



Ottawa, Tuesday, January 7, 1992

Appeal No. AP-90-145

IN THE MATTER OF an appeal heard on October 18, 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 21, 1990, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

GUELPH PAPER BOX COMPANY LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the particular boxes in issue are usual coverings or containers used exclusively for covering or containing goods not subject to the consumption or sales tax and are not goods designed for dispensing goods for sale.

Charles A. Gracey
Charles A. Gracey
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Michèle Blouin
Michèle Blouin
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-145

GUELPH PAPER BOX COMPANY LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The goods at issue are rectangular cardboard containers, 17 cm by 22 cm, used to carry food products and up to four cups of coffee. They are constructed of lightweight cardboard with low sides, no cover, and are divided into separate compartments. The containers are disposable.

The licensed manufacturer of the goods, Guelph Paper Box Company Limited, sold the goods to Tim Donut Limited. It did not charge its customer federal sales tax between February 4, 1985, and July 31, 1988, which formed the basis of the assessment.

HELD: *The appeal is allowed. The Tribunal finds that the particular boxes in issue are usual coverings or containers used exclusively for covering or containing goods not subject to the consumption or sales tax and are not goods designed for dispensing goods for sale. As such, they are exempt from the consumption or sales tax.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 18, 1991
Date of Decision: January 7, 1992

Tribunal Members: Charles A. Gracey, Presiding Member
W. Roy Hines, Member
Michèle Blouin, Member

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Pierrette Hébert

Appearances: Adèle Malo, for the appellant
Meg Kinnear, for the respondent

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and

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TRIBUNAL: CHARLES A. GRACEY, Presiding Member
W. ROY HINES, Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

The issues in this appeal are:

1. whether cardboard containers designed to carry bakery products and up to four cups of coffee for consumption off premises qualify for tax exemption as usual coverings or usual containers for use exclusively in covering or containing goods, but not including coverings or containers designed for dispensing goods for sale or designed for repeated use; and
2. whether the respondent was justified in imposing a penalty on the appellant subsequent to the assessment.

The goods at issue are rectangular cardboard containers, 17 cm by 22 cm, used to carry food products and up to four cups of coffee. They are constructed of lightweight cardboard with low sides, no cover, and are divided into separate compartments. The containers are disposable.

The licensed manufacturer of the goods, Guelph Paper Box Company Limited (Guelph Paper Box), sold the goods to Tim Donut Limited (Tim Donut). It did not charge its customer federal sales tax between February 4, 1985, and July 31, 1988, which formed the basis of the assessment.

By instrument dated December 13, 1990, Guelph Paper Box assigned its right to the appeal to Tim Donut.

For purposes of this appeal, the relevant provisions of the *Excise Tax Act*¹ are:

51. (1) The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III ...

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

SCHEDULE III

PART I

COVERINGS OR CONTAINERS

1. Usual coverings or usual containers sold to or imported by a manufacturer or producer for use by him exclusively in covering or containing goods of his manufacture or production that are not subject to the consumption or sales tax, but not including coverings or containers designed for dispensing goods for sale or designed for repeated use.

Counsel for the respondent argued that the onus is on Tim Donut to establish that the goods in issue are described by the exemption claimed and that every constituent element necessary to the exemption has been satisfied.

Counsel identified three elements that must be met:

- (i) the goods are usual coverings or usual containers;
- (ii) the goods must be for use by Tim Donut exclusively in covering or containing goods of its manufacture or production that are not subject to the consumption or sales tax; and
- (iii) the goods may not be designed for dispensing goods for sale or designed for repeated use.

Counsel admitted that the goods meet the second element, but not the other two.

Counsel for the respondent argued that in order to be considered a usual covering or usual container, the goods must be used to cover or contain the manufactured goods. However, in this case, they do not cover or contain the goods. Rather, they are used to carry the containers for the manufactured goods, namely, the cups that contain the coffee or the bags that carry the doughnuts. Counsel argued that, as two thirds of the containers are used to hold beverages, they are more properly viewed as trays designed for dispensing goods and cannot be considered as a usual container.

The Tribunal believes, however, as counsel for the appellant argued, that a cover or container can be considered usual when it is used in a manner consistent with the purpose of its design and usage. In other words, it is used in a manner consistent with what commonly occurs and what a reasonable person would expect to occur. Margarine sold in Tupperware would not be considered usual. Margarine sold in a nondescript plastic tub would be considered usual, and the plastic tub a usual container. Accordingly, the Tribunal believes that, as the boxes are used in a manner consistent with the purpose for which they were designed, and as approximately 15 million of them will be used for this purpose in 1991, they can be considered a usual covering or container. The Tribunal also believes that this quality is not lost when the box is used to carry a cup containing coffee or a bag containing a doughnut.

Counsel for the respondent argued that the boxes in issue are designed for dispensing goods for sale and are therefore outside the exemption claimed. She argued that when goods come into use only in the hands of retail customers and are not used to contain or cover the manufactured item at some prior point in the distribution system, they should be classified as being designed for dispensing goods for sale. The goods at issue only come into use in the hands of retail customers to carry beverages and baked goods out of the outlets after the sale. Counsel submits, therefore, that they are used to dispense the goods for sale and do not fit within the exemption claimed.

In addressing this issue, the Tribunal referred to paragraph 21 of Excise Memorandum ET 302 that acknowledges the manufacturing status of a doughnut outlet with eat-in accommodations. Of greatest interest for the purpose of this appeal is the statement contained in that paragraph acknowledging that such doughnut manufacturers "may obtain coverings and containers to cover or contain the baked goods for sale to the public exempt of tax." This notion is also apparent in a memorandum addressed to all regional directors, Excise, ET/PS 222-1, stamp dated February 1, 1984, contained in the respondent's brief, where, in reference to doughnut shops, it is stated that "[i]n these types of dual operations, exemption from sales tax is granted to the manufacturer for the following goods: ... - coverings and containers to cover or contain the baked goods ... including the paper bags, cardboard boxes and similar containers." From the above two references it would appear, therefore, that cardboard boxes, used as a covering or container for the sale of baked goods to the public should be obtainable by a doughnut manufacturer exempt from sales tax; and the Tribunal is in agreement with this statement.

In rendering this decision, the Tribunal notes that Part I to Schedule III refers to "coverings or containers designed for dispensing goods for sale." The Tribunal acknowledges that the cardboard boxes are used as a convenient means of carrying several items at once or to protect fragile or large items that would not easily fit into a paper bag. However, it does not believe that the boxes are designed for dispensing goods in the sense that the box, *per se*, is designed or devised to do the dispensing of the goods for sale to the customer. In support of this definition, reference is made to paragraph 6 of Excise Memorandum ET 302, where it is stated that "[t]he term 'designed for dispensing goods' includes such container devices as soft-drink dispensers, tea and coffee urns and similar articles designed for the dispensing function." The Tribunal believes that the boxes in issue were not designed for dispensing goods as a soft-drink dispenser or a coffee urn was designed to dispense goods.

Accordingly, the appeal is allowed. The Tribunal finds that the particular boxes in issue are usual coverings or containers used exclusively for covering or containing goods not subject to the consumption or sales tax and are not goods designed for dispensing goods for sale. As Tim Donut is successful in its appeal, the second issue need not be addressed.

Charles A. Gracey
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Presiding Member

W. Roy Hines
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