CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, April 6, 1992

Appeal No. AP-91-121

IN THE MATTER OF an appeal heard on February 19, 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 May 6, 1991, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

ESSEX TOPCROP SALES LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the imported pet food, being Schedule III.1 goods, are not deemed to be produced or manufactured in Canada by the appellant. Neither were the goods actually produced or manufactured in Canada. As the sales tax under paragraph 50(1)(*a*) of the *Excise Tax Act* (the Act) is imposed on goods produced or manufactured in Canada, the taxing provision does not apply so as to impose sales tax on pet food sold by the appellant. Consequently, the appellant is not liable for sales tax on the sale of pet food. As it was the determination of the Minister of National Revenue, made under subsection 72(4) of the Act that was appealed under section 81.19 of the Act, the appellant's claim is limited to those moneys actually paid in error for which it applied for a refund. Its claim is further limited by section 68 of the Act to those moneys paid in error two years prior to February 28, 1990.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-91-121

ESSEX TOPCROP SALES LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

During the period in issue, January 1, 1988, to December 31, 1989, the appellant purchased pet food from an importing wholesaler. The appellant subsequently sold the goods to retailers in Canada and paid federal sales tax on their sale price. The appellant filed an application under section 68 of the Excise Tax Act (the Act), requesting a refund of "tax recoverable on markup." The refund was denied and the appellant subsequently served a notice of objection to that determination. The Minister of National Revenue (the Minister) confirmed that the appellant was liable for sales tax on the total sale price it charged for the pet food. Hence, this appeal was initiated. The issue, as argued in this appeal, is whether the appellant is liable for sales tax on the sale price of the pet food it subsequently sold to retailers. The respondent claimed that the goods were deemed to be produced or manufactured in Canada, thus subject to sales tax under paragraph 50(1)(a) of the Act. In contrast, the appellant claimed that the goods were not deemed to be produced or manufactured in Canada and thus not subject to the sales tax.

***HELD**: The appeal is allowed. The Tribunal finds that the imported pet food, being Schedule III.1 goods, are not deemed to be produced or manufactured in Canada by the appellant. Neither were the goods actually produced or manufactured in Canada. As the sales tax under paragraph 50(1)(a) of the Act is imposed on goods produced or manufactured in Canada, the taxing provision does not apply so as to impose sales tax on pet food sold by the appellant. Consequently, the appellant is not liable for sales tax on the sale of pet food. As it was the determination of the Minister, made under subsection 72(4) of the Act that was appealed under section 81.19 of the Act, the appellant's claim is limited to those moneys actually paid in error for which it applied for a refund. Its claim is further limited by section 68 of the Act to those moneys paid in error two years prior to February 28, 1990.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 19, 1992*
Date of Decision:	*April 6, 1992*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Charles A. Gracey, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Peter Dillon, for the appellant* *Michael Ciavaglia, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-121

ESSEX TOPCROP SALES LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
CHARLES A. GRACEY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

During the period in issue, January 1, 1988, to December 31, 1989, the appellant purchased pet food from an importing wholesaler. The appellant subsequently sold the goods to retailers in Canada and paid federal sales tax on their sale price.

The appellant filed an application under section 68 of the *Excise Tax Act*[1] (the Act), requesting a refund of "tax recoverable on markup." The refund was denied and the appellant subsequently served a notice of objection to that determination. The Minister of National Revenue (the Minister) confirmed that the appellant was liable for sales tax on the total sale price it charged for the pet food. Hence, this appeal was initiated.

The appellant's brief indicated that it claimed a refund of tax in the amount of $28,848.17, being the difference between the tax paid by the appellant on the total sale price of the goods and the tax liability of the importer on the sale price of the goods sold to the appellant. However, at the hearing, counsel for the appellant framed the issue in the appeal as whether the appellant was liable for any tax on the sale of the pet food and not simply the markup.

For purposes of this appeal, and understanding the parties' arguments, the following provisions of the Act are relevant.

> *2. (1) In this Act ...*
> *"manufacturer or producer" includes ...*
>
> > *(g) any person who imports into Canada new motor vehicles designed for highway use, or chassis therefor,*
> >
> > *(h) any person who sells, otherwise than predominantly to consumers, new motor vehicles designed for highway use, or chassis therefor,*

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

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(i) any person who sells goods enumerated in Schedule III.1, other than a person who sells those goods exclusively and directly to consumers

...

(3) For the purposes of this Act, a person who is a manufacturer or producer within the meaning of paragraph ... (i) ... of the definition of that term in subsection (1) ... and who imports into Canada

...

(c) goods enumerated in Schedule III.1 ...

shall be deemed to be the manufacturer or producer in Canada thereof and not the importer thereof and the goods shall be deemed to be goods produced or manufactured in Canada and not imported goods.

SCHEDULE III.I

GOODS SOLD BY DEEMED MANUFACTURERS OR PRODUCERS

1. Feeds, and supplements for addition to feeds, for animals, fish or fowl that are not ordinarily raised to produce, or to be used as, food for human consumption.

...

2. (4.1) For the purposes of this Act, a person who is a manufacturer or producer within the meaning of paragraph (g) of the definition of that term in subsection (1) ... and who imports new motor vehicles designed for highway use, or chassis therefor, into Canada shall be deemed to be the manufacturer or producer in Canada thereof and not the importer thereof and the vehicles or chassis shall be deemed to be goods produced or manufactured in Canada and not imported goods.

2. (4.2) For the purposes of this Act, new motor vehicles designed for highway use, and chassis therefor, imported into Canada that are sold by a person who is a manufacturer or producer within the meaning of paragraph (h) of the definition of that term in subsection (1) ... shall be deemed to be goods produced or manufactured in Canada and not imported goods.

...

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 sold of all goods

(a) produced or manufactured in Canada

(i) payable ... by the producer or 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 ...

> *(5) Notwithstanding anything in subsection (1), the consumption or sales tax shall not be payable on goods*
>
> > *(k) sold to or imported by a person described in paragraph (i) of the definition "manufacturer or producer" in subsection 2(1) who is a licensed manufacturer under this Act, if the goods are goods enumerated in Schedule III.1 ...*

Counsel for the appellant noted that under paragraph 50(1)(*a*) of the Act, sales tax is levied against goods produced or manufactured in Canada and payable by the producer or manufacturer. Counsel argued that the Act does not deem the appellant, who does not import, to be the manufacturer or producer of the Schedule III.1 goods. Similarly, the Act does not deem the Schedule III.1 goods, which are sold by the appellant, to be manufactured or produced in Canada.

Counsel argued that subsection 2(3) of the Act does not deem Schedule III.1 goods to be goods produced or manufactured in Canada for all purposes of the Act. As such, the goods retain the character of being imported goods unless the conditions of subsection 2(3) are met. Counsel noted that the pet food importer met the definition of a manufacturer or producer in paragraph 2(1)(*i*) of the Act. Accordingly, the imported pet food was deemed to be manufactured or produced in Canada, but only when in the hands of the importer.

Counsel argued that subsection 2(3) is equivalent to subsection 2(4.1) of the Act where an importer of motor vehicles is deemed to be a manufacturer or producer in Canada and the goods to be manufactured or produced in Canada. Counsel noted that subsection 2(4.2) of the Act, which applies to any person who sells new motor vehicles imported into Canada to persons otherwise than predominantly to consumers, also deems such motor vehicles to be manufactured or produced in Canada. As such, that person is liable for sales tax pursuant to subsection 50(1) of the Act. However, there is no equivalent to subsection 2(4.2) that is applicable to a person who sells goods enumerated in Schedule III.1. It required an explicit provision to deem new motor vehicles sold by a person other than the importer to be manufactured or produced in Canada. As there is no equivalent provision deeming Schedule III.1 goods, sold by a person other than the importer, to be manufactured or produced in Canada, such goods cannot be considered manufactured or produced in Canada; they retain their character as imported goods. Accordingly, they are not subject to tax under subsection 50(1) as that provision applies only to goods manufactured or produced in Canada.

Counsel concluded that the imposition of tax must be expressed in clear and unambiguous terms and that doubts respecting the meaning of a taxing statute should be resolved in favour of the taxpayer.[2]

Counsel for the respondent argued that the appellant, as a licensed manufacturer or producer, is entitled to purchase Schedule III.1 goods exempt from sales tax pursuant to paragraph 50(5)(*k*) of the Act. He argued, however, that on subsequent sales, the appellant is required to pay tax on the sale price of the goods.

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2. See, e.g., *Johns-Manville Canada Inc. v. Her Majesty The Queen* [1985] 2 S.C.R. 46 at 72.

Counsel argued that under subsection 2(3), the imported goods are deemed to be goods produced or manufactured in Canada.[3] The status of the goods does not change upon completion of the sale by the importer to the appellant, but maintains its status as goods manufactured or produced in Canada. Once an item has been deemed to have a particular quality there is no authority in the Act which can alter that quality.

Counsel argued that one cannot compare the provisions of subsection 2(3) to the provisions of subsection 2(4.2) dealing with the importation and sale of new motor vehicles. This provision is an exception in the Act that is intended to exclude retailers who make "accommodation" sales to other retailers from the payment of sales tax.

In the alternative, counsel argued that where a manufacturer or producer purchases Schedule III.1 goods under license rendering the goods exempt from tax, the purchaser and not the manufacturer is liable, pursuant to paragraph 116(4)(*a*) of the Act, to pay the tax and any penalty and interest thereon.

Counsel noted that if the appellant is successful, the respondent will have to verify tax payments and the amount of the claim. Also, any entitlement pursuant to section 68 of the Act is reduced to those sums paid within two years prior to February 28, 1990, being the date the appellant applied for the refund.

The Tribunal notes that pet foods are listed in Schedule III.1 of the Act. As such, pursuant to paragraph 2(1)(*i*) of the Act, the importing wholesaler, from whom the appellant purchased the goods, was defined as a manufacturer or producer as it did not sell the imported goods exclusively and directly to consumers. Pursuant to subsection 2(3) of the Act, the importing wholesaler was deemed to be the manufacturer or producer in Canada of the pet food and not the importer thereof. Similarly, the goods were deemed to be goods manufactured or produced in Canada, and not imported.

Pursuant to subparagraph 50(1)(*a*)(i) of the Act, the importing wholesaler was liable for sales tax on the sale price of the pet food, payable when the goods were delivered to the appellant or at the time when the property in the goods passed. However, pursuant to paragraph 50(5)(*k*), if the importer was a licensed manufacturer, because it sold some of the goods to non-consumers (e.g., wholesalers, such as the appellant), the tax imposed by subparagraph 50(1)(*a*)(i) was not payable. Regardless, as the appellant was a licensed manufacturer who met the definition of manufacturer or producer in paragraph 2(1)(*i*), it could purchase the goods without the imposition of the sales tax.

The issue, as argued in this appeal, is whether the appellant is liable for sales tax on the subsequent sale of the pet food to retailers. The respondent claimed that the goods are deemed to be manufactured or produced in Canada thus subject to sales tax under paragraph 50(1)(*a*). In contrast, the appellant claimed that the goods are not deemed to be manufactured or produced in Canada and thus not subject to sales tax.

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3. In support of this proposition, counsel referred to p. 19 of the Federal Court of Canada decision in *Attorney General of Canada v. Maltby Inc.*, unreported, T-2135-88, August 16, 1991.

It is arguable that Parliament intended to impose a tax on the sale price of the pet food sold by the appellant. The Tribunal notes that the appellant could purchase the goods without the imposition of sales tax. However, a mere presumed intention on the part of Parliament is not sufficient to impose a tax on a party when such intention is not expressed in clear and unambiguous terms. As stated by Estey, J. in the *Johns-Manville* decision, " ... where [a] taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer."[4] In this case, the Tribunal believes that the Act is not explicit and unambiguous in deeming the goods, sold by the appellant, to be manufactured or produced in Canada. As such, it has interpreted the Act in favour of the appellant.

The Tribunal cannot interpret the words of subsection 2(3) as deeming pet food to be goods manufactured or produced in Canada for purposes other than involving the importer of such goods. It is aware that subsection 2(3) is initiated by the phrase "For the purposes of this Act," after which goods enumerated in Schedule III.1 are deemed to be manufactured or produced in Canada. However, as noted by counsel for the appellant, subsection 2(4.1) is also initiated by the same phrase after which imported motor vehicles are deemed to be manufactured or produced in Canada. Yet, Parliament felt it necessary under subsection 2(4.2) to again deem imported motor vehicles to be manufactured or produced in Canada for purposes involving persons who sell them otherwise than predominantly to consumers. Counsel for the respondent attempted to explain this, stating that subsection 2(4.2) is a unique provision designed for "accommodation" sales between wholesalers. However, as argued by opposing counsel, the Tribunal has no evidence to this effect and is left with interpreting the terms of the subsection as promulgated by Parliament.

As stated by Thurlow, C. J. in *Coca Cola Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, "[w]hether goods have been 'manufactured or produced' in Canada may be tested by what has happened to them in Canada."[5] The evidence is clear that nothing has happened to the goods in Canada save for their markup and sale through their distribution channel.

With doubt as to the extent to which the deeming provision of subsection 2(3) is effective, the Tribunal concludes that the pet food, being Schedule III.1 goods, is not deemed to be produced or manufactured in Canada by the appellant. Also, the evidence is clear that the goods were not actually produced or manufactured in Canada. As the sales tax under paragraph 50(1)(*a*) is imposed on goods produced or manufactured in Canada, the taxing provision does not apply so as to impose sales tax on pet food sold by the appellant. Consequently, the appellant is not liable for sales tax on the sale of pet food. The Tribunal notes that this interpretation is consistent with an earlier decision of the Tariff Board that was upheld by the Federal Court.[6]

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4. *Supra*, note 2.
5. [1984] 1 F.C. 447 at 456 (C.A.).
6. *Attorney General of Canada v. Maltby Inc.*, (F.C.T.D.), T-2135-88, August 16, 1991, affirming *Maltby Inc. v. Minister of National Revenue*, 17 C.E.R. 201 (Tariff Board).

Accordingly, the appeal is allowed and the Tribunal refers the matter back to the Minister for reconsideration in light of its decision. The Tribunal is in agreement with counsel for the respondent that the appellant's entitlement to a refund is limited to two years prior to February 28, 1990. As it was the determination of the Minister, made under subsection 72(4) of the Act, that was appealed under section 81.19 of the Act, the appellant's claim is limited to those moneys actually paid in error for which it applied for a refund.

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