CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, May 19, 1992

Appeal No. AP-90-101

IN THE MATTER OF an appeal heard on March 9, 1992, under 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 May 17, 1990, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

THE CHOCOLATE MESSENGER LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. There is a consistent intention evident in the *Excise Tax Act* to exclude from the definition of manufacturer or producer a person who engages in activities similar to those of the appellant. Acknowledging this manifest intention, the Tribunal concludes that the appellant should not be considered a manufacturer or producer under the *Excise Tax Act*.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-90-101

THE CHOCOLATE MESSENGER LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant, The Chocolate Messenger Ltd. (CML), is a small chocolate store located in central Toronto. In the store, goods are prepared and sold over the counter for immediate consumption or delivered at a customer's request. In addition, CML prepares goods to the specifications of customers for their consumption. The goods may also be packaged according to a customer's choice.

The appellant purchases edible base chocolate known as "couverture" and chocolate truffle shells. Other ingredients used by the appellant include candied fruit peel, ginger, marzipan, Oreo cookies, cocktail maraschino cherries, whipping cream and liqueurs. Couverture is melted and coated over some of the ingredients, creating finished confectionery items. Couverture is also moulded into various forms using solid or hollow moulds. Truffle shells are filled with a mixture of whipping cream, melted couverture and liqueurs to make truffles.

The issue in this appeal is whether the appellant is a manufacturer or producer within the meaning of the Excise Tax Act and, thus, liable for sales tax on the sale of its confectioneries.

***HELD**: The appeal is allowed. There is a consistent intention evident in the Excise Tax Act to exclude from the definition of manufacturer or producer a person who engages in activities similar to those of the appellant. Acknowledging this manifest intention, the Tribunal concludes that the appellant should not be considered a manufacturer or producer under the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*March 9, 1992*
Date of Decision:	*May 19, 1992*
Tribunal Members:	*Michèle Blouin, Presiding Member* *Kathleen E. Macmillan, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Elena Nisbet Butler, for the appellant* *John B. Edmond, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-90-101

THE CHOCOLATE MESSENGER LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
KATHLEEN E. MACMILLAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

The appellant, The Chocolate Messenger Ltd. (CML), is a small chocolate store located in central Toronto. In the store, goods are prepared and sold over the counter for immediate consumption or delivered at a customer's request. In addition, CML prepares goods to the specifications of customers for their consumption. The goods may also be packaged according to a customer's choice.

The appellant employs one full-time employee, other than the owner, whose duties include serving customers, taking orders over the phone, packaging and assisting the owner in the preparation of the goods.

The appellant purchases edible base chocolate known as "couverture" and chocolate truffle shells, both available in white, dark and milk varieties. Couverture is purchased in 5-kg pieces. The ready-made truffle shells come packaged in boxes of 504. Other ingredients used by the appellant include candied fruit peel, ginger, marzipan, Oreo cookies, cocktail maraschino cherries, whipping cream and liqueurs.

Couverture is melted and coated over some of the ingredients, creating finished confectionery items. Couverture is also moulded into various forms using solid or hollow moulds, producing such novelty items as chocolate champagne bottles. Truffle shells are filled with a mixture of whipping cream, melted couverture and liqueurs to make truffles. Certain larger moulded items may subsequently be filled with truffles.

The issue in this appeal is whether the appellant is a manufacturer or producer within the meaning of the *Excise Tax Act*[1] (the Act) and, thus, liable for sales tax on the sale of its confectioneries.

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

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Ms. Elena Nisbet Butler, President of CML, represented the appellant. She acknowledged the description of a manufacturer or producer as used in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Ltd*.[2] However, she noted that more recent decisions of the courts have defined the term "manufacturer or producer," in the context of food preparation, to mean something else. In *Controlled Foods Corporation Limited v. Her Majesty the Queen*,[3] the court found that the words "manufacturer or producer" would not apply to the operations carried out by the taxpayer notwithstanding that such operations involved substantial changes in the forms, qualities and properties of the raw materials used to create the finished product. She concluded, therefore, that with respect to food-related operations, something more than cutting, mixing, melting, cooking and otherwise preparing food for consumption must occur in order to be classified as a manufacturer or producer.

The appellant's representative claimed that CML's activities are not marginal manufacturing as defined in paragraph 2(1)(*f*) of the Act, which reads as follows:

> *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,*
>
> ...

According to Ms. Butler, the operations of CML fit into Revenue Canada's definitions of "blending," "mixing," "cutting to size" and "retail store." Therefore, CML would be considered a marginal manufacturer except for the exclusion for persons who prepare goods for sale in a retail store.

Ms. Butler also argued that if CML is successful in its appeal, the refund should not be limited to those moneys paid in error two years prior to the date of formal application for the refund, being May 18, 1989. She argued that as early as October 26, 1987, CML applied for a refund, though informally, arguing that it was not a manufacturer or producer. In a response to that request, dated November 16, 1987, Revenue Canada informed CML that it was required to account for taxes as its operation was "properly classified as traditional manufacturing." Such

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2. *Infra*, footnote 4.
3. [1981] 2 F.C. 238.

characterization was based, in part, on an erroneous understanding of CML's activities. She argued that there should have been some obligation on Revenue Canada to inform CML of the necessity to formally apply for a refund if it intended to protect its right to that refund. Therefore, on a successful appeal, the refund should not be limited as Revenue Canada did not inform CML of the requirement to apply in prescribed form, thus prejudicing it.

Counsel for the respondent submitted that the Act does not define what he referred to as the "traditional manufacturer or producer." However, the courts have established that

> *... to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it 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*.[4]

Counsel claimed that production and manufacturing are equivalent for purposes of the Act. He notes, however, that they are not synonymous and an act that is not manufacturing may be considered production.[5]

Counsel argued that the appellant, in purchasing 5-kg blocks of couverture, truffle shells and ingredients, and selling chocolate-coated confectioneries, moulded items and truffles, it is giving new forms, qualities and properties or combinations to the raw or prepared materials. He submitted that the nature of the appellant's business activity places it squarely within the definition of the traditional manufacturer. The fact that the appellant is engaged primarily in retail sales of chocolate goods does not alter the fact that it is the producer or manufacturer of those goods; it is the act of producing or manufacturing that attracts the tax liability.[6] Consequently, the appellant is liable to pay sales tax on the goods it creates.

Counsel noted that the appellant claims that its operations "should be held to constitute the production of goods in the bakery industry ... " leading, it is claimed, to a tax exemption pursuant to section 51 of the Act, as the goods constitute foodstuffs enumerated under section 1 of Part V of Schedule III to the Act. Counsel argued that the appellant has overlooked that the goods produced by the appellant, unlike the usual products of a bakery, are excluded from the tax exemption given to foodstuffs by virtue of paragraph 1(*e*) of Part V of Schedule III.

Counsel noted that pursuant to section 68 of the Act, the appellant can only claim a refund of moneys paid in error within two years prior to the date it applied for the refund. Counsel claims, therefore, that if CML is successful in its appeal it would be entitled only to those taxes paid two years prior to May 18, 1989. Any refund claim must be made in prescribed form, this

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4. *Minister of National Revenue v. Dominion Shuttle Company Limited* (1933), 72 Que. S.C. 15; quoted with approval by Spence, J. in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*, [1968] S.C.R. 140.
5. *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited, supra*, footnote 4.
6. *Hobart Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise* (1985), 85 DTC 5440.

necessity preceding the appellant's informal application of October 26, 1987.[7] Also, as a licensed manufacturer, the appellant has purchased its supplies tax free as "partly manufactured goods" pursuant to paragraph 50(5)(*a*)[8] of the Act. Counsel claims that if the appellant is successful in its appeal, it would be liable to pay the tax from which, as a licensed manufacturer, it was previously exempt.

Counsel submitted that *Controlled Foods* cited by the appellant is limited in its application to the restaurant industry and that the appellant is not in the restaurant industry. Also, any apparent unfairness resulting from the fact that a producer or manufacturer is liable to pay sales tax while some of its competitors may be exempt under the *Small Manufacturers or Producers Exemption Regulations*[9] does not relieve the producer or manufacturer from sales tax liability.[10]

In resolving this matter, the Tribunal considered the words of Urie, J, found in the *Controlled Foods* decision to be instructive. In this decision the court found that, in the preparation of meals and beverages, new forms, qualities and properties were imparted to the components thereof. Yet, the court found that the appellant was not a manufacturer or producer. In other words, the test applied in the *York Marble* decision, that is so often used to determine whether a party is a manufacturer or producer, is not always determinative of that issue. The Tribunal notes that this is in keeping with an earlier decision of the Supreme Court of Canada in *His Majesty the King v. Vandeweghe Limited*, where Duff, C.J. stated, in reference to the words "all goods (a) produced or manufactured in Canada," that

> *The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe*.[11]

Accordingly, the Tribunal did not consider itself bound to conclude that the appellant was a manufacturer or producer merely because its activities give new forms to the ingredients it uses in the creation of confectioneries. This was particularly significant in light of the doubt the Tribunal had with regard to the applicability of the *York Marble* test in this instance and the conclusions advocated by counsel for the respondent on applying that test.

In determining whether the appellant's activities would render it a manufacturer or producer under the Act, the Tribunal made reference to the context of the Act to ascertain the intention of Parliament in this regard. The appellant's representative noted paragraph (*f*) of the definition of manufacturer or producer at subsection 2(1) of the Act that serves to clarify who is a manufacturer or producer under the Act. In reference to this provision, the Tribunal notes that the

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7. See, e.g., R.S.C. 1985, c. 7 (2nd Supp.), s. 34, in force May 1, 1986, amending subs. 72(2) of the Act, requiring that an application under section 68 be made in prescribed form.
8. Formerly paragraph 27(2)(*a*).
9. SOR/82-498, 13 May, 1982.
10. *Roy Dennis Roofing Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. Ap-89-271, August 22, 1991.
11. [1934] S.C.R. 244, at 248.

activities of the appellant include preparing goods for sale by blending, mixing and diluting various ingredients and by applying coatings of chocolate to certain goods such as candied fruit peels or cherries, all in the creation of chocolate confectioneries. Clearly, such activities are described in paragraph (*f*). Yet, this provision excludes from the definition of manufacturer or producer any person who engages in such activities in a retail store for purposes of sale of those goods exclusively and directly to customers. Again, this is a situation applicable to the appellant.

Pursuant to paragraph 2(1)(*i*) of the Act, the definition of "manufacturer or producer" includes:

> *(i) any person who sells goods enumerated in Schedule III.1, other than a person who sells those goods exclusively and directly to consumers, ...*

Schedule III.1 includes, at section 3, "[f]ood for human consumption enumerated in paragraphs 1(*e*) to (*m*) of Part V of Schedule III." Paragraph 1(*e*) of Part V of Schedule III includes "candies, confectionery that may be classed as candy, and all goods sold as candies, such as ... chocolate...." The appellant's representative argued that because CML sells chocolate confectionery that may be classed as candy, it would fall within the definition of a manufacturer or producer at paragraph 2(1)(*i*) of the Act except for the exclusion of those persons who sell those goods exclusively and directly to consumers. With this the Tribunal agrees.

The significance of the above two provisions is that there is a consistent intention evident in the Act to exclude from the definition of manufacturer or producer a person who engages in activities similar to those of the appellant. Acknowledging this manifest intention, the Tribunal concludes that the appellant should not be considered a manufacturer or producer under the Act. Therefore, the appeal is allowed.

Pursuant to sections 68 and 72 of the Act, the appellant's claim is limited to those moneys paid in error two years prior to May 18, 1989, when it applied in prescribed form for a refund of moneys paid in error. However, the Tribunal notes that in the correspondence with CML two years earlier, Revenue Canada incorrectly characterized the nature of the appellant's operations and failed to act on the appellant's request for a refund. It did not inform the appellant of the necessity to apply in prescribed form. Under these circumstances, the Tribunal suggests that it would be fitting to refund all moneys paid in error by CML.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

W. Roy Hines
W. Roy Hines
Member