

Ottawa, Friday, April 10, 1992

Appeal No. AP-91-149

IN THE MATTER OF an appeal heard on March 2, 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 28, 1991, with respect to a
notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

AIRWAY SURGICAL APPLIANCES LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the cervical collars in issue should be considered "spinal and other orthopaedic braces" within the meaning of paragraph 20, Part VIII, Schedule III to the *Excise Tax Act*.

Sidney A. Fraleigh

Sidney A. Fraleigh
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-91-149

AIRWAY SURGICAL APPLIANCES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether certain "cervical collars" qualify as "spinal and other orthopaedic braces" as defined in paragraph 20, Part VIII, Schedule III to the Excise Tax Act and thus qualify for tax exemption pursuant to section 51 of the Excise Tax Act.

The goods in issue are cervical spinal collars. There are approximately 12 different models in issue, varying in the materials they are made of, their sizing, design and the degree of bracing they provide. They are made with polyurethane foam covered with stretch hosiery stockinette which absorbs perspiration and then uses the moisture as a cooling system. The cervical collars are secured with velcro tabs allowing for adjustment to neck size. They are manufactured with different designs and firmness to provide for a range of different cervical spine injuries.

HELD: *The appeal is allowed. The Tribunal finds that the cervical collars in issue should be considered "spinal and other orthopaedic braces" within the meaning of paragraph 20, Part VIII, Schedule III to the Excise Tax Act.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 2, 1992
Date of Decision: April 10, 1992

Tribunal Members: Sidney A. Fraleigh, Presiding Member
Arthur B. Trudeau, Member
W. Roy Hines, Member

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Dyna Côté

Appearances: Michael A. Kelen, for the appellant
Gilles Villeneuve, for the respondent

Appeal No. AP-91-149

AIRWAY SURGICAL APPLIANCES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
W. ROY HINES, Member

REASONS FOR DECISION

The issue in this appeal is whether certain "cervical collars" qualify as "spinal and other orthopaedic braces" as defined in paragraph 20, Part VIII, Schedule III to the *Excise Tax Act*¹ (the Act) and thus qualify for tax exemption pursuant to section 51 of the Act.

The goods in issue are cervical spinal collars. There are approximately 12 different models in issue, varying in the materials they are made of, their sizing, design and the degree of bracing they provide. They are made with polyurethane foam covered with stretch hosiery stockinette that absorbs perspiration and then uses the moisture as a cooling system. The cervical collars are secured with velcro tabs allowing for adjustment to neck size. They are manufactured with different designs and firmness to provide for a range of different cervical spine injuries.

Cervical collars are normally prescribed by physicians specializing in orthopaedics or emergency medicine. The cervical collar braces the cervical spine (neck) so that the patient is not able to flex or extend (up or down head movement) or rotate (side to side head movement). The cervical collar also protects against residual rocking while the cervical spine is allowed to heal. If the cervical collar is prescribed by a physician specializing in orthopaedics, it is provided by a prescription which can be filled at a store specializing in medical devices.

For purposes of this appeal, the following provisions of the Act are relevant:

51. (1) The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III ...

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

SCHEDULE III

PART VIII

HEALTH

...

20. Artificial limbs, with or without power, and all accessories and devices therefor; spinal and other orthopaedic braces; specially constructed appliances made to order for a person having a crippled or deformed foot or ankle; parts of the foregoing.

Counsel for the appellant argued that the words of a statute are to be given their ordinary or popular meaning, but where it is found that a word has been used in a statute in the jargon or vernacular of a particular area, part of the community, trade or field of learning, then it is to be given that meaning.² In this regard, counsel argued that a lay-person would consider the collars to be braces. However, he noted that Mr. William Dickinson, who is Vice-President of Administration and Finance for the appellant company, testified that cervical collars are considered braces in the industry. Similarly, both Ms. Jeanne Robichaud, who is employed by Ontario Medical Supply and who is authorized by the Minister of Health for the Province of Ontario as a fitter of cervical collars under the Assistive Devices Program, and Dr. Edward Austin Day, who is a specialist in physical medicine and rehabilitation and an Assistant Professor at the University of Ottawa Medical School in rehabilitation medicine, testified that they considered the cervical collars to be braces. Counsel also argued that the collars meet the definition of brace as used in medical dictionaries.

Counsel noted that the French version of the Act, being "*supports de l'épine dorsale et autres supports orthopédiques*," can be loosely translated to mean "dorsal spine support and other orthopaedic support." Counsel referred to the testimony of Dr. Day, who mentioned that orthopaedics is the science of bones, including the spine. Counsel argued that an orthopaedic support would include a support of the cervical spine. He noted that the cervical collars are designed to support and partially immobilize the head and neck in the treatment of soft-tissue injuries or for post-operative treatment of a neck fracture.

Counsel for the respondent argued that the issue in the appeal is not whether the cervical collars in issue are braces, but whether they are braces within the meaning of the Act. Counsel submitted that tax exemptions must be interpreted restrictively, and it is for the appellant to establish that its refund claim falls within the relevant exempting provisions of the Act.³

Counsel noted that the appellant's product catalogue describes the goods at issue as collars and not braces. Medical dictionaries draw a distinction between collars and braces. For example, Dorland's Illustrated Medical Dictionary⁴ defines a collar as "an encircling band, generally around the neck," where "band" is defined as "an object or appliance that confines or restricts while allowing a limited or desired degree of movement." Consequently, given the

2. *Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, [1973] F.C. 3 at 7.

3. *Gustavson Drilling (1964) Limited v. The Minister of National Revenue*, [1977] 1 S.C.R. 271 at 277.

4. Dorland's Illustrated Medical Dictionary, 27th Edition, Philadelphia, W.B. Saunders Company, 1988, pp. 187 and 357.

difference in meaning between the two words, counsel argued that the foam collars at issue are not braces within the meaning of paragraph 20.

Counsel argued that the exempting provisions of paragraph 20 must be read as a whole. Parliament included in the same provision artificial limbs, spinal and other orthopaedic braces and specially constructed appliances made to order for a person having a crippled or deformed foot or ankle. Since Parliament chose to group the three classes of goods together, the meaning of the term "brace" is coloured by the other two. He argued that to qualify as a brace the goods must:

1. be specially constructed to the injured person's needs and specifications;
2. be for a grave disability; and
3. be used to overcome a bodily deficiency. In other words, be palliative as opposed to curative.

In this regard, counsel argued that the collars are prefabricated and adjusted by a velcro fastener. They are for the treatment of mild trauma of the cervical spine or, as indicated in the appellant's product catalogue, for the treatment of mild cervical lesions or wherever a reminder against making quick and painful neck movements is required. There is no evidence showing that they are used for grave disabilities such as the loss of a limb. Finally, the collars are used in the healing process that must be considered curative in nature. Accordingly, the cervical collars do not qualify as braces under paragraph 20.

With regard to the French version of paragraph 20, counsel argued that the terms "*support de l'épine dorsale*" or "*supports orthopédiques*" are not found in French medical dictionaries. Therefore, they should be disregarded.

In construing the phrase "spinal and other orthopaedic braces," as used in paragraph 20, the Tribunal recognizes the modern approach to the interpretation of taxation statutes. As articulated by MacGuigan, J.A., in *Lor-Wes Contracting Ltd. v. The Queen*⁵:

*The only principle of interpretation now recognized is a words-in-total-context approach with a view to determining the object and spirit of the taxing provisions.*⁶

In this particular instance, the Tribunal adopts this approach to the interpretation of a tax exempting provision of the Act.

In effect, counsel for the respondent has argued that, based on the entire content of Part VIII to Schedule III and, in particular, the structure and content of paragraph 20 of Part VIII, words of limitation should be read into the phrase "spinal and other orthopaedic braces." Counsel advocated such limits for purposes of clarifying what he believes Parliament has indicated by inference. However, the Tribunal cannot agree with this agreement. There is nothing in the structure or content of Part VIII or, in particular, paragraph 20 to justify adding words of limitation to a clear and unambiguous phrase.

5. [1986] 1 F.C. 346 (F.C.A.).

6. *Ibid.* at 352.

The uncontroverted evidence of the appellant's witnesses was that cervical collars of the type in issue are considered braces within the industry and the medical field dealing with such devices. They serve to brace the cervical spine against sudden or excessive movement and support the head during periods of healing.

Accordingly, the appeal is allowed. The Tribunal finds that the cervical collars in issue should be considered "spinal or other orthopaedic braces" within the meaning of paragraph 20, Part VIII, Schedule III to the *Excise Tax Act*.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

W. Roy Hines
W. Roy Hines
Member