CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 17, 1992

Appeal No. AP-91-061

IN THE MATTER OF an appeal heard on June 23, 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 March 12, 1991, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

LABEL TECH, A DIVISION OF PRIDAMOR INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. Labels produced by the appellant and sold to Mac's Convenience Stores Inc., A Division of Silcorp Limited, are articles and materials for use exclusively in the manufacture or production of food for human consumption pursuant to sections 1 and 3, Part V, Schedule III to the *Excise Tax Act*.

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

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-91-061

LABEL TECH, A DIVISION OF PRIDAMOR INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether labels produced by the appellant and sold to Mac's Convenience Stores Inc., A Division of Silcorp Limited, are articles and materials for use exclusively in the manufacture or production of food for human consumption pursuant to sections 1 and 3, Part V, Schedule III to the Excise Tax Act.

HELD: *The appeal is allowed.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*June 23, 1992*
Date of Decision:	*August 17, 1992*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *W. Roy Hines, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Clifford Sosnow*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Neil A. Bass, for the appellant* *Brian Tittemore, for the respondent*

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Appeal No. AP-91-061

LABEL TECH, A DIVISION OF PRIDAMOR INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
W. ROY HINES, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

The appellant is a manufacturer of labels which are affixed to prepared foods sold at Mac's Convenience Stores Inc. (Mac's). Mac's, which is a division of Silcorp Limited, is an operator of retail convenience stores. At issue is whether the labels are federal sales tax exempt.

Mac's and a company called Golden Touch Foods Limited (Golden Touch) have an arms length business relation whereby Golden Touch produces prepared foods such as sandwiches and hamburgers for Mac's. The appellant's labels, which are sold to Mac's, are shipped directly by the appellant to Golden Touch where they are affixed to the wrapping of the prepared foods. In turn, Golden Touch sells and distributes the products to Mac's which offers the goods at its convenience stores under the trademark "Fresh Express." The labels specify, in French and English, the prepared foods being sold and the ingredients used in making the product and include the name "Mac's Convenience Stores Inc."

Mr. Ted Collins, General Manager at Golden Touch, testified on behalf of the appellant. According to his testimony, Mac's provided Golden Touch with a "Fresh Express Spec Book" (the book) which contains detailed instructions to be followed by Golden Touch when manufacturing and labelling the prepared foods. The book specifies the ingredients to be used, the exact weight of each ingredient that goes into making the sandwich, the supplier of the ingredients, the method of preparation of the sandwiches, the packaging type, the style of wrap, the type of label to be placed on the product and its location on the wrapping.

Mr. Collins testified that Mac's will not purchase the sandwiches unless the prepared foods are made in accordance with the specifications set out in the book. He said that Golden Touch's compliance with the book is monitored through weekly visits to Golden Touch's operations by Mac's personnel. This verification of book procedures also includes an examination of whether Golden Touch complies with the labelling procedure set out in the book. In fact, Mac's does not allow prepared foods produced by Golden Touch to be sold in its convenience stores unless the products carry the Fresh Express labels. Mr. Collins also indicated that, in any event, pursuant to the *Consumer Packaging and Labelling Act*,[1] an identifying label must be affixed to the wrapping of the prepared foods produced by Golden Touch.

1. R.S.C., 1985, c. C-38.

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Mr. Collins said that sandwiches are prepared by people stationed beside a moving production line. Each person has a different function in the preparation of the sandwiches. After a sandwich is prepared, it moves along the production line to a station where it is wrapped, labelled, "best before" code dated and placed in collecting trays. The trays are then moved to an "order assembly" area for distribution to Mac's stores. Depending on the product, wrapping and labelling are done either by hand or by machine.

The first issue is whether the labels sold by the appellant to Mac's are "for use exclusively in the manufacture or production" of the Fresh Express prepared foods pursuant to sections 1 and 3, Part V, Schedule III to the *Excise Tax Act*[2] (the Act).

The appellant contends that the labels are for such exclusive use because the production process is not complete until the prepared foods are packaged and labelled in accordance with the book specifications. The appellant submits that production processes include all operations undertaken to convert goods into marketable form or to prepare goods prior to the commencement of distribution to market. The appellant claims that the packaging and labelling of the Fresh Express products are steps in a series of operations performed to prepare the products for market. Such operations are performed prior to the commencement of distribution and warehousing operations since the Fresh Express products are not saleable until packaged and labelled according to the book specifications.

The respondent contends that the labels were not sold for use exclusively in the manufacture or production of the Fresh Express products because the fixing of labels does not constitute a part of the manufacture or production of the prepared foods. The respondent, citing the Supreme Court of Canada decision in *The Queen v. York Marble, Tile and Terrazzo Limited*,[3] submits that only those activities or materials which contribute to giving raw or prepared materials new forms, qualities or properties, or which become a constituent part of the goods, are to be considered part of the manufacturing or production of a product. The respondent claims that the labels did not contribute to new forms, qualities or properties nor did they become a constituent part of those food products.

The respondent also submits that when Parliament intends to include in the phrase "manufacture or production" ancillary processes such as the packaging of a product, it expressly states so, as in the extended definition of "manufacturer or producer" in section 2 of the Act. Otherwise, Parliament treats such activities as separate and distinct from the manufacture or production of products.

In the alternative, the appellant argues that if the labels are not sold for use in the manufacture or production of the Fresh Express prepared foods, Mac's is nevertheless entitled to purchase the labels from the appellant exempt from federal sales tax because the labels are "[u]sual coverings or ... containers sold to ... a manufacturer [i.e., Mac's] ... for use by him exclusively in covering ... goods of his manufacture" pursuant to section 1, Part I, Schedule III to the Act.

The appellant contends that Mac's is a "manufacturer" because, pursuant to paragraph 2(1)(*b*) of the Act, Mac's holds a proprietary or sales right to the Fresh Express products. Mac's maintains control over the ingredients to be used in the products, the suppliers

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2. R.S.C., 1985, c. E-15, as amended.
3. [1968] S.C.R. 140.

of those ingredients, the method of preparation, the packaging type, the style of wrap, the labelling procedure, as well as any other specification. The appellant also contends that the labels are coverings or containers because the labels are placed on all Fresh Express products for identification and marketing purposes.

The respondent argues that Mac's is not a manufacturer of the food products that it purchased from Golden Touch. Mac's simply provided Golden Touch with the labels that were to be placed on the prepared foods once those products were made. The respondent submits that there is no evidence that Mac's owned, held, claimed or used any patent, proprietary, sales or other rights to the food products that were prepared by Golden Touch. The respondent contends that the elements of control over the production and manufacturing were ultimately in the hands of Golden Touch, and Golden Touch alone retained the right of sale of the food products that it prepared. The respondent adds that the labels do not fall within the ordinary and grammatical meaning of the word "coverings" or "containers" and that the labels are not used to cover or contain goods. In contrast, they are used to mark or identify the goods after the goods have been covered or contained.

After having examined the evidence and applicable jurisprudence, the Tribunal concludes that the labels in issue are "for use exclusively in the manufacture or production" of the Fresh Express prepared foods and, thus, are federal sales tax exempt pursuant to sections 1 and 3, Part V, Schedule III to the Act. Consequently, the Tribunal does not address the second issue raised in this appeal.

The Tribunal has found the Federal Court of Appeal decision in *Coca Cola Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,[4] which was a Tariff Board appeal, to be particularly applicable to the case at bar. In that case, the issue was whether soft drink carriers and cases were for use in the manufacture or production of bottled soft drinks pursuant to subparagraph 1(*a*)(i), Part XIII, Schedule III to the Act. The carriers and cases were used to transport empty bottles to a point in the appellant's production process where the bottles were removed, washed, filled and capped. The carriers and cases were then moved to a point in the production line where they were filled with the bottles and placed on pallets for removal to a warehouse.

In the *Coca Cola* case, the Court rejected the argument, put forward by the respondent in the present appeal, that because subsection 2(1) of the Act has expressly extended the meaning of the phrase "manufacturer or producer" to include those who package goods whereas sections 1 and 3, Part V, Schedule III to the Act do not explicitly include such operations, Parliament did not intend to include packaging in the meaning of the phrase "manufacture or production" of goods.

> *It appears to me that the expressions "manufacturer or producer," "manufactured or produced" and "manufacture or production," which are found in various places and contexts in the Act, are used for differing purposes and that it is wrong to try to interpret one by reference to what another means or has been held to include either in a particular context or in general. As it seems to me, the definition of "manufacturer or producer" in subsection 2(1) is intended to identify a person who will be liable to pay the*

4. [1984] 1 F.C. 447.

> *tax whether or not he manufactures or produces anything or is or is not a manufacturer or producer.*[5]

The Tribunal agrees with this and considers the principle enunciated in that case to be applicable to the case at bar. The scope of the definition of "manufacture or production" in sections 1 and 3, Part V, Schedule III to the Act cannot be ascertained by reference to an extended meaning of the phrase "manufacturer or producer" as set out in subsection 2(1) of the Act.

In the *Coca Cola* case, the Court also rejected the respondent's argument that because the labels did not contribute to giving the prepared foods new forms, qualities or properties, or did not become a constituent part of the products, the labels could not be considered part of the manufacturing or production process. In that case, the Tariff Board, relying on the *York Marble* case, held that the carriers and cases were not used in the production of soft drinks because they did not give any new forms, qualities or properties to the soft drinks. The Court said that the Tariff Board erred in taking this approach which is called "narrow," "unduly confining" and "unreal."

> *The second branch of the appellant's submission was ... that the Board erred in applying the test of The Queen v. York Marble, Tile and Terrazo Limited....*
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> *I agree.... In my view the Board erred in applying to the question whether goods which fall within the meaning of "machinery or apparatus" are for use in the "manufacture or production" of goods a test which narrowly and unduly confines such machinery or apparatus to that used up to but not after the moment when a usable and saleable article is in existence without regard for what must happen immediately thereafter to get the article out of the way of like articles on the production line.... Such a test, in my opinion, is unreal. In an operation of this kind, means for removal of the product from the production equipment is as essential as any other part of the machinery or apparatus used in the manufacture or production of the product and is used as directly in the manufacture or production of the product as any of the other parts.*[6]

The Tribunal considers that the tests set out in the above-noted passage are applicable to the present appeal. The uncontroverted evidence in this appeal is that the labels are put on the sandwich products before they are taken off the sandwich production line and placed in collecting trays which, in turn, are then moved to an "order assembly" area for distribution to Mac's stores. The uncontradicted testimony of Mr. Collins is that the labels are an integral part of the process that renders the sandwiches into a marketable and saleable item of commerce. Mac's not only specifies the kind of label that Golden Touch is to use, but also indicates where on the sandwich packaging the label is to be affixed. Indeed, the prepared foods will not be purchased by Mac's, nor could they be sold anywhere else, unless a label is affixed to the product.

In the Tribunal's view, if cases and carriers used to get articles of commerce out of the way of like articles on a production line can be considered an integral part of the manufacturing operation and as apparatus used in the manufacture or production of that article of commerce as per the *Coca Cola* case, *a fortiori*, the labels in issue, which are affixed to the sandwiches before

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5. *Ibid.*, at 454.
6. *Ibid.*, at 456-57.

they are taken off the production line and used to render the prepared foods into a marketable and saleable item of commerce, are used in the manufacture and production of these products.

For the foregoing reasons, the appeal is allowed.

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

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member