CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, December 8, 1992

Appeal No. AP-90-170

IN THE MATTER OF an appeal heard on October 20, 1992, 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 December 18, 1990, pursuant to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

LES ÉQUIPEMENTS FRIGMA INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-90-170

LES ÉQUIPEMENTS FRIGMA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant imports slush-making machines. It sells those machines to retail outlets such as dairy bars, small corner stores or other commercial establishments. The slush-making machines are used to make slush beverages that are sold to customers for immediate consumption. The issue in this appeal is whether the retail outlets that purchase the slush-making machines are "manufacturers or producers" for the purposes of subsection 51(1) of the Excise Tax Act and subparagraph 1(a)(i), Part XIII, Schedule III to that Act.

HELD: *The appeal is allowed. In the Tribunal's view, had Parliament intended to increase the scope of section 43.1, it would have done so by choosing the appropriate words. However, contrary to the definition of the words "producer or manufacturer" contained in section 42 of the Excise Tax Act, Parliament has made section 43.1 only applicable to Part VI of that Act and not to its Schedules. Moreover, section 43.1 applies only "in relation to any" beverage manufactured or produced by those persons. The Excise Tax Act therefore considers the appellant's customers to be producers or manufacturers for other purposes. The Tribunal finds that one of these purposes is the application of the exempting provision in paragraph 1(a), Part XIII, Schedule III to the Excise Tax Act. Moreoever, except for the presumption it contains, section 43.1 clearly implies that those persons should be considered manufacturers or producers. The goods in issue are therefore encompassed by the terms of the exempting provision (paragraph 1(a)) of Part XIII, Schedule III, upon which the appellant relied.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*October 20, 1992*
Date of Decision:	*December 8, 1992*
Tribunal Members:	*Michèle Blouin, Presiding Member* *Kathleen E. Macmillan, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Michael Kaylor, for the appellant* *Christine Hudon, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-90-170

LES ÉQUIPEMENTS FRIGMA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
KATHLEEN E. MACMILLAN, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from a decision made by the Minister of National Revenue confirming a determination that denied a refund claim application to recover federal sales tax paid on the purchase of slush-making machines.

The appellant imports slush-making machines. It sells those machines to retail outlets such as dairy bars, small corner stores or other commercial establishments. The slush-making machines are used to make slush beverages that are sold to customers for immediate consumption.

The issue in this appeal is whether the retail outlets that purchase the slush-making machines are "manufacturers or producers" for purposes of subsection 51(1) of the Act and subparagraph 1(*a*)(i), Part XIII, Schedule III to that Act.

Subsection 51(1) reads as follows:

> *The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III, other than those goods mentioned in Part XIII of that Schedule that are sold to or imported by persons exempt from consumption or sales tax under subsection 54(2).*

The appellant asserts that the goods in issue, which are sold to retail outlets, are machinery sold to manufacturers or producers for use by them primarily and directly in the manufacture or production of goods as mentioned in subparagraph 1(*a*)(i), Part XIII, Schedule III to the Act. These goods, it contends, are therefore exempted from sales tax pursuant to subsection 51(1) of the Act.

The appellant bases its argument on the facts that according to section 43.1 of the Act, a person who manufactures or produces in a retail outlet carbonated beverages or non-carbonated fruit flavoured beverages having less than 25 percent by volume of natural fruit, for sale in that

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

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outlet directly to consumers, is deemed not to be a manufacturer or producer for the purposes of Part VI of the Act.

Section 43.1 reads as follows:

> *Where a person manufactures or produces in a retail outlet carbonated beverages or non-carbonated fruit flavoured beverages, other than alcoholic beverages, having less than twenty-five per cent by volume of natural fruit, for sale in that outlet exclusively and directly to consumers for immediate consumption, he shall, for the purposes of this Part, be deemed not to be, in relation to any such beverage so manufactured or produced by him, the manufacturer or producer thereof.* (Emphasis added)

In the appellant's view, the presumption contained in section 43.1 of the Act shows that the appellant's customers would normally be considered manufacturers or producers under the Act. And, as section 43.1 applies only to Part VI of the Act, it has no bearing on Schedule III under which the appellant claims the goods in issue to be exempted. Therefore, the machinery sold by the appellant should benefit from the terms of the exempting provision contained in Schedule III to the Act.

The respondent objects to the appellant's argument on the grounds that the exempting provisions in Schedule III to the Act are made in relation to subsection 51(1) which is also included in Part VI of the Act and, therefore, that section 43.1 is applicable in this instance. The respondent also argues that retail outlets are excluded from the scope of Part VI of the Act by section 42, which provides that:

> *"producer or manufacturer" includes any printer, publisher, lithographer, engraver or commercial artist, but does not include, for the purposes of this Part and the Schedules, any restaurateur, caterer or other person engaged in the business of preparing in a restaurant, centralized kitchen or similar establishment food or drink, whether or not the food or drink is for consumption on the premises.* (Emphasis added)

In addition, the respondent argues that paragraph (*f*) of the definition of the words "manufacturer or producer" in subsection 2(1) contains a similar exclusion for the purposes of the Act. Finally, the respondent relies upon the decision of the Tribunal in *The Chocolate Messenger Ltd. v. The Minister of National Revenue*,[2] where the Tribunal stated 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," in which case a small chocolate store prepared confectionery items that were sold over the counter for immediate consumption or delivery.

As section 43.1 of the Act specifically addresses the situation of the appellant's customers, the Tribunal disagrees with the respondent and finds that neither paragraph (*f*) of the definition of

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2. Canadian International Trade Tribunal, Appeal No. AP-90-101, May 19, 1992.

"manufacturer or producer" in subsection 2(1) nor the definition of "producer or manufacturer" in section 42, Part VI of the Act is applicable in this instance.

The Tribunal is of the view that the explicit wording used by Parliament in enacting section 43.1[3] is of prime importance in this case. Had Parliament intended to increase the scope of section 43.1, the Tribunal believes that it would have chosen the appropriate words. However, contrary to the definition of the words "producer or manufacturer" contained in section 42 of the Act, Parliament has made section 43.1 only applicable to Part VI of the Act and not to its Schedules. The Tribunal would have been reluctant to find some significance in that discrepancy, given that Schedule III to the Act only applies through subsection 51(1), which is also contained in Part VI. However, the Tribunal's interpretation that section 43.1 does not apply to Schedule III to the Act is reinforced by the fact that the deeming provision, precluding the appellant's customers from being considered producers or manufacturers, is limited. Indeed, section 43.1 applies only "in relation to any" beverage manufactured or produced by those persons. The Tribunal thus considers that the presumption is made with respect to the end product, in this case, the slush beverages for specific purposes.

The two elements of the wording of section 43.1 identified by the Tribunal lead to the conclusion that the Act does consider persons such as the appellant's customers to be producers or manufacturers for other purposes. The Tribunal finds that one of these purposes is the application of paragraph 1(*a*), Part XIII, Schedule III to the Act. Furthermore, there is nothing in the Act to prevent the appellant's customers from being considered manufacturers or producers. Indeed, section 43.1 clearly implies that those persons should be considered manufacturers or producers. The goods in issue are therefore encompassed by the terms of the exempting provision upon which the appellant relied.

For the foregoing reasons, the appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

3. *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof*, S.C. 1986, c. 9, s. 15(2).