CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 7, 1993

**Appeal No. AP-92-064**

IN THE MATTER OF an appeal heard on March 18, 1993, 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 June 24, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**WALTER H. HARMON (85) LTD.** **Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

## DECISION OF THE TRIBUNAL

The appeal is allowed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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*UNOFFICIAL SUMMARY*

**Appeal No. AP-92-064**

**WALTER H. HARMON (85) LTD.** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act from a decision of the Minister of National Revenue dated June 24, 1992. The appellant is a licensed manufacturer of receiving blankets. The primary issue in this appeal is whether the subject goods are exempt from federal sales tax under subsection 51(1) of the Excise Tax Act as being "clothing and footwear" within the meaning of section 1 of Part XV of Schedule III to the Excise Tax Act. If the Tribunal finds that the subject goods are exempt from tax, then it must consider whether that portion of the appellant's claim relating to taxes paid more than two years before the appellant's application for refund is statute-barred.*

***HELD:*** *The appeal is allowed. The Tribunal finds that the receiving blankets in issue are exempt from federal sales tax under section 1 of Part XV of Schedule III to the Excise Tax Act, as they come within the meaning of "children's and infants' clothing" for purposes of paragraph 2(h) of the Clothing and Footwear Determination Regulations. In addition, the Tribunal finds that the appellant's claim is limited by section 68 of the Excise Tax Act to those moneys paid within two years of the appellant's application for the refund on March 20, 1991.*

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|---|---|
| *Place of Hearing:* | *Ottawa, Ontario* |
| *Date of Hearing:* | *March 18, 1993* |
| *Date of Decision:* | *October 7, 1993* |
| *Tribunal Members:* | *Kathleen E. Macmillan, Presiding Member*<br>*Michèle Blouin, Member*<br>*Lise Bergeron, Member* |
| *Counsel for the Tribunal:* | *Hugh J. Cheetham* |
| *Clerk of the Tribunal:* | *Janet Rumball* |
| *Appearances:* | *Michael Kaylor, for the appellant*<br>*Michelle P. Mann, for the respondent* |

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

**Appeal No. AP-92-064**

**WALTER H. HARMON (85) LTD.** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
MICHÈLE BLOUIN, Member
LISE BERGERON, Member

## REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from a decision of the Minister of National Revenue (the Minister) dated June 24, 1992.

The appellant is a licensed manufacturer of receiving blankets, which are lightweight blankets, usually made of cotton, used for infants in a variety of ways. On March 20, 1991, the appellant applied for a refund of federal sales tax (FST) that it claimed to have paid in respect of the subject goods during the period from February 1, 1989, to December 31, 1990. By notice of determination dated May 9, 1991, the respondent disallowed the appellant's application on the basis that the subject goods are not "clothing" for the purpose of the sales tax exemption, given the meaning of the word "clothing" under section 1 of Part XV of Schedule III to the Act. By notice of objection dated July 17, 1991, the appellant objected to the determination on the basis that a receiving blanket should be considered as a piece of clothing. By notice of decision dated June 24, 1992, the respondent disallowed the appellant's objection and confirmed the determination.

The primary issue in this appeal is whether the subject goods are exempt from FST under subsection 51(1) of the Act as being "clothing and footwear" within the meaning of section 1 of Part XV of Schedule III to the Act. If the Tribunal finds that the subject goods are exempt from tax, then it must consider whether that portion of the appellant's claim relating to taxes paid more than two years before the appellant's application for refund is statute-barred pursuant to section 68 of the Act.

The meaning to be given to "clothing and footwear" is determined through regulation by the Governor in Council.[2] In this regard, the relevant regulations are the *Clothing and Footwear Determination Regulations*[3] (the Regulations). Further, paragraph 2(*h*) of the Regulations sets out examples of children's and infants' clothing that come within the exemption. Consequently, the Tribunal must decide whether the wording of paragraph 2(*h*) encompasses the subject goods.

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1. R.S.C. 1985, c. E-15.
2. *Ibid.*, Schedule III, Part XV, s. 1.
3. SOR/84-247, March 22, 1984, Canada Gazette Part II, Vol. 118, No. 7 at 1232.

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Paragraph 2(*h*) of the Regulations reads as follows:

> *2. For the purposes of Part XV of Schedule III to the Excise Tax Act, it is determined that clothing and footwear includes*
>
> *...*
>
> *(h) children's and infants' clothing such as bibs, booties, bunting bags with or without hood or sleeves, coat sets, costume play suits, diapers, plastic and rubber pants, rompers, shells, sleepers and snow suits.*

The Tribunal first considered the arguments of both counsel as to whether the Regulations should be interpreted in an exhaustive or restrictive manner. The Tribunal does not accept counsel for the respondent's argument that a product must be named explicitly in section 2 of the Regulations in order to be covered by the exemption. Rather, the words "includes" in the opening phrase of the section and "such as" in paragraph (*h*) lead the Tribunal to conclude that the items listed in section 2 are meant to be illustrative and not exhaustive. Consequently, the Tribunal's task is to determine whether the subject goods can be described as children's or infants' clothing, giving the term its ordinary grammatical meaning, and whether they are sufficiently similar to the other clothing items enumerated in paragraph 2(*h*) of the Regulations.

The Tribunal next examined the traditional functions of clothing that it and its predecessors have considered. These functions are adornment, status, protection from the elements and modesty.[4] In its decision in *Suntech Optics Inc. v. The Minister of National Revenue*,[5] the Tribunal noted that evidence was presented as to a further function, namely the enhancement of comfort. The Tribunal finds in this case, that in their role of enveloping the infant and providing warmth, the subject goods fulfil all the above-referenced functions in some measure. Most particularly, receiving blankets provide for comfort and protection from the elements. In this respect, the Tribunal was persuaded by the evidence that receiving blankets provide a most practical means of covering a newborn baby, and one that has been employed for many centuries. It is for this reason that hospitals envelop the infants in their care in this fashion, whether they are awake or asleep, and recommend that parents continue to use the receiving blankets this way for the first few weeks of an infant's life. Similarly, a number of nursing textbooks and paediatric guides entered into evidence at the hearing discussed swaddling infants in this fashion.

The evidence also established to the satisfaction of the Tribunal that, when used in this fashion, the receiving blankets fit the characteristics of clothing. They encompass, warm and comfort an infant. They accompany the infant and do not remain on the bed as a blanket or sheet would. Although they contain no buttons or fasteners of any kind, the receiving blankets' unique way of enveloping a small and fairly immobile infant ensures that they remain intact around the body. Further, the Tribunal notes that the inclusion of shawls, another essentially shapeless garment without fasteners, under paragraph 2(*a*) of the Regulations suggests that this characteristic is not critical to whether an item is considered clothing or not.

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4. See, for instance, *Johnson & Johnson Limited v. The Deputy Minister of National Revenue for Customs and Excise*, 7 T.B.R. 164; *Playtex Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* 8 T.B.R. 549; and *Artel Manufacturing Ltd. et al. v. The Deputy Minister of National Revenue for Customs and Excise*, 8 T.B.R. 684.

5. Appeal No. AP-91-082, June 2, 1992.

The Tribunal accepts that other clothing items, such as bunting bags or sleepers, could better warm an infant than a receiving blanket. Further, it concedes that receiving blankets are usually used in conjunction with other clothing, such as gowns, diapers and undershirts. However, the Tribunal sees nothing in the common ordinary meaning of the term "clothing" that requires that it be worn on its own to provide warmth and comfort. Indeed, clothing is often worn in layers together with other items. A brief perusal of the types of garments detailed in section 2 of the Regulations, such as aprons, foundation garments, hosiery, children's bibs and diapers, bears this out.

The Tribunal is also persuaded by the evidence that receiving blankets are a multi-use item. After the infant reaches the age of approximately six weeks, he or she is unlikely to be "swaddled." The blanket is either put away or used for such things as a mattress or floor cover, blanket or sheet. Indeed, these uses would apply even when the infant is newly born. Notwithstanding these other applications, the Tribunal still views the primary use of a receiving blanket to be that of clothing through enveloping, comforting and warming the newborn infant. The fact that the blanket is a convenient, accessible and low-cost means of fulfilling other functions is secondary, for the purposes of this appeal. Many other items available on the market could serve as blankets, sheets and mattress protectors. The fact that parents might choose to employ a piece of infants' clothing that has outlived its primary purpose for these functions does not mean that it no longer qualifies as clothing. In this regard, the Tribunal notes that diapers, a clothing item explicitly listed in section 2 of the Regulations as being exempt from tax, could similarly be used for the same secondary purposes as receiving blankets.

The Tribunal heard much testimony concerning the various alternative uses for receiving blankets. It recognizes that some caregivers use them only for enveloping or clothing the infant, that others use them predominantly as a sheet or blanket, and that practices differ from individual to individual. However, the Tribunal was persuaded by the evidence given that the subject goods are primarily used as clothing for infants under the age of six to eight weeks. Further, the Tribunal is of the view that this conclusion is borne out by the meaning of "*lange*," the French term for the goods in issue. "*Lange*" is defined as follows in Le Petit Robert 1:

> *vêtement de laine ... Large carré de laine ou de coton dont on emmaillote un bébé de la taille aux pieds.*[6]
>
> ([Translation] woollen clothing ... large piece of wool or cotton in which an infant is wrapped from the waist down.)

Having found that the subject goods are exempt from FST, the Tribunal must turn to the second issue set out above, namely, whether any part of the appellant's claim is statute-barred. Section 68 of the Act reads as follows:

> *68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.*

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6. (Montreal: Les Dictionnaires Robert-Canada S.C.C., 1990) at 1072.

As stated in previous decisions,[7] the Tribunal is of the view that section 68 of the Act restricts the appellant's entitlement to a refund to two years prior to the date of application. In this case, the appellant submitted its application on March 20, 1991. Therefore, the appellant is only entitled to a refund for taxes paid between that date and March 20, 1989. Accordingly, the appeal is allowed, and the Tribunal refers the matter back to the Minister so that the amount of the refund to which the appellant is entitled may be calculated in accordance with the above.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Lise Bergeron
Lise Bergeron
Member

7. See, for instance, *Essex Topcrop Sales Limited v. The Minister of National Revenue*, Appeal No. AP-91-121, April 6, 1992.