

Ottawa, Monday, July 20, 1992

Appeal No. AP-91-141

IN THE MATTER OF an appeal heard on June 1, 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 21, 1991, relating to a notice
of objection served under section 81.15 of the *Excise Tax
Act*.

BETWEEN

THE SHELDON L. KATES DESIGN GROUP LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-141

THE SHELDON L. KATES DESIGN GROUP LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant is a licensed manufacturer of mattresses and pillows. The production process includes cutting fabrics to size, sewing them and installing zippers. Foam is then stuffed inside the sewn fabrics to make a pillow or mattress. A zipper is then affixed to the fabric. The sole issue in this appeal is whether the appellant is a manufacturer or producer pursuant to the Excise Tax Act.

***HELD:** The appeal is dismissed. There is no doubt that the appellant manufactures pillows and mattresses on its premises and that it is a manufacturer under the Excise Tax Act. The Tribunal thus concludes that the appellant's operations are not marginal manufacturing activities since the appellant does more than simply prepare goods for sale by "assembling, blending, mixing, cutting to size, diluting, bottling, packaging or repackaging the goods or by applying coatings or finishes to the goods." Being a manufacturer in the ordinary sense of the word, the appellant cannot therefore rely upon the exempting phrase of paragraph 2(1)(f) which excludes a person who "prepares goods in a retail store for sale in that store exclusively and directly to consumers."*

Place of Hearing: Ottawa, Ontario

Date of Hearing: June 1, 1992

Date of Decision: July 20, 1992

Tribunal Members: Charles A. Gracey, Presiding Member

Arthur B. Trudeau, Member

W. Roy Hines, Member

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Janet Rumball

Appearances: Sheldon L. Kates, for the appellant

Alain Préfontaine, for the respondent

Appeal No. AP-91-141

THE SHELDON L. KATES DESIGN GROUP LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ARTHUR B. TRUDEAU, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) against a decision of the Minister of National Revenue varying an assessment dated July 25, 1990.

The appellant, The Sheldon L. Kates Design Group Limited, is a licensed manufacturer. It conducts operations under the trade names of Kates & Company and The Foam & Fabric Shoppe. Under the trade name Kates & Company, the appellant carries on activities as a retail home furnishing store. As The Foam & Fabric Shoppe, it transforms fabrics and foam into pillows and mattresses. Both activities are conducted on the same premises.

On July 25, 1990, the appellant was assessed for \$10,950.41 including unpaid sales tax, interest and penalty. The relevant period of assessment is August 1, 1986, to April 30, 1990. The appellant objected to the assessment that was varied in the respondent's decision dated June 21, 1991. That decision was appealed to the Tribunal.

At the outset of the hearing, the appellant's representative, Sheldon L. Kates, also the owner of the appellant company, presented a motion to participate in the hearing as a co-appellant. Given that there is no such provision in the Act, the motion was denied. Indeed, the Act limits any participation in an appeal to the person who has served a notice of objection, to the purchaser of the goods in specific circumstances, in which case the vendor may also intervene, and finally, to an intervenor who has a substantial and direct interest in the subject matter of the appeal. The Tribunal found that none of these circumstances applied to Mr. Kates. First, Mr. Kates did not serve the notice of objection and, second, the goods were not purchased by him. Third, while the Tribunal acknowledges the fact that Mr. Kates was the sole owner and shareholder of The Sheldon L. Kates Design Group Limited, that fact led the Tribunal to conclude that Mr. Kates himself could bring nothing different or new to this appeal. In the Tribunal's view, he therefore lacked substantial and direct interest in the subject matter of the appeal, which is whether the appellant is a manufacturer or producer under the Act.

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

However, in order to determine whether the appellant is a manufacturer or producer under the Act, the Tribunal received evidence from Mr. Kates as the owner of The Sheldon L. Kates Design Group Limited. The Tribunal heard that the appellant's premises are divided into storage and workroom facilities and that they contain an office as well as a showroom. A few sewing machines, a cutting table and racking are located in the workroom facilities. The appellant purchases merchandise, such as beds, which are sold from its retail store. The appellant also purchases foam slabs which it transforms into foam mattresses and pillows for sale directly to consumers. Mr. Kates conceded that raw materials such as foam and fabrics used in the production of these products were purchased tax exempt using the company's manufacturer's sales tax licence. The production process includes cutting fabrics to size, sewing them together and, where necessary, installing zippers. Foam is stuffed inside the sewn fabrics to make a pillow or mattress.

Counsel for the respondent argued that the activities carried out by the appellant with respect to the transformation of foam slabs and fabrics into pillows and mattresses are manufacturing activities according to the decision of the Supreme Court of Canada in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*.² The appellant, he said, gives new forms, qualities and properties or combinations to the material that it uses and is therefore a manufacturer. Counsel submitted, on the other hand, that the appellant cannot rely upon the exempting phrase of paragraph 2(1)(f) which excludes a marginal manufacturer that "prepares goods in a retail store for sale in that store exclusively and directly to consumers." In counsel's view, the appellant is not a marginal manufacturer under paragraph 2(1)(f) but a true manufacturer within the meaning of that word. In sum, the appellant is a manufacturer under the ordinary meaning of the word, and it cannot invoke the exemption of paragraph 2(1)(f).

The appellant raised several arguments, but, in the Tribunal's view, none of them address the sole issue in this matter. The appellant first submitted that the audit and the assessment were unlawful. However, at the hearing, the appellant admitted that it used a manufacturer's licence when it bought its raw materials. The Tribunal is therefore satisfied that the respondent had all the authority provided by the Act to make an audit of the appellant's operations and to further assess the appellant. The appellant also argued discrimination and inequitable treatment and invoked infringements of constitutional rights provided by the *Canadian Charter of Rights and Freedoms* (the Charter). The Tribunal first notes that it did not receive any evidence sustaining the appellant's argument in this regard. Furthermore, the appellant argued infringements of legal and equality rights provided by sections 7 and 15 of the Charter, which rights pertain to the physical person and not to a corporation³ like the appellant. Lastly, the Tribunal is of the view that there is no need to further address any of the appellant's arguments based on the Charter to decide, as is its duty under the Act, whether the appellant is a manufacturer or producer. Consequently, the Tribunal concludes that none of the Charter's arguments raised by the appellant apply in this case.

The Tribunal finds, therefore, that the sole issue in this appeal must be decided in favour of the respondent. In the Tribunal's view, the definition of the words "manufacturer or producer" in section 2 of the Act is not exhaustive. Its purpose is to deal with specific situations where some persons or entity are deemed the manufacturer or the producer of goods for the

2. [1968] S.C.R. 140.

3. See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; and *National Anti-Poverty Organization v. Canada (Attorney General)(C.A.)*, [1989] 3 F.C. 684.

purpose of the Act. Paragraph 2(1)(f) deals with what is known as marginal manufacturing. However, the transformation activities carried out by the appellant are not marginal manufacturing activities pursuant to paragraph 2(1)(f). The appellant, in fact, does more than simply prepare goods for sale by "assembling, blending, mixing, cutting to size, diluting, bottling, packaging or repackaging the goods or by applying coatings or finishes to the goods." In the Tribunal's view, the transformation of foam and fabrics into pillows and mattresses by the appellant falls within the scope of a manufacturing activity as interpreted by the Supreme Court in the *York Marble*⁴ decision. Being a manufacturer in the ordinary sense of the word, the appellant cannot therefore rely upon the exempting phrase of paragraph 2(1)(f) and argue that it "prepares goods in a retail store for sale in that store exclusively and directly to consumers." The appellant is thus liable to pay sales tax according to subsection 50(1) of the Act.

For the foregoing reasons, the appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

W. Roy Hines
W. Roy Hines
Member

4. *Supra*, footnote 2.