CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, July 23, 1993

Appeal No. AP-92-095

IN THE MATTER OF an appeal heard on January 15, 1993, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated May 27, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

CANADIAN THERMOS PRODUCTS INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

John C. Coleman
John C. Coleman
Presiding Member

Desmond Hallissey
Desmond Hallissey
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-095

CANADIAN THERMOS PRODUCTS INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant, a licensed manufacturer under the Excise Tax Act, is in the business of manufacturing and importing bottles which it sells under its "Thermos" trademark. The primary issue in this appeal is whether the goods in question, bottles sold by the appellant under its "Thermos" trademark, are exempt from federal sales tax under paragraph 2(k) of Part I of Schedule III to the Excise Tax Act. In addition, the respondent has raised two subsidiary issues relating to the amount of the appellant's refund claim. First, it must be determined if the portion of the appellant's claim relating to taxes paid more than two years before the appellant's two applications for refund at issue is statute barred under section 68 of the Excise Tax Act. Second, if the appeal is allowed, it was requested that issues of quantum be resolved by a subsequent audit.

HELD: *The appeal is dismissed. The Tribunal is of the view that paragraph 2(k) of Part I of Schedule III to the Excise Tax Act must be interpreted with reference to other paragraphs of section 2, to the remainder of Part I of Schedule III and to the purpose of the Excise Tax Act. In this regard, the containers described in paragraphs (a) to (j) of section 2 are used in the food industry in producing and packaging tax-exempt goods. Paragraph 2(k), in the context of section 2 as a whole and as an element of Part 1 of Schedule III, is clearly meant to be read in a commercial context. Further, the Tribunal is of the view that, to come within the exemptions in section 2, the items in question must contain tax-exempt goods at the time of sale and not be sold empty. If the appeal does not fail solely on the basis of statutory interpretation, it must fail on the basis of the facts. The appellant did not bring conclusive evidence that thermos bottles are "usual" containers for tax-exempt food or drink, or that they are used "exclusively" for this purpose.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*January 15, 1993*
Date of Decision:	*July 23, 1993*
Tribunal Members:	*John C. Coleman, Presiding Member* *Desmond Hallissey, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Dennis A. Wyslobicky and Robert G. Kreklewetz, for the appellant* *John B. Edmond, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-095

CANADIAN THERMOS PRODUCTS INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: JOHN C. COLEMAN, Presiding Member
DESMOND HALLISSEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from decisions of the Minister of National Revenue (the Minister) dated May 27, 1992.

The appellant, a licensed manufacturer under the Act, is in the business of manufacturing and importing bottles which it sells under its "Thermos" trademark. These bottles have glass or steel liners, or are constructed with foam insulation. Their height is considerably greater than their width, and their neck is narrower than their body. Also, their casing and their stoppers or caps function as a necessary part of a thermos bottle.

By refund claim no. 50421, dated April 29, 1991, the appellant claimed a refund in the amount of $116,094.08 for federal sales tax (FST) paid in respect of some of the goods in issue manufactured or imported between March 1, 1989, and December 31, 1990. By refund claim no. 50992 dated June 13, 1991, the appellant claimed a refund in the amount of $1,349,379.23 for FST paid in respect of certain additional goods in issue manufactured or imported between May 1, 1989, and December 31, 1990.[2] By notices of determination dated October 15, 1991, the Minister disallowed these refund claims. By notices of objection dated November 18, 1991, the appellant objected to the determinations. By notices of decision dated May 27, 1992, the Minister disallowed the appellant's objections and confirmed the initial determinations. The appellant's two appeals were consolidated by the Tribunal into Appeal No. AP-92-095.

The primary issue in this appeal is whether the goods in issue, bottles sold by the appellant under its "Thermos" trademark, are exempt from FST under paragraph 2(*k*) of Part I of Schedule III to the Act. In addition, the respondent has raised two subsidiary issues relating to the amount of the appellant's claim. First, it must be determined if the portion of the appellant's claim relating to taxes paid more than two years before the appellant's two applications for refund at issue is statute barred under section 68 of the Act. Second, if the appeal is allowed, it was requested that issues of quantum be resolved by a subsequent audit.

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1. R.S.C. 1985, c. E-15.
2. The appellant has abandoned its claim with respect to the "Snak Jars" on the basis that these containers are jars and not bottles. The appellant states that these jars represent approximately $20,000.00 of its total claim.

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Sections 1 and 2 of Part I of Schedule III to the Act read as follows:

COVERINGS OR CONTAINERS

1. Usual coverings or usual containers sold to or imported by a manufacturer or producer for use by him exclusively in covering or containing goods of his manufacture or production that are not subject to the consumption or sales tax, but not including coverings or containers designed for dispensing goods for sale or designed for repeated use.

2. All of the following usual coverings or usual containers when for use exclusively for covering or containing goods not subject to the consumption or sales tax:

(a) barrels and boxes for fish; lobster crates; scallop bags;
(b) barrels, boxes, baskets and crates for packaging fruits and vegetables;
(c) bottles and cans for milk and cream;
(d) boxes, crates and cartons for eggs;
(e) butter and cheese boxes;
(f) cans and insulated bags for ice cream;
(g) corrugated paper boxes for bread;
(h) drums and cans for honey;
(i) flour bags;
(j) crates, cages and boxes for transportation of live poultry;
and
(k) bottles for food or drink.

The appellant's first witness was Mr. James Symons. Mr. Symons was an employee of the appellant for 43 years until his retirement in 1989. During that time, he worked in various aspects of its manufacturing operations, with his last position being Manufacturing Manager. For the balance of the appeal period, Mr. Symons continued his association with the appellant as a consultant. The witness first identified the component parts of each of the products in issue and then explained how they are made. Mr. Symons also explained that the use of carbonated beverages in thermos bottles was not advised because the bottles were not designed for maintaining the pressure that is associated with such beverages. He stated that the use of the bottles for such beverages could lead to either leakage or an implosion of the glass bottle inside the container. Finally, the witness stated that thermos bottles had never been called anything but bottles while he was with the appellant.

The appellant's second witness was Mr. Hugh J. McDonald. Mr. McDonald is Executive Vice-President of Sales and Marketing with the appellant and its senior executive in Canada. He indicated that he was responsible for the general administration of the appellant and had been in this position since 1978. Mr. McDonald's testimony focused on the uses of the goods in issue and the relationship of the appellant's marketing approach to those uses. He stated that the products were directed towards hot and cold beverages and foods. He estimated that between 75 and 90 percent of the use of the goods in issue related to coffee. The remaining intended uses that he identified included tea, milk, ice water, fruit juices, soups, stews and other tax-exempt foods and beverages. The witness could not say definitively that the goods in issue were not used to some degree for non-tax-exempt beverages, such as Kool-Aid and other similar drinks. In response to questions about whether the goods in issue might be used for alcoholic beverages, Mr. McDonald said that the appellant intended no such use and would not want to be associated with any such use. Finally, the witness testified that the goods in issue had certain highly unusual *de minimis* uses, such as to contain frozen bull semen and frozen oxygen.

Counsel for the appellant based their case on the "plain meaning" or "words-in-total-context" rule of statutory interpretation. They summarized this approach as

meaning that words in a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament. They also argued that, where the words at issue are clear, greater weight should be given to those words and their immediate context as opposed to assertions about parliamentary intention.

Counsel for the appellant argued that the wording of paragraph 2(*k*) of Part I of Schedule III to the Act is clear and unambiguous. While section 1 of Part I of Schedule III to the Act refers to manufacturing, production and sale and is, thus, set in a commercial context, section 2 of the said part is silent on these matters. The bottles for food or drink need not be filled at the time of sale with tax-exempt goods. All that is required, counsel for the appellant maintained, is that the containers be "usual," that they be "bottles," that they be for "food or drink" and that they be "for use exclusively for covering or containing goods not subject to the consumption or sales tax."

Counsel for the appellant observed that differences between the legislation in effect since 1985 and that in force earlier were significant. The earlier version effectively combined sections 1 and 2 of the current version of Part I of Schedule III to the Act into one section which related the various exemptions for food and beverage containers to the production and sale of tax-exempt goods. Counsel cited the statement of Laskin J. in *Bathurst Paper Limited v. The Minister of Municipal Affairs of the Province of New Brunswick* that "Legislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended.[3]" Counsel suggested that, as Parliament had deliberately separated section 2 from section 1 and had not put them in a commercial context, then the decision of the Federal Court of Appeal in *Les Entreprises Kato Inc. v. The Deputy Minister of National Revenue, Customs and Excise*,[4] on which the respondent relied, was not applicable because it was decided on the basis of the pre-1985 legislation.

Counsel for the appellant then turned to the conditions set out in section 2 of Part I of Schedule III to the Act, making the following submissions on each of the elements.

(1) "Usual" means for ordinary or common use. Citing the Tribunal's decision in *Guelph Paper Box Company Limited v. The Minister of National Revenue*,[5] counsel submitted that "usual" meant in a manner consistent with the purpose of the goods and the design of their usage. The thermos bottles are designed to contain tax-exempt food and drink, and the greatest part of their actual use is for that purpose. If they were used occasionally for non-tax-exempt goods, that use was *de minimis*.

(2) Dictionary definitions of the word "bottle" encompass the products in issue; definitions of "thermos" make reference to the word "bottle." The words "thermos" and "bottle" are commonly connected in commercial parlance.

(3) Marketing and advertising of the goods in issue feature tax-exempt "food or drink" and warn against use of the product for carbonated beverages which are not tax-exempt.

(4) "For use" does not mean that, at the time of sale to the appellant's wholesale or retail customers, the thermos bottles must contain tax-exempt food or drink. This would not be consistent with the plain meaning of section 2 which does not, in any way, refer to the level of trade or to the user of the container.

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3. [1972] S.C.R. 471 at 477.
4. [1984] 1 F.C. 827.
5. 5 T.C.T. 1045, Canadian International Trade Tribunal, Appeal No. AP-90-145, January 7, 1992.

Counsel for the appellant argued that the wording of section 2 can be distinguished from other sections and parts of Schedule III to the Act, such as section 2 of Part I, paragraph 1(*a*) of Part XIII and section 8 of Part XVIII. Accordingly, it would be inappropriate to narrow the application of section 2 by reading into it or implying limiting words. On the question of the goods being used "exclusively," counsel applied the reasoning of (1) above, also citing *Singer Sewing Machine Co. of Canada Ltd. v. The Minister of National Revenue for Customs and Excise*,[6] to argue that "exclusively" must be interpreted in terms of the design of the goods and not the use to which a purchaser may adapt the goods. The intended uses of the thermos bottles are to contain tax-exempt food or drink.

Counsel for the respondent argued, first, that the context in which the exemptions of Part I of Schedule III to the Act are given is one of production and trade in tax-exempt goods, which does not apply in the case at hand. He cited *Les Entreprises Kato* in support of this position. The goods in issue are not used in conjunction with commerce in tax-exempt goods, but rather are sold empty to consumers who decide what to put in them. In addition, paragraph 2(*k*) of Part I of Schedule III to the Act should take its meaning from the other items listed in section 2, all of which, unlike the thermos bottles in issue, are unambiguously containers used in the food industry for packing tax-exempt products.

Counsel for the respondent's second main argument was that the appellant had not shown that the goods in issue are for use "exclusively" in containing tax-exempt goods. Even in terms of the intended use of the goods, the advertising material for one of the products in issue aimed at children appeared to show an artificial fruit drink. The concept of *de minimis* was meant to apply to items such as bull semen and liquid oxygen and not to uses which might be from 10 to 25 percent of total use.

Counsel for the respondent's third line of argument dealt with the concept of a "usual container." He likened the goods in issue to the example cited by the Tribunal in *Guelph Paper Box*, where margarine sold in Tupperware (not a "usual" container) was contrasted with margarine sold in nondescript plastic tubs ("usual" containers).

In support of the position that thermos bottles were not "usual" containers in the sale of tax-exempt food or drink, counsel for the respondent also referred to relevant administrative policies of the Department of National Revenue as provided for in Excise Memorandum ET 302[7] (Memorandum ET 302) which states that containers designated for household or consumer use are not "usual" coverings or containers for purposes of the Act.

The Tribunal considers that this case turns on statutory interpretation and, in particular, on whether, under paragraph 2(*k*) of Part I of Schedule III to the Act, thermos bottles can be interpreted as "usual" coverings or containers for use "exclusively" for food or drink not subject to sales tax.

The Tribunal agrees with the appellant's view that the "plain meaning," "words-in-total-context" approach to statutory interpretation is the appropriate one.

However, applying this approach does not lead the Tribunal to read paragraph 2(*k*) of Part I of Schedule III to the Act by itself and without reference to other paragraphs of section 2, to the remainder of Part I of Schedule III to the Act or, indeed, to the overall purpose of the Act. It is not simply the letter but also the object and spirit of the legislation which the Tribunal must examine in interpreting the statute. The Act is concerned with commercial transactions involving

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6. 17 C.E.R. 97, Tariff Board, Appeal No. 2951, July 21, 1988.
7. Containers and Coverings, Department of National Revenue, March 16, 1989.

the production, sale and consumption of goods. It takes no interest in private and household uses of goods.

It is true that section 2 of Part I of Schedule III to the Act does not specifically mention manufacture, production or sale of goods, as does section 1. However, the containers described in paragraphs (*a*) to (*j*) of section 2 are used in the food industry in producing and packaging tax-exempt goods. Paragraph 2(*k*), in the context of section 2 as a whole and as an element of Part I of Schedule III, is clearly meant to be read in a commercial context. The Tribunal cannot imagine what public purpose Parliament could have had in mind if it had intended that products such as empty thermos bottles or Tupperware containers should be tax-exempt, provided that it could be shown that, when filled by the consumer, they exclusively contained tax-exempt food or drink. Rather, the Tribunal is of the view that it is intended that, to come within the exemptions of section 2 of Part I of Schedule III to the Act, the items in issue are to contain tax-exempt goods at the time of sale and not to be sold empty. Further, while not determinative, the provisions of Memorandum ET 302 lend support to interpreting section 2 in a commercial context.

If the appeal does not fail solely on the basis of statutory interpretation, it must fail on the basis of the facts. The appellant did not bring conclusive evidence that thermos bottles are "usual" containers for containing tax-exempt food or drink, or that they are used "exclusively" for this purpose. Thermos bottles are relatively specialized containers for food and drink, tax-exempt or not. More usual household containers for tax-exempt food or drink would be pitchers, pots, plastic containers, plates and the like.

In any event, in considering the question of exclusivity, the Tribunal must look at actual, not merely intended use. Truly *de minimis* uses of thermos bottles for non-tax-exempt liquids, such as frozen bull semen and frozen oxygen, would not be inconsistent with an overall intention that the goods contain only tax-exempt food or drink. However, the appellant's witnesses could not give a breakdown of the uses of thermos bottles for other tax-exempt food or drink besides coffee, which they estimated accounted for 75 to 90 percent of total use. In the absence of evidence that virtually all of the goods are used to contain tax-exempt food and drink, the Tribunal cannot find that the exclusivity test has been met. The appellant's statements about the intended use of the thermos bottles are not sufficient by themselves.

For these reasons, the Tribunal dismisses the appeal. The Tribunal notes that, if it had found for the appellant on the primary issue, in accordance with previous decisions of the Tribunal, it would have limited the appellant's claim to that portion of taxes paid within two years of the date of the appellant's application for refund and referred the matter back to the respondent with directions to calculate the amount owing to the appellant on that basis.

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