OF an appeal heard on April 10, 1991, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF the decision of the Minister of National Revenue dated November 8, 1989, to which a notice of objection was served under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**ROY DENNIS ROOFING LTD.** **Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

## DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that the appellant manufactures roof flashing and uses it in the installation of roofs, thus rendering it subject to tax liability.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Robert J. Martin
Robert J. Martin
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

*UNOFFICIAL SUMMARY*

**Appeal No. AP-89-271**

**ROY DENNIS ROOFING LTD.** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act by Roy Dennis Roofing Ltd. from a decision of the Minister of National Revenue disallowing an objection and confirming an assessment. By Notice of Assessment dated October 28, 1988, the appellant was assessed for the period commencing August 1, 1987, and ending August 31, 1988, against the company's transactions resulting in a total amount unpaid of $7,169.21. From this total, the appellant was credited $658.76 for taxes paid on purchasing production equipment, resulting in an amount owing of $6,510.45. The appellant objected to the assessment on the basis that it placed it at a competitive disadvantage with others in the same industry. By Notice of Decision dated November 8, 1989, the Minister of National Revenue disallowed the objection on the basis that the appellant was a manufacturer of roof flashing with sales of taxable goods in excess of $50,000 per calendar year and, therefore, not exempt from tax liability.*

***HELD**: The appeal is dismissed. The Tribunal finds that the appellant manufactures roof flashing and uses it in the installation of roofs, thus rendering it subject to tax liability.*

| | |
|---|---|
| *Place of Hearing:* | *Vancouver, British Columbia* |
| *Date of Hearing:* | *April 10, 1991* |
| *Date of Decision:* | *August 22, 1991* |
| *Tribunal Members:* | *Kathleen E. Macmillan, Presiding Member*<br>*Sidney A. Fraleigh, Member*<br>*Arthur B. Trudeau, Member* |
| *Counsel for the Tribunal:* | *David M. Attwater* |
| *Clerk of the Tribunal:* | *Nicole Pelletier* |
| *Appearances:* | *Raymond F. Dennis, for the appellant*<br>*Brian J. Saunders, for the respondent* |
| ***Cases Cited**:* | *Her Majesty The Queen v. York Marble, Tile and Terrazzo Ltd., [1968] S.C.R. 140; Gruen Watch Company of Canada Ltd. et al. v. A.-G. of Canada, [1950] O.R. 429, at 442; Minister of National Revenue v. Enseignes Imperial Signs Ltée, Appeal No. A-264-89, Federal Court of Appeal, February 28, 1990; The Queen v. Dante Albert Saracini and Albert Saracini (1958), 59 D.T.C. 1005 (Exch. Ct.).* |

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

**Appeal No. AP-89-271**

**ROY DENNIS ROOFING LTD.** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
SIDNEY A. FRALEIGH, Member
ARTHUR B. TRUDEAU, Member

## REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) by Roy Dennis Roofing Ltd. from the decision of the Minister of National Revenue (the Minister) dated November 8, 1989. The Minister determined that the appellant was a manufacturer of roof flashing with sales of taxable goods in excess of $50,000 per calendar year and, as such, was required to operate under a manufacturer's sales tax licence and account for tax on taxable sales of goods of its manufacture.

The issue in this appeal is whether the appellant is a manufacturer.

The relevant provisions of the Act to this appeal are:

*2.(1) ...*

*"manufacturer or producer" includes*

...

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

...

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

365 Laurier Avenue West
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*27.(1)[2] 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*

*...*

*(iii) payable, in a case where the goods are for use by the producer or manufacturer thereof, by the producer or manufacturer at the time the goods are appropriated for use;*

*...*

*31.(1)[3] Subject to this section, every manufacturer or producer shall apply for a licence for the purposes of this Part.*

*(2)[4] The Minister may grant a licence to any person applying therefor under subsection (1), but the Governor in Council ... may make regulations exempting any class of small manufacturer or producer from payment of consumption or sales tax on goods manufactured or produced by persons who are members of the class and persons so exempted are not required to apply for a licence.*

Also relevant to this appeal are provisions of Revenue Canada Memorandum ET 805 entitled Sheet Metal Products, which reads in part:

*...*

*8. Manufacturers of ductwork, roofing articles, eavestrough and downspout, for buildings, who do not regularly sell identical goods of their manufacture without erection or installation should account for tax on such goods produced exclusively for their own use in the execution of installed contracts, calculated*

*(a) at the reduced rate of 5% tax on the ductwork, flashing, copings, gravelstop, eavestrough and downspout, manufactured from GALVANIZED IRON OR TINPLATE; on the laid down cost of all materials used, including wastage, plus 100%, ...*

FACTS AND EVIDENCE

By Notice of Assessment dated October 28, 1988, the appellant was assessed for the period commencing August 1, 1987, and ending August 31, 1988, against the company's transactions, resulting in an assessment for unpaid taxes of $6,691.95, interest thereon of $278.41 and penalty of $198.85 for a total amount unpaid of $7,169.21. From this total, the appellant was credited $658.76 for taxes paid on production equipment, resulting in an amount owing of $6,510.45.

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2. Now subsection 50(1).
3. Now subsection 54(1).
4. Now subsection 54(2).

The appellant objected to the assessment on the basis that it placed the appellant at a competitive disadvantage with others in the same industry. By Notice of Decision dated November 8, 1989, the Minister disallowed the objection on the basis that the appellant was a manufacturer of roof flashing with sales of taxable goods in excess of $50,000 per calendar year and, therefore, required to operate under a manufacturer's sales tax licence. On January 19, 1990, Roy Dennis Roofing Ltd. appealed to this Tribunal.

The appellant was represented by Mr. Raymond F. Dennis, President of the appellant, Roy Dennis Roofing Ltd. Mr. Dennis, who also acted as witness, described the appellant as a roofing contractor whose main occupation is the installation of roofs. The material at the focus of this appeal is roof flashing, which is a metal trim that the appellant installs on the perimeter of a roof as part of its overall job. In its brief, the appellant describes the flashing as "strips of galvanized metal, several inches wide" that "are used to protect the roof." At the hearing, the witness denied that the metal was galvanized iron, claiming it was simply pre-painted sheet metal. Under questioning, however, he stated that the sheet metal was composed of iron.

As each roof is unique, the flashing must be specially formed. On a new construction site, which is where most of the appellant's work is done, measurements are taken from a set of plans. These dimensions are then confirmed on the job site before any cutting or shaping of the metal occurs.

The appellant purchases sheets of pre-painted metal (26 gauge), eight feet by three feet, as its raw material. Occasionally, it purchases sheets eight feet by four feet. The witness testified that the appellant purchases approximately $80,000 worth of sheet metal per year, of which $3,000 is plain, galvanized metal.

The sheet metal is first cut to the required width on a slitter. To bend the metal to the required shape, the appellant uses a sheet metal brake. Both these procedures are done at the appellant's premises. At this stage, the metal has the basic shape of roof flashing and is transported to the job site where it undergoes further modifications.

During actual installation of the flashing, the shaped metal must be notched to allow for corners, cut to length and trimmed along its long end to accommodate any slope in the roof. To join the lengths of flashing, their ends must be snipped, bent up and crimped together.

The respondent called one witness, Mr. Vinod K. Bhindi, an employee with Revenue Canada, who performed the audit on the appellant that resulted in the notice of assessment that is now before the Tribunal. Mr. Bhindi testified that in assessing the appellant, credits were given for federal sales tax paid on materials and equipment bought by the company and used for making the flashing. The witness stated that he calculated the amount of taxes due on the manufacture of the flashing on the basis of Memorandum ET 805, entitled Sheet Metal Products. Pursuant to the provisions dealing with manufactures of galvanized iron, taxes owing were calculated as 8 percent of two times the cost of the raw materials, less taxes paid. He confirmed that taxes were assessed only with respect to the metal flashing. Without elaboration, he stated that another person from Revenue Canada had determined the appellant was a manufacturer before he performed the assessment.

ARGUMENTS

Mr. Dennis argued that the appellant is not a manufacturer as it does not have any power tools for manufacturing. All its cutting and shaping tools are hand tools only.

He noted that the appellant's market consists of small commercial work and residential contracting and that roofing contracting is a very competitive and price sensitive market. As many of its competitors do not reach the $50,000 threshold, the appellant is placed at a competitive disadvantage if it must charge tax on its manufacturing. As such, the appellant's president argued that the tax imposes an unfair burden.

Mr. Dennis further argued that because the "manufacturing" is only a sideline necessitated by its construction activity, he believes that the company should not be obliged to pay federal sales tax on such activity. He noted that when pricing a job, there are not two prices given, one for installation of the roof and one for the flashing, rather, it is just one contract job and price. All of the metal taken to the job site is altered in some way and the appellant does not sell flashing separately nor does it contract to install flashing only. Further, 95 percent of the labor input is on the job site and only 5 percent at its premises.

Mr. Dennis also argued that Memorandum ET 805 is not applicable to the appellant's activities as its raw material is pre-painted metal and not galvanized iron. He contended that the appellant did not apply for a manufacturer's licence, it did not want such a licence nor does it consider itself a manufacturer. It asked the Tribunal to rule that its activities do not constitute manufacturing.

Counsel for the respondent argued that the threshold issue in this appeal is whether or not the operations of the appellant constitute manufacturing or production of roof flashing. He noted that the terms "manufacturer" and "producer" are not defined in the Act, save for the deemed manufacturer/producer provisions. To assist the Tribunal in defining these terms, he referred the Tribunal to the decision of *Her Majesty The Queen v. York Marble, Tile and Terrazzo Ltd.*[5] of the Supreme Court of Canada, where Mr. Justice Spence adopted the following definition:

> *... manufacture is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery....*

Counsel noted that the definition encompasses work performed by hand, such as some of the work performed by the appellant in the manufacture of the flashing. He also noted that the *York Marble* decision stood for the proposition that a "manufacturer" and "producer" do not mean the same thing.

Counsel for the respondent argued that an activity need not be elaborate, expensive or time-consuming to constitute production. In this regard, he referred the Tribunal to the decision of *Gruen Watch Company of Canada Ltd. et al. v. A.-G. of Canada*,[6] to which the Supreme Court referred in the *York Marble* case, and to *Minister of National Revenue v. Enseignes Imperial Signs Ltée*,[7] a decision of the Federal Court of Appeal, wherein it was stated at page 4:

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5. [1968] S.C.R. 140.
6. [1950] O.R. 429, at 442.
7. Appeal No. A-264-89, Federal Court of Appeal, February 28, 1990.

> *... a thing can be produced by carrying out a very simple operation. What matters is not the complexity of the operation but its result. A thing is produced if what a person does has the result of producing something new; and a thing is new when it can perform a function that could not be performed by the things which existed previously.*
>
> ...

Counsel argued that the appellant's activity starts in the shop, where a sheet of metal is cut to size and shaped, and thereby given new form and properties. What goes in is a sheet of metal, what goes out is roof flashing. Despite the simplicity of the operation described by the appellant, such activity is considered manufacturing or producing.

Counsel for the respondent next addressed the argument raised by the appellant that it installs roofs and does not sell roof flashing. He argued that the Act imposes a tax on goods manufactured or produced when appropriated for use by the manufacturer or producer. In support of this proposition, he referred the Tribunal to the decision of *The Queen v. Dante Albert Saracini and Albert Saracini*.[8] In this case, Mr. Justice Cameron stated at page 1007:

> *... in order to attract this [Excise] tax it is clear that the goods need not be sold. If they are "goods" and consumed or used by the manufacturer, they are liable to the tax, unless especially exempted....*

In conclusion, counsel for the respondent submitted that the assessment should be confirmed and the appeal, dismissed.

REASONS

The Tribunal finds that the appellant's act of cutting and bending sheet metal into roof flashing gives to these materials new forms and qualities. In effect, the appellant has created something new. Recognizing this, the Tribunal concludes that the appellant meets the definition of "manufacturer" as used by the Supreme Court of Canada in the *York Marble* decision.

When the flashing is incorporated into a roof, the appellant is effectively using the goods it manufactured. Accordingly, it falls within the provisions of subparagraph 27(1)(*a*)(iii) of the Act, thus attracting tax liability.

The Tribunal finds that the appellant did not rebut the presumption that the respondent properly applied the provisions of Memorandum ET 805. It also finds that the provisions of the *Small Manufacturers or Producers Exemption Regulations*[9] are not applicable.

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8. (1958), 59 D.T.C. 1005 (Exch. Ct.).
9. SOR/82-498, 13 May, 1992.

CONCLUSION

The appeal is dismissed. The Tribunal finds that the appellant manufactures roof flashing and uses it in the installation of roofs, thus rendering it subject to tax liability.

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