CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, October 30, 1992

Appeal No. AP-91-155

IN THE MATTER OF an appeal heard on August 17, 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 June 4, 1991, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

MACKAY FAMILY INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Michèle Blouin
Michèle Blouin
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-91-155

MACKAY FAMILY INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the appellant is eligible to claim a refund of an amount equal to the portion of the price paid to its supplier that represented sales tax on equipment used by the appellant primarily and directly in the production of ice cream.

***HELD**: The appeal is dismissed. The monies paid by the appellant were paid to Carvel (Canada) Limited for sales tax required under the Excise Tax Act to be paid by Carvel (Canada) Limited. This being so, the appellant has not paid monies which have been taken into account as taxes and is therefore not eligible to claim a refund of such monies under section 68 of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*August 17, 1991*
Date of Decision:	*October 30, 1992*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *Michèle Blouin, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Brenda C. Swick-Martin*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Salim Musaji, for the appellant* *F.B. Woyiwada, for the respondent*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-155

MACKAY FAMILY INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
MICHÈLE BLOUIN, 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 of the respondent, disallowing the appellant's application, under section 68 of the Act, for a refund of federal sales tax.

The parties consented to having this appeal heard by way of written submissions based on an agreed statement of facts and written submissions filed by both parties.

The appellant produces ice cream in a retail outlet for sale directly to consumers and operates under a franchise agreement with Carvel (Canada) Limited (Carvel). The appellant purchased equipment from Carvel for use in the production of ice cream. The price at which the appellant purchased its equipment included a markup which represented the federal sales tax that Carvel had remitted to the respondent on the sale of the equipment.

The appellant applied for a refund from the respondent of an amount equal to the sales tax markup charged to it by Carvel. The respondent disallowed the application, after which the appellant filed a notice of objection, which objection was subsequently disallowed by the respondent. Thereafter, the appellant filed an appeal with the Tribunal.

The issue in this appeal is whether the appellant is eligible to claim a refund of an amount equal to the portion of the price paid to its supplier that represented sales tax on equipment used by the appellant primarily and directly in the production of ice cream.

The relevant provisions of the Act are as follows:

> *68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.*

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

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> *68.2 Where tax under Part III or VI has been paid in respect of any goods and subsequently the goods are sold to a purchaser in circumstances that, by virtue of the nature of that purchaser or the use to which the goods are to be put or by virtue of both such nature and use, would have rendered the sale to that purchaser exempt or relieved from that tax under subsection 23(6), paragraph 23(8)(b) or subsection 50(5) or 51(1) had the goods been manufactured in Canada and sold to the purchaser by the manufacturer or producer thereof, an amount equal to the amount of that tax shall, subject to this Part, be paid to the person who sold the goods to that purchaser if the person who sold the goods applies therefor within two years after he sold the goods.*

The appellant argued that a purchaser has paid federal sales tax in error when the tax has been paid on goods exempt from sales tax. The appellant submitted that it had paid sales tax in error because the equipment was used primarily and directly in the production of ice cream and, therefore, qualified for sales tax exemption pursuant to paragraph 1(*a*) of Part XIII of Schedule III to the Act.

The respondent submitted that the appellant is not entitled to a refund of sales tax paid by Carvel because only the person obliged to pay sales tax is entitled to such a refund and not the person to whom the goods were supplied, even if they were supplied at a price that included a sales tax markup. Accordingly, because Carvel, and not the appellant, was obliged to pay federal sales tax, it was submitted that only Carvel is entitled to any refund that may be payable by the respondent under the Act.

The Tribunal finds that the appellant is not eligible for a refund of an amount equal to the portion of the price paid to Carvel that represented federal sales tax statutorily required to be paid by Carvel.

A condition to claiming a refund under section 68 of the Act is that monies, for which the claim was made, must have been taken into account as taxes imposed under the Act.

The jurisprudence established by the Supreme Court of Canada in *The Queen v. M. Geller Incorporated*[2] and by the Federal Court of Appeal in *Price (Nfld.) Pulp and Paper Limited v. The Queen*,[3] and followed by the Tribunal in *Geocrude Energy Inc. v. The Minister of National Revenue*,[4] has consistently held that amounts representing federal sales tax paid by the purchaser of goods to the person obliged to pay such tax under the legislation are not considered as taxes imposed under the Act.

The monies paid by the appellant were paid to Carvel for sales tax required under the Act to be paid by Carvel. This being so, the appellant has not paid monies which have been taken into account as taxes imposed under the Act and is therefore not eligible to claim a refund of such monies under section 68 of the Act.

Section 68.2 of the Act provides that, where tax under Part VI has been paid in respect of any goods and subsequently the goods are sold to a purchaser in circumstances that would have rendered the sale to that purchaser exempt from tax under subsection 51(1) of the Act, an amount equal to the amount of that tax shall be paid to the person who sold the goods to that

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2. [1963] S.C.R. 629.
3. [1974] 2 F.C. 436.
4. 1 T.S.T. 1212; Canadian International Trade Tribunal, Appeal No. 2937, August 21, 1989.

purchaser. Clearly, the eligible claimant for a refund under this provision is the person who paid the sales tax on goods that were sold to a purchaser under tax-exempt conditions. The appellant is, therefore, not an eligible claimant for a refund of sales tax under section 68.2 of the Act because Carvel, and not the appellant, paid the tax on the sale of the equipment.

For the foregoing reasons, the appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Michèle Blouin
Michèle Blouin
Member

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