

Ottawa, Wednesday, March 31, 1993

**Appeal No. AP-92-021**

IN THE MATTER OF an appeal heard on October 8, 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 February 7, 1992, with respect to  
a notice of objection served under section 81.17 of the  
*Excise Tax Act*.

**BETWEEN**

**JOHNSON & JOHNSON INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan  
Member

Desmond Hallissey

Desmond Hallissey  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-021**

**JOHNSON & JOHNSON INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act from a determination of the Minister of National Revenue dated November 10, 1989. The issue is whether nursing pads are exempt from federal sales tax under section 24 of Part XI of Schedule III to the Excise Tax Act or under paragraphs 2(c) and (e) of the Clothing and Footwear Determination Regulations as "undergarments" or "foundation garments," respectively.*

**HELD:** *The appeal is dismissed. The Tribunal finds that the nursing pads in issue are not exempt from federal sales tax under section 24 of Part XI of Schedule III to the Excise Tax Act nor exempt within the meaning of section 1 of Part XV of Schedule III to the Excise Tax Act and the Clothing and Footwear Determination Regulations as "clothing."*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: October 8, 1992  
Date of Decision: March 31, 1993*

*Tribunal Members: Arthur B. Trudeau, Presiding Member  
Kathleen E. Macmillan, Member  
Desmond Hallissey, Member*

*Counsel for the Tribunal: Brenda C. Swick-Martin*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: Glenn A. Cranker, for the appellant  
Meg Kinnear, for the respondent*

**Appeal No. AP-92-021**

**JOHNSON & JOHNSON INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member  
KATHLEEN E. MACMILLAN, Member  
DESMOND HALLISSEY, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) from a determination of the Minister of National Revenue dated November 10, 1989, disallowing the appellant's refund claim with respect to federal sales tax (FST) paid on nursing pads.

The appellant is a manufacturer and distributor of consumer and personal care products, including disposable nursing pads, which are the goods in issue. Nursing pads are made of absorbent layers of material and are worn by nursing women to retain excess flow of milk and to prevent soiling of outer garments. Nursing pads have a self-adhesive strip which holds them in place and are worn with either a nursing bra or a regular bra.

At issue is whether the nursing pads are exempt from FST under section 24 of Part XI of Schedule III to the Act or under paragraphs 2(c) and (e) of the *Clothing and Footwear Determination Regulations*<sup>2</sup> (the Regulations) as "undergarments" or "foundation garments," respectively.

Section 24 of Part XI of Schedule III to the Act provides for exemption from FST for "[s]anitary napkins, tampons, belts for sanitary napkins, and articles and materials for use exclusively in the manufacture or production thereof."

Subsection 51(1) of the Act provides, in part, that FST not be applied to the sale of the goods mentioned in Schedule III to the Act. Part XV of Schedule III to the Act is entitled "Clothing and Footwear" and exempts the following items from FST:

*1. Clothing and footwear, including articles and materials for incorporation in home or commercial production thereof, as the Governor in Council may determine by regulation.*

(Emphasis added)

*2. Articles and materials for use exclusively in the manufacture or production of the tax exempt goods mentioned in section 1 of this Part.*

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

2. SOR/84-247, March 22, 1984, Canada Gazette Part II, Vol. 118, No. 7 at 1232.

On March 22, 1984, the Regulations were passed pursuant to Part XV of Schedule III to the Act. Paragraphs 2(a) to (k) of the Regulations list items which are included as clothing and footwear and which are, therefore, exempt from FST. Paragraphs 2(l) to (s) of the Regulations list items which are not included as clothing and footwear and which are, therefore, not exempt from FST.

By virtue of paragraphs 2(c) and (e) of the Regulations, the following items are included as "clothing" and are, therefore, exempt from FST:

*(c) undergarments such as briefs, lingerie, long underwear, panties, shorts, slips and undershirts,*

...

*(e) foundation garments such as brassieres, corselets, corsets, girdles, pantie girdles, and similar non medical body supporting garments.*

Paragraph 2(p) of the Regulations states that the following items are not included as "clothing" for purposes of the Act and are, therefore, subject to FST:

*(p) goods that are for cosmetic, prosthetic or sanitary purposes such as disposable bibs for restaurants and dental offices, hair bands, hair nets, hairpieces, medical appliances, removable sweat pads, sanitary napkins and belts, shampoo caps and capes and tampons.*

Counsel for the appellant submitted that nursing pads were exempt from FST under section 24 of Part XI of Schedule III to the Act or under paragraphs 2(c) and (e) of the Regulations as "undergarments" or "foundation garments," respectively.

Counsel for the respondent submitted that nursing pads were not exempt from FST under section 24 of Part XI of Schedule III to the Act nor under paragraphs 2(c) and (e) of the Regulations.

As previously stated, section 24 of Part XI of Schedule III to the Act provides for exemption from FST for "[s]anitary napkins, tampons, belts for sanitary napkins, and articles and materials for use exclusively in the manufacture or production thereof." In the Tribunal's view, this exemption does not apply to the goods in issue because, to be exempt, the goods must be one of those enumerated. Nursing pads are clearly not one of the items listed in section 24 of Part XI of Schedule III to the Act and, therefore, cannot be exempt from FST under that provision.

In the Tribunal's view, the nursing pads are not "clothing" within the ordinary and grammatical meaning of the word. The dictionary definition of "clothing"<sup>3</sup> is an apparel, a dress or a garment. An ordinary and grammatical meaning of the word "clothing" would not include nursing pads, and to conclude otherwise would, in the Tribunal's opinion, attribute an unusual meaning to the word which is beyond its ordinary usage and cannot have been intended by Parliament.

The Regulations provide further guidance as to whether the goods in issue are "clothing" for purposes of the FST exemption in Part XV of Schedule III to the Act. The parties have provided three provisions of the Regulations under which the goods in issue could fall, namely, paragraphs 2(c), (e) and (p). Nursing pads, themselves, are not expressly provided for in any of those paragraphs. However, in the Tribunal's view, the words "includes" and "such as" in section 2 of the Regulations indicate that the items specifically named in that section do not

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3. The Oxford English Dictionary, Vol. III, 2nd ed., Oxford: Clarendon Press, 1989 at 356.

constitute an exhaustive listing of "clothing" and are meant to be illustrative of the type of items which Parliament intended to be classified as "clothing."<sup>4</sup> Therefore, the Tribunal must determine the paragraph of the Regulations under which the nursing pads most logically fall.

In the Tribunal's view, nursing pads are not analogous to "undergarments" in paragraph 2(c) of the Regulations. The items listed in this provision, i.e. briefs, lingerie, long underwear, panties, shorts, slips and undershirts, are garments or articles of dress in and of themselves and are worn under clothing, whereas nursing pads are not garments in and of themselves, but must be attached to an undergarment with an adhesive strip to perform their function.

The Tribunal is also of the view that nursing pads are not analogous to "foundation garments," such as brassieres, corselets, corsets, girdles, pantie girdles and similar non medical body supporting garments, within the meaning of paragraph 2(e) of the Regulations. The garments enumerated in paragraph 2(e) of the Regulations all provide a body support function, which is not the function of nursing pads which are designed to retain excess flow of milk and to prevent soiling of outer garments.

The Tribunal finds that the nursing pads most logically fall under paragraph 2(p) of the Regulations, as goods that are for cosmetic or sanitary purposes, and that they are, therefore, not "clothing" for purposes of exemption from FST under Part XV of Schedule III to the Act. In reaching such a conclusion, the Tribunal relies, in part, on its decision in *Jolly Jumper Inc. v. The Deputy Minister of National Revenue for Customs and Excise*,<sup>5</sup> where it found that nursing pads had a sanitary purpose, in that they were designed to be worn by women to prevent breast milk from leaking onto brassieres or undershirts and blouses. In this regard, the appellant's own submission was that nursing pads were worn by nursing women to retain excessive flow of milk and to prevent soiling of outer garments. The Tribunal's conclusion is also supported by the documentary evidence provided by the appellant which stated that the absorption system in the nursing pads pulls wetness from the skin to ensure dryness and comfort.

For the foregoing reasons, the appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan  
Member

Desmond Hallissey

Desmond Hallissey  
Member

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4. *Erin Michaels Mfg. Inc. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-233, March 10, 1992; and *Suntech Optics Inc. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-91-082, June 2, 1992.

5. Appeal No. AP-91-235, September 14, 1992.