CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, January 18, 1993

Appeal No. AP-91-120

IN THE MATTER OF an appeal heard on October 21, 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 April 30, 1991, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

BASF COATINGS & INKS CANADA LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

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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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-91-120

BASF COATINGS & INKS CANADA LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is in the business of producing and selling automotive paints, solvents, reducers and thinners. The appellant sells its products primarily through a network of independent jobbers that subsequently resell the products to end users. The appellant offers jobbers certain adjustments, based on the resale price obtained by jobbers, on sales to certain end users - identified as fleet purchasers, government and educational institutions, and body builders - who come under the appellant's Specialty Markets Program. The amount in dispute represents the amount of federal sales tax attributable to the aggregate "sale price" reductions, given to jobbers during the assessment period, under the Specialty Markets Program.

HELD: *The appeal is allowed. In the Tribunal's view, the reductions or credits given to the jobbers were directly related to the commercial relationship between the appellant and its jobbers. In the Tribunal's view, the sale price on which tax is paid should be the actual price or net realized value received by a vendor. If the reductions were not allowed in the instant case, the appellant would be taxed on amounts that it did not receive, which would be contrary to the intention of subsection 50(1) of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*October 21, 1992*
Date of Decision:	*January 18, 1993*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *Michèle Blouin, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Joseph Groia and Mark I. Jadd, for the appellant* *Joseph de Pencier, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-120

BASF COATINGS & INKS CANADA LTD. **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 of an assessment made pursuant to section 81.19 of the *Excise Tax Act*[1] (the Act). BASF Coatings & Inks Canada Ltd. was assessed a net amount of $73,680.99 for federal sales tax (FST) not remitted on taxable sales, penalties and interest. The appellant disputed the assessment to the extent of $50,429.00 plus applicable penalties and interest.

The appellant[2] is in the business of producing and selling automotive paints, solvents, reducers and thinners. The appellant sells its products primarily through a network of independent jobbers that subsequently resell the products to end users. The initial price paid by these jobbers is subject to a number of possible adjustments, e.g. a reduction for prompt payment. The appellant also offers jobbers certain adjustments, based on the resale price obtained by jobbers, on sales to certain end users - identified as fleet purchasers, government and educational institutions, and body builders - who come under the appellant's Specialty Markets Program (the SMP). The amount in dispute represents the amount of FST attributable to the aggregate "sale price" reductions, given to jobbers during the assessment period, under the SMP.

The issue in this appeal is whether the adjustments to the price of the products sold under the SMP should be recognized as legitimate reductions to the "sale price" of these goods for purposes of subsection 50(1) of the Act.

The relevant provisions of the Act are as follows:

> *50. (1) There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sale price or on the volume of all goods*
>
> *(a) produced or manufactured in Canada*
>
> *(i) payable... by the ... manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier.*

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1. R.S.C. 1985, c. E-15.
2. By articles of amalgamation, effective January 1, 1992, the appellant amalgamated with BASF Canada Inc. and has continued operations under the name BASF Canada Inc.

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42. "sale price", for the purpose of determining the consumption or sales tax, means

(a) ... the aggregate of

(i) the amount charged as price ...

(ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing.

The appellant's first witness was Mr. David J. M^{c}Gregor, Manager, Logistics Systems, Planning and Controlling, BASF Canada Inc. Mr. M^{c}Gregor was Marketing Services Manager in the Refinishing Division for most of the assessment period. Mr. M^{c}Gregor was intricately involved in the development of the SMP and, in fact, wrote the manual for the implementation of the program. In his testimony, he explained the background of the SMP and the reasons for its structure.

According to Mr. M^{c}Gregor, the SMP was implemented to facilitate the appellant's entry into new markets on which it had not previously focussed. This was done, he stated, because of contraction in the appellant's main market, namely, sales to body shops. In approaching these specialty markets, the appellant and its jobbers recognized that they would have to sell their products at lower prices than the prices at which they were sold to body shops. It followed that sales by the appellant to its jobbers would have to be at lower prices if the jobbers were going to sell to these accounts and remain profitable.

Mr. M^{c}Gregor explained that the first step in the pricing system involved the qualification of a jobber's customer under the SMP. This account approval process could be completed before or after the sale, depending on the circumstances. Jobbers would then make a claim for the credit or price adjustment. This was effected by submitting monthly sales reports that would break down, among other things, sales to specialty market purchasers. These credit claims were to be substantiated on a monthly basis through an invoice review by the relevant district sales manager. Also, the appellant had a policy of making audits on a random basis to review these claims. For those claims that were approved, the appellant would give the jobber a credit against future purchases and adjust its own sales figures by subsequently reducing its sales revenues by the amount of such credits.

The appellant's second witness, Mr. Peter Western, is a regional manager for McKerlie-Millen Inc., an independent jobber associated with the appellant. Mr. Western first testified with respect to an affidavit sworn by Mr. Robert Duffus, dated October 19, 1992. Mr. Duffus, who identifies himself as a sales manager with Automotive Finishers and Suppliers Inc., is an independent jobber associated with the appellant. Mr. Duffus' affidavit sets out how the SMP works from a jobber's perspective. Mr. Western confirmed that he was familiar with the details of Mr. Duffus' affidavit and testified that he agreed with it completely. Mr. Western also explained that it was impossible to designate what part of a jobber's inventory would eventually be sold to a specialty market purchaser as opposed to other purchasers.

Counsel for the appellant's argument was twofold. First, that the appellant's two-tier pricing system in respect of sales to specialty market purchasers is consistent with the relevant sections of the Act and that the fact that no one can predict if, or in what volume, sales may eventually be made to such purchasers at the time a sale is made to a jobber is not relevant for

purposes of section 42 and subsection 50(1) of the Act. In the alternative, counsel argued that present fact situation falls within the requirements of the Department of National Revenue's Ruling No. 3200/82-3, issued on April 14, 1987 (the Ruling), for the treatment of allowances, rebates and credits as a reduction of "sale price" under subsection 50(1) of the Act.

In support of their first argument, counsel for the appellant submitted that, when the Act refers to the amount charged as price, it does so with regard to the actual or real price charged and not the initial price that is set out in an invoice. This position, they stated, was consistent with previous decisions of the Tribunal. The first case to which counsel referred was *Timmins Tire Sales Ltd. v. The Minister of National Revenue*.[3] The appellant in that case was a wholesaler that received volume credits on its purchases from a manufacturer of tires. The credits claimed included sales to certain tax-exempt purchasers. The issue in that case was whether, in calculating the amount of refund, for tax previously paid under subsection 50(1) of the Act, based on subsequent volume credits received from its manufacturer, the appellant could reduce the credits that it received by a factor that reflected the portion of its sales attributable to tax-exempt purchasers. Counsel argued that *Timmins* was analogous to the present case in that, when the appellant bought the goods in question, it paid a wholesale price higher than the actual price that it would ultimately pay because of the subsequent factoring in of the volume credits it received. They stated that the principle set out in *Timmins* is that one must look at the actual price, and the actual price in that case was the original price less the credits subsequently received (not including credits received regarding tax-exempt sales). It is this principle that, counsel submitted, should be applied in this case.

Counsel for the appellant also referred to the Tribunal's decision in *Sunset Lamp Manufacturing Company Ltd. v. The Minister of National Revenue*.[4] This case dealt with certain overbilled sums which were not part of the negotiated price of the goods. Counsel submitted that the issue in that case was the circumstances under which the "sale price" is determined to be different from the invoice price. In quoting extensively from the decision, counsel highlighted the following passage:

> *In an earlier decision, Dure Foods v. The Minister of National Revenue, [Canadian International Trade Tribunal, Appeal No. AP-89-158, November 21, 1991] the Tribunal recognized that sale price is to include "any amount that the purchaser is liable to pay to the vendor." In making this statement, the Tribunal acknowledged that liability for tax is imposed on the total value realized by the vendor by reason of, or in respect to, the sale of its goods. This is often greater than the "amount charged as price." Similarly, the Tribunal is cognizant that certain exclusions and deductions from selling price are, at times, proper and necessary for the calculation of sale price on which tax is payable. In effect, the vendor is asked to pay tax on the net realized value it received for, or in respect to, the sale of its goods.*[5]

Counsel noted that, in both cases, transactions occurring long after the date of the original billing had an impact on the calculation of sale price.

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3. Canadian International Trade Tribunal, Appeal No. AP-90-107, February 10, 1992; (1992) 5 T.C.T. 1092.

4. Canadian International Trade Tribunal, Appeal No. AP-89-032, December 12, 1991; (1992) 5 T.C.T. 1016.

5. *Ibid.* at 2; at 1017.

Finally, counsel for the appellant referenced the respondent's acknowledgment that prompt payment discounts were recognized by the respondent for purposes of sale price calculations, notwithstanding the fact that when the invoice is sent, there is no indication as to when the purchaser will pay and, thus, whether it will qualify for the discount.

With respect to their second submission, counsel for the appellant argued that the appellant's approach to calculating sale price is consistent with the requirements of the Ruling for the treatment of allowances, rebates and credits as a reduction of "sale price." In particular, counsel took issue with the respondent's interpretation of paragraph 2(e) of that decision.

Counsel for the respondent argued that the facts before the Tribunal revealed two different transactions - that between the appellant and the jobber, and a subsequent one between the jobber and the ultimate purchaser. He submitted that the liability to pay tax under subsection 50(1) of the Act is triggered by, and only applies to, the first of these transactions. The wording of subsection 50(1) of the Act, he stated, is clear and unequivocal; there is a tax levied on a sale price, and such tax is payable on delivery or when property in the goods passes, whichever is earlier. In this case, he contended, it is the sale of the goods from the appellant to the jobber and the "sale price" paid on that transaction alone that determine the tax payable. In this regard, counsel referred to the testimony of Mr. Western who stated that a sale between the appellant and a jobber was not on a consignment basis, but free and clear.

Counsel for the respondent submitted that the two authorities to which counsel for the appellant referred could be distinguished on the basis that neither case dealt with a factual situation of two separate transactions. Rather, he submitted, both cases dealt with the relationship between a manufacturer and its customer. Counsel for the respondent also made a distinction between a prompt payment discount, which, he stated, is a clear and definitive condition between the parties which may well be taken into consideration in the calculation of sale price, and the instant case, and stated that the former situation would apply to the *Timmins* case.

With respect to the administrative policy in question, counsel for the respondent argued that the appellant's situation simply did not fall under the plain wording of paragraphs 2(d) and (e) of the Ruling. Counsel further submitted that it is clear law that under a taxing statute, if an exception is claimed, a taxpayer must demonstrate a clear entitlement to it.[6]

In making its decision, the Tribunal notes that, pursuant to subsection 50(1) of the Act, tax is imposed on the "sale price" (or volume sold) of all goods produced or manufactured in Canada. The Tribunal has previously found that the term "sale price" refers to the "actual price" or "net realized value" received by the taxpayer. Both of these formulations require one to look behind the initial transaction to the substantive nature of the commercial relationship between the parties to the contract. In the instant case, as in *Timmins*, this may require the Tribunal to consider transactions that do not involve parties to the initial transaction. While *Timmins* involved credits based on volume sales in aggregate, the present fact situation provides for credits only in respect of a certain portion of the jobbers' sales. The Tribunal does not believe that this difference is sufficient to distinguish the two cases.

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6. *The Assessment Commissioner of The Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*, [1973] S.C.R. 189.

Therefore, the Tribunal finds that the adjustments made by the appellant were directly related to, and necessary for, a determination of the actual amount it received on the sale of products to jobbers that were eventually purchased by specialty market purchasers. The appellant's program is well laid out for both jobbers and the appellant to follow, and the Tribunal finds no evidence to suggest that the program is directed towards avoiding the payment of any taxes owing. Rather, it is structured to reflect what the appellant actually receives on its sales in this new market which it is attempting to penetrate.

Further, the Tribunal considers that the wording of paragraph 50(1)(*a*) of the Act does not, as the respondent contends, mean that the amount of tax owing must be quantified at the time that either of the events set out in the subsection occurs, i.e. when the goods are delivered to the purchaser or when the property in the goods passes. Rather, the Tribunal believes that, while this wording crystallizes the obligation to pay the tax, it is not determinative of the amount of tax to be paid. The quantification of tax owing is dependent upon the phrase "sale price" in subsection 50(1), and this phrase is given meaning under section 42, not paragraph 50(1)(*a*) of the Act. In the Tribunal's view, determination of the amount of tax payable relates to the actual amount received by the vendor, and, in the instant case, such amount can only be determined after the occurrence of those events which are fundamental to establishing what the appellant actually receives, even if such events occur subsequent to the events referenced in paragraph 50(1)(*a*) of the Act.

As the Tribunal has made its decision on the basis of the appellant's first submission, it makes no finding with respect to the possible application of the Ruling to this case.

Accordingly, the appeal is allowed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Michèle Blouin
Michèle Blouin
Member

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