



Ottawa, Friday, June 26, 1992

Appeal No. AP-91-127

IN THE MATTER OF an appeal heard on April 16, 1992,
under section 51.19 of the *Excise Tax Act*, R.S.C., 1970,
c. E-13, as amended;

AND IN THE MATTER OF a decision of the Minister of
National Revenue dated May 13, 1991, with respect to a
notice of objection served under section 51.15 the *Excise
Tax Act*.

BETWEEN

H & K MANUFACTURING LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The Tribunal finds that the goods in issue are kitchen cabinets identifiable as construction materials permanently installed in restaurant buildings. It refers the matter back to the respondent to determine whether the appellant's refund claim was made within the statutorily prescribed time limit.

W. Roy Hines

W. Roy Hines
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-127

H & K MANUFACTURING LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether certain goods sold by the appellant to McDonald's Restaurants of Canada Limited are kitchen cabinets and countertops therefor, for permanent installation in buildings or, in the alternative, structural metal and fabricated metal for buildings and other structures, within the meaning of section 10 or 21, respectively, of Part I of Schedule V to the Excise Tax Act, so as to subject the goods to the lower rate of tax specified in paragraph 27(1.1)(b) of the Excise Tax Act as it then read. The goods in issue include beverage section/cash stands, filet stations, fry stations, grill stations, centre islands and customer service sections exclusively for sale to McDonald's Restaurants of Canada Limited for use by them in newly constructed or renovated restaurant kitchens.

HELD: *The Tribunal finds that the goods in issue are kitchen cabinets identifiable as construction materials permanently installed in restaurant buildings. It therefore refers the matter back to the respondent to determine whether the appellant's refund claim was made within the statutorily prescribed time limit.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: April 16, 1992
Date of Decision: June 26, 1992*

*Tribunal Members: W. Roy Hines, Presiding Member
Kathleen E. Macmillan, Member
Robert C. Coates, Q.C., Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Janet Rumball

*Appearances: Thomas B. Akin and Neil E. Bass, for the appellant
Linda J. Wall, for the respondent*

Appeal No. AP-91-127

H & K MANUFACTURING LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: W. ROY HINES, Presiding Member
KATHLEEN E. MACMILLAN, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

The issue in this appeal is whether certain goods sold by the appellant to McDonald's Restaurants of Canada Limited (McDonald's) are kitchen cabinets and countertops therefor, for permanent installation in buildings or, in the alternative, structural metal and fabricated metal for buildings and other structures, within the meaning of section 10 or 21, respectively, of Part I of Schedule V to the *Excise Tax Act*¹ (the Act) as it then read, so as to subject the goods to the lower rate of tax specified in paragraph 27(1.1)(b) of the Act.

The appellant manufactured beverage section/cash stands, filet stations, fry stations, grill stations, centre islands and customer service sections exclusively for sale to McDonald's for use by it in newly constructed or renovated restaurant kitchens. McDonald's provided the appellant with blueprint drawings of the restaurant kitchens showing the location of the subject goods within the kitchens, together with detailed specifications of the design and dimensions of the goods. The appellant manufactured the goods in strict accordance with these specifications. All of the subject goods are constructed of a combination of Type 430 and Type 304 stainless steel.

The beverage section/storage stand units consist of an ice storage bin, several wells for cup storage and a horizontal surface upon which certain kitchen equipment such as drink dispensers and coffee makers may be placed, although these do not form part of the goods in issue.

The filet station is made up of five different items, consisting of two cabinets, an overhead ducted ventilation hood and two overhead freezer compartments. The freezer units do not form part of the goods in issue. The filet stations include a column of drawers, shelving, a backsplash and a hollow cabinet designed to hold bun steamers. The units are designed to provide an enclosure to house a two- or three-battery split vat fryer that does not form part of the goods in issue.

The fry stations are comprised of two enclosed storage areas, a centre backsplash and an overhead ducted ventilation hood. The units are manufactured in a manner so as to form a partial enclosure in which a three-battery fryer may be positioned that does not form part of the

1. R.S.C., 1970, c. E-13, as amended.

goods in issue. The units are built with "blank-off" plates that may be removed to accommodate the controls of the fryer. The units are designed to hold cooked french fries before they are served to customers.

The grill stations consist of a backsplash and an overhead ducted ventilation hood that are constructed to form a partly enclosed area for placement of grills that do not form part of the goods in issue. Hamburgers and certain breakfast foods are cooked at these stations, which are designed to hold items such as butter, butter brushes, etc.

The centre island units are comprised of cup storage wells, ice bins, an enclosed cupboard, a refrigerated compartment and a warming bin where hamburgers are stored, ready to be served, all superimposed with a horizontal surface upon which certain kitchen equipment may be placed.

The customer service units consist of a large number of enclosed shelves and storage areas of varying dimensions. Items such as serving trays and condiments are stored in these units. Customers are served from this unit.

Pursuant to subsection 27(1) of the Act, as it then read, a consumption or sales tax is payable on the sale price of all goods produced or manufactured in Canada. Under paragraph (b) of subsection 27(1.1), goods are entitled to a reduced rate of sales tax if they are enumerated in Schedule V to the Act. The appellant claimed that the goods in issue are enumerated in the following sections of Schedule V:

10. Kitchen and bathroom cabinets and countertops therefor, for permanent installation in buildings.

21. Structural metal and fabricated metal for buildings and other structures.

Counsel for the appellant noted that the Tariff Board in *Selenia Food Equipment Limited v. The Deputy Minister of National Revenue for Customs and Excise*² held that in order for goods to fall within section 10 of Part I of Schedule V to the Act, it must be demonstrated that (1) the goods are kitchen cabinets and countertops therefor; (2) the goods are for permanent installation in buildings; and (3) the goods are identified as construction materials.

After referring the Tribunal to several dictionary definitions of "cabinet," counsel argued that the goods are cabinets as they are designed and used for holding and storing articles and equipment. The goods are for use in kitchens as they are designed for, and installed in, the kitchen portion of McDonald's restaurants, which are equipped with apparatus for cooking and in which food is cooked and prepared. The goods are kitchen cabinets since they are cabinets installed in a kitchen and are used for the storage of cooking utensils, food supplies and serving containers. Merely because the goods are designed with superior functionality, in that the design of each item incorporates features related to the particular food processing or serving that takes place at that location, does not change the goods' status as kitchen cabinets.

Counsel argued that the goods are for permanent installation in buildings. This is because they are custom manufactured in strict accordance with specifications that are unique to a particular type of restaurant and are for use in a particular location within that type of

2. 13 T.B.R. 139.

restaurant. Further, the long lifespan of the goods, together with the manner in which the goods are affixed to the premises, indicates an intention that they be permanently installed. Counsel noted that, except for the centre island, all the goods are either riveted or bolted to the floor or wall and siliconed to the wall where possible. The centre island, weighing between 1,500 and 2,000 lbs is not affixed to the floor. It is, however, attached to the building through various electrical and plumbing connections.

Counsel submitted that the goods are construction materials as they form an integral part of the kitchen which is an integral part of the restaurant itself. They argued that the restaurant is designed around the design of the kitchen. The appellant is provided with blueprint drawings that show the kitchen to be constructed with the specific dimensions of the items to be fabricated for the kitchen and their location therein. Counsel noted that the goods become affixed to the building during the construction phase of the restaurant. Further, under provincial legislation specifically designed to regulate the construction industry, the appellant has a lien upon the interests of the owner in the premises in which the goods are installed.

In the alternative, counsel submitted that the goods are fabricated metal for buildings within the meaning of section 21 of Part I of Schedule V to the Act. These arguments will not be considered for reasons to follow.

Counsel for the respondent submitted that the onus is on the appellant to demonstrate both that its refund claim was filed within the limitation period prescribed by the Act and that the goods fall within the ambit of Part I of Schedule V to the Act.

The intention of Parliament in enacting Part I of Schedule V was not to tax all construction materials and equipment at the lower rate, but to tax only those specific items enumerated in that part. It was submitted that the goods are neither specifically enumerated in Part I nor included in the description "Kitchen ... cabinets ... and countertops therefor ..." in section 10. Also, to be considered construction materials they must form a component part of a building or structure. The goods do not form a component part of the building or structure housing a restaurant but, rather, constitute specialized equipment that is transferable by the user to other standardized sites.

The goods are not kitchen cabinets as that term is understood in its ordinary grammatical sense. Counsel noted that storage best describes the function of a cabinet. She noted that ordinary kitchen cabinets do not have piping to accommodate a fire protection system as do the fry, file and grill stations. Ordinary kitchen cabinets do not have hoods as do these three stations. Counsel submitted that the manufacturer's intentions and the design, marketing and use of the subject goods demonstrate the true identity of the goods as specialty equipment performing specialized functions. The functional approach to the goods demonstrates that the passive role of storage associated with "kitchen cabinets" in the ordinary sense of the term is secondary and incidental to the primary function of the goods and does not change their essential character, which is one of specialized performance. Counsel noted that the appellant has referred to the goods as equipment rather than as cabinets.

Counsel urged the Tribunal to find that the customer service counter is not part of the kitchen. She noted that it is not related to the cooking or preparation of food, but to the serving of customers. Nor is it located in that area of the restaurant where food is cooked or prepared.

Counsel for the respondent also addressed the appellant's alternative argument, which the Tribunal did not need to consider.

At the outset of the hearing, counsel for the respondent advised the Tribunal that the respondent had not conducted an audit on the appellant's refund claim that resulted in the present appeal. She requested that the appeal proceed on the main issue and that, if the Tribunal found in favour of the appellant, the matter be referred back to the respondent for an audit to determine whether the appellant's refund claim was submitted within the time limits provided in the Act. Counsel for the appellant agreed to this request.

The Tribunal has carefully reviewed the evidence and arguments put forward in this appeal and has concluded that the goods in issue qualify under section 10 of Part I of Schedule V as kitchen cabinets and countertops therefor, for permanent installation in buildings. In arriving at this conclusion, the Tribunal attached particular significance to the similarities between this appeal and the *Selenia*³ decision. It concurs with the three criteria set out by the Tariff Board in that case for goods to fall within section 10.

Without reiterating all of the evidence, the Tribunal considers that the goods in issue are for permanent installation and can be identified as construction materials. In its view, the term "permanent installation" does not imply that something can never, under any circumstance, be removed once put in place. The evidence before the Tribunal is that the goods in issue are custom designed for each restaurant with an expected life of 15 to 20 years and are affixed to the physical building or situated in, or connected to, it in such a manner that their removal would result in significant damage to both the building and equipment. Further, the Tribunal was advised that when any of this equipment is removed it is scrapped because it would not be adaptable to another McDonald's restaurant. The evidence also supports the view that the goods in issue are construction materials in the sense that they constitute an integral part of the design of the restaurant building and the kitchen itself in respect of the construction process, engineering, location and attachment within the physical structure of the building.

There remains the question of whether these goods qualify as kitchen cabinets and countertops therefor. Counsel for the respondent urged the Tribunal to examine the six items in issue separately, rather than as a package of things being sold by the appellant. Viewed in this way, counsel argued that the individual items could not be regarded as cabinets for storage but, rather, as specialized and sophisticated pieces of equipment which, when brought together, fulfil their primary service and food preparation functions.

Counsel placed considerable emphasis on the storage function of cabinets in an "ordinary" kitchen. There are a number of points to be made in respect of these submissions. First, the word "ordinary" does not appear in the legislation and probably for good reason, since it would be difficult to describe with any degree of precision the full range of kitchen types found in residential, commercial and industrial structures. Second, while the Tribunal agrees with counsel that one of the functions of cabinets is to store goods, it believes that storage need not be their only function. Third, because the goods in issue are specifically designed and engineered as components for a commercial kitchen to perform more than a storage function does not, in the Tribunal's view, limit in any way their basic status. Fourth, the undisputed evidence before the Tribunal is that the subject goods are designed and constructed solely for incorporation in the kitchen area of McDonald's restaurants. The goods are shipped in partially finished condition from the appellant's factory to the building site where they are assembled along with other goods to form the cabinets and surface working area for the preparation of food and drinks. Merely because the goods are assembled into their final form at the building site rather than in

3. *Ibid.*

the factory does not, in the Tribunal's view, mean that the appellant is selling something other than the kitchen cabinets as provided for in the blueprints and design for the restaurant.

Given the foregoing, the Tribunal finds that the goods in issue are kitchen cabinets identifiable as construction materials permanently installed in restaurant buildings. In view of this decision, it is not necessary for the Tribunal to decide whether the goods are fabricated metal for buildings within the meaning of section 21 of Part I of Schedule V to the Act. Therefore, the Tribunal refers the matter back to the respondent to determine whether the appellant's refund claim was made within the statutorily prescribed time limit.

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Presiding Member

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