CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, September 21, 1993

Appeal No. AP-92-128

IN THE MATTER OF an appeal heard on February 23, 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 29, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

PARK CITY PRODUCTS LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed (Member Gracey dissenting).

W. Roy Hines
W. Roy Hines
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-128

PARK CITY PRODUCTS LIMITED **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. The appellant claimed a refund for moneys remitted to the Department of National Revenue that it alleged were paid in error, totalling $177,986.90, during the period from May 1, 1989, to December 31, 1990. In the notice of determination dated September 30, 1991, the Minister of National Revenue disallowed the application, indicating that no error had been made as the appellant's customers had elected to use an alternative tax accounting method for retailers/wholesalers, whereby the appellant would be expected to remit taxes to the respondent. The issue in this appeal is whether the appellant is entitled to a refund of the moneys that it claimed were paid in error to the Department of National Revenue.

***HELD**: The appeal is allowed (Member Gracey dissenting). The majority of the Tribunal did not receive sufficient evidence to persuade it that the appellant and its customers were using an alternative tax accounting method for retailers/wholesalers. The majority of the Tribunal found that the appellant was exempt from paying tax on the sale of pet food under paragraph 50(5)(k) of the Excise Tax Act, yet it continued to remit moneys to the Department of National Revenue that were taken into account as taxes under the Excise Tax Act. The appellant was entitled to a refund of the moneys under section 68 of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 23, 1993*
Date of Decision:	*September 21, 1993*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Kathleen E. Macmillan, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Terrance A. Sweeney, for the appellant* *Geoffrey S. Lester, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-128

PARK CITY PRODUCTS LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
KATHLEEN E. MACMILLAN, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from a determination of the Minister of National Revenue (the Minister). In an application dated May 29, 1991, the appellant claimed a refund for moneys remitted to the Department of National Revenue (Revenue Canada) that it alleged were paid in error, totalling $177,986.90, during the period from May 1, 1989, to December 31, 1990. In the notice of determination dated September 30, 1991, the Minister disallowed the application, indicating that no error had been made as the appellant's customers had elected to use an alternative tax accounting method for retailers/wholesalers (Alternative Tax Accounting Method), whereby the appellant would be expected to remit taxes to the respondent. The issue in this appeal is whether the appellant is entitled to a refund of the moneys that it claimed were paid in error to Revenue Canada.

Mr. James E. Neumann, president and sole shareholder of Park City Products Limited (Park City), served as its witness. He testified that the appellant is the only manufacturer of dry pet food in Manitoba. The company sells mainly to wholesalers and distributors, with some sales to the general public. A product brochure was entered into the record as Exhibit A-1, including pamphlets on the company's "Super Treat" dog and cat food and "Golden Chunks" dog food. These products account for approximately 20 percent of the appellant's pet food production, while the balance is sold under private label. Pet food accounts for 50 percent of the company's total business.

A list of the appellant's four major customers (the customers) - MacDonalds Consolidated, Western Grocers-Calgary, Codville Company and Premier Mix Feeds - was entered into the record as Exhibit A-2. The total federal sales tax (FST) remitted on sales of pet food to the customers over the period at issue totalled $177,986.90, which represents the amount at issue in this appeal. The witness testified that Park City made monthly remittances of FST on a prescribed form based on the amounts collected from its customers. Counsel for the respondent admitted that the appellant had paid the taxes claimed "subject to order," meaning that "the moneys had been remitted."

During cross-examination, the witness confirmed that the FST remitted was money received from the appellant's customers. He testified that some of the customers, mostly

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

breeders, requested to purchase tax-exempt, which the appellant was able to accommodate. No special arrangements were made for those customers that continued to pay tax and, to the best of his knowledge, no customer that sold to wholesalers and end users requested to purchase tax-exempt.

The witness testified that the customers act as wholesalers of food products, selling to other distributors and end users. He indicated that they do not sell exclusively to end users. Counsel for the respondent admitted that the customers are licensed manufacturers under the Act.

Mr. Neumann indicated that pet food was not taxable under the Act until July 1, 1985. The change in the taxing regime was realized through several sources, including the company's customers, which advised the appellant that its prices had to be revised to include FST. The witness contended that the company's procedure of collecting tax and remitting it to Revenue Canada did not change until December 31, 1990, even though the appellant was relieved of the liability for the payment of the tax under paragraph 50(5)(*k*) of the Act, which was added to the legislation on May 1, 1987. He maintained that a review of the company's files, and in particular those of the customers, revealed no documentation referring to the Alternative Tax Accounting Method alleged by the respondent to be used by the customers. Mr. Neumann further testified that he had no recollection or knowledge of being informed about the Alternative Tax Accounting Method between May 1985 and December 31, 1990. He explained that he first became aware that the appellant may have been paying taxes in error in May 1991.

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

2.(1) In this Act,

...

"manufacturer or producer" includes

...

(i) any person who sells goods enumerated in Schedule III.1, other than a person who sells those goods exclusively and directly to consumers.

50.(1) There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sale price or on the volume sold of all goods

(a) produced or manufactured in Canada

(i) payable ... by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier.

50.(5) Notwithstanding anything in subsection (1), the consumption or sales tax shall not be payable on goods

...

(k) sold to ... a person described in paragraph (i) of the definition "manufacturer or producer" in subsection 2(1) who is a licensed manufacturer under this Act, if the goods are goods enumerated in Schedule III.1.

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.

SCHEDULE III.1

GOODS SOLD BY DEEMED MANUFACTURERS OR PRODUCERS

1. Feeds, and supplements for addition to feeds, for animals, fish or fowl that are not ordinarily raised to produce, or to be used as, food for human consumption.

Counsel for the appellant argued that the evidence had clearly established that the appellant manufactures pet food as identified in Schedule III.1 to the Act. On July 1, 1985, the appellant became liable to pay tax on the sale of pet food. Then, in May 1987, the Act was further amended, shifting tax liability down the distribution chain to the appellant's customers, or possibly their customers, as deemed manufacturers or producers. Counsel asserted that Mr. Neumann's evidence was clear that, from June 1985 to December 31, 1990, the appellant's practice of recouping tax from its customers and remitting it to Revenue Canada remained unchanged. The evidence was that the appellant's customers did not sell exclusively and directly to consumers. As the appellant continued to pay tax when it was not liable to do so, it was entitled to a refund of moneys paid in error under section 68 of the Act.

Counsel for the respondent argued that the appellant did not actually pay any money by mistake. The appellant was aware that certain customers could purchase on a tax-exempt basis, but it did not inquire with respect to the customers. Counsel submitted that, because it waved inquiry and did not investigate further, it cannot be said to have paid any moneys in error.

Counsel referred to *Alpha Fuels Limited v. The Minister of National Revenue*,[2] arguing that the Tribunal has acknowledged that a party discharges its tax liability when it pays using the scheme provided in the Alternative Tax Accounting Method. Counsel stated that the Tribunal has characterized a party like the appellant, within the Alternative Tax Accounting Method, as a tax collector with the responsibility of remitting taxes collected from its customers to Revenue Canada. As such, when the appellant remits tax as a tax collector, it cannot be said to be paying under a mistake of fact or law or otherwise.

Counsel argued that, to be entitled to a refund under section 68 of the Act, the moneys must have been taken into account as taxes under the Act. If there is some other explanation for the payment of the moneys, then they are voluntary payments outside the provisions of the Act. As there was no tax liability imposed on the appellant, it cannot be said that the moneys were taken into account as taxes.

With regard to *Jack Herdman Limited v. The Minister of National Revenue*,[3] which counsel acknowledged is the most difficult case to rationalize with the respondent's position, counsel argued that it could be distinguished from the present case as the relevant provisions of the Act read differently, in that there was no requirement that moneys be taken into account as taxes. Further, the case did not deal with a claim for a refund. Counsel characterized the case as one involving estoppel where the appellant changed its position to its detriment on the strength of representations made by Revenue Canada. He argued that the *Herdman* case stands for the proposition that, to be entitled to the refund, the party that has actually remitted moneys to Revenue Canada must be "out of pocket" before it is properly refunded. Counsel cited

2. Canadian International Trade Tribunal, Appeal No. AP-89-264, April 6, 1992.
3. 83 D.T.C. 5274 (F.C.A.), Court File No. A-682-81, May 25, 1983.

Geocrude Energy Inc. v. The Minister of National Revenue[4] for the proposition that the appellant's refund should be denied on the ground that it was not liable to pay the tax and that, therefore, the moneys were not paid in error.

The evidence is clear to the majority of the Tribunal that the pet food sold by the appellant qualifies as goods enumerated in Schedule III.1 to the Act. Similarly, the uncontroverted evidence is that the appellant does not sell the pet food exclusively and directly to consumers. As such, it qualifies as a manufacturer or producer under paragraph 2(1)(*i*) of the Act.

Under subsection 50(1) of the Act, the appellant, as a manufacturer or producer, is liable to pay tax on the sale price of the pet food that it sold to its customers unless exempt from the payment of this tax. In this regard, the appellant has claimed to be exempt by virtue of paragraph 50(5)(*k*) of the Act. The uncontested evidence of Mr. Neumann was that the appellant's customers, the sales to whom represent the transactions at issue, did not resell the pet food purchased from the appellant exclusively and directly to consumers. As such, these customers would also qualify as manufacturers or producers under paragraph 2(1)(*i*) of the Act. The respondent has acknowledged that these customers are licensed under the Act. As such, under paragraph 50(5)(*k*) of the Act, the consumption or sales tax was not payable by the appellant on sales of pet food to these customers. The appellant did pay sales tax on these transactions totalling $177,986.90 during the period in issue and claimed a refund of these moneys under section 68 of the Act.

The *Herdman* case, cited by both counsel, stands for the proposition that, when taxes are paid when there is no legal obligation to do so, such taxes are paid in "error." The evidence of Mr. Neumann was that the moneys paid in error were made on a monthly basis in prescribed form, as established by regulation under the Act, for making returns of tax payable to Revenue Canada. Revenue Canada accepted the appellant's returns on this basis. It is the opinion of the majority of the Tribunal that, when such a return is made and accepted by Revenue Canada, such moneys are taken into account as taxes under the Act, unless the respondent can establish otherwise, which, in this case, it has not. As the appellant paid moneys in error that were taken into account as taxes under the Act and applied for a refund of those moneys within two years after payment of the moneys, it is entitled, under section 68 of the Act, to a refund of those moneys.

As stated by the Tribunal in the *Alpha Fuels* case, "the effect of the Alternative Tax Accounting Method is to make the vendor the tax collector when agreement is reached with the purchaser that sales ... will be on a 'tax-in' basis.[5] " In that case, the Tribunal concluded, on the basis of detailed documentary evidence and testimony, that there was an agreement between the parties to purchase on a "tax-in" basis as provided in the Alternative Tax Accounting Method. However, in this case, the majority of the Tribunal is not satisfied on the evidence that, at the time that the moneys were paid to Revenue Canada, there was an agreement between the appellant and the purchasers of its pet food to use the Alternative Tax Accounting Method.

Counsel for the respondent referred to the appellant's notice of objection in which it was stated that the appellant's customers "did not buy our goods FST exempt because of the administrative policy created by Revenue Canada," referring to the Alternative Tax

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4. 2 T.C.T. 1160, Canadian International Trade Tribunal, Appeal No. 2937, August 21, 1989.
5. *Supra*, note 2 at 6.

Accounting Method. However, this statement was made in a document dated subsequent to the period in issue. Also, Mr. Neumann's testimony was that he had no knowledge of the Alternative Tax Accounting Method during the period in issue.

In allowing this appeal, the majority of the Tribunal is very much aware that this decision will result in a windfall of a substantial amount of money for the appellant. It is clear from the evidence that, commencing in 1985, the price charged by the appellant for its pet food included an amount to offset the FST involved and that these moneys were remitted to Revenue Canada. The Act was amended in 1987, relieving the appellant of tax liability by shifting it forward to the appellant's customers, yet the appellant continued to collect an FST component in the sale price of its pet food and to remit it to Revenue Canada. Concomitant to this amendment was the Alternative Tax Accounting Method which allowed a purchaser to buy tax-exempt goods on a tax-paid basis and, subsequently, to remit taxes to Revenue Canada only on its markup. This scheme required the seller to remit the taxes that it collected on the otherwise exempt sales to Revenue Canada, thus satisfying the ultimate tax liability. Counsel for the respondent argued, but did not prove, that this is the simple explanation for the appellant's customers continuing to pay tax on exempt sales and for the appellant to continue to remit tax to Revenue Canada. The majority of the Tribunal was reminded by counsel that other remedies are available in law to correct any injustice that may arise from this decision.

W. Roy Hines
W. Roy Hines
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

DISSENTING OPINION OF MEMBER GRACEY

I respectfully dissent from the decision of my colleagues in this matter and am persuaded that the appellant did not pay taxes in error as contemplated in section 68 of the Act.

The essential facts of this case are that the appellant charged its customers the proper amount of sales tax on the goods that it sold to them during the relevant period, remitted that same amount of tax to Revenue Canada on a regular basis and now seeks a refund of that amount on the claim that it paid taxes in error under section 68 of the Act.

The appellant claims that the error that it made was in failing to realize that it was not, after May 1987, liable for tax, but that the liability, during the relevant period, had shifted to its customers that were deemed manufacturers. The appellant's witness admitted, however, that the appellant sold its goods to its main customers on a tax-included basis.

In its notice of objection to Revenue Canada's denial of its claim, the appellant states that "deemed manufacturers did not buy our goods FST exempt because of the administrative policy created by Revenue Canada - Excise that has been reinforced by many publications including Excise News No. 59,[6] and ruling card 3700-83/1." The notice of objection goes on to indicate a clear understanding of the Alternative Tax Accounting Method. This statement contrasts quite vividly with Mr. Neumann's testimony that he was generally unaware of the provisions of that administrative policy. Despite the fact that the notice of objection was dated September 30, 1991, the witness stated, in sworn testimony, that he only learned about the Alternative Tax Accounting Method "about a month ago." Although counsel for the appellant pointed out that the notice of objection was not prepared with his assistance, that cannot alter the fact that the appellant was aware of the Alternative Tax Accounting Method at least by the date of the notice of objection. However, the appellant also contends in its notice of objection that "this administrative policy does not alter the fact that we remitted FST in error because paragraph 50(5)(*k*) [of the Act] supersedes this administrative policy and permits FST exemption on these transactions."

I find that this sequence of statements and events places the appellant far outside the intent of the provision for taxes paid in error. In asserting the obvious fact that the law supersedes mere administrative procedures, the appellant appears to argue that any time an administrative procedure such as the Alternative Tax Accounting Method is employed, taxes are somehow paid in error because the law supersedes. This is clearly not so as Revenue Canada has the authority to create and employ administrative procedures. What was open to the appellant was to advise its customers that, in view of its exemption from tax liability, it would not only cease remitting tax, but would cease selling its customers its goods on a tax-included basis. The appellant did not do so because, as stated in Mr. Neumann's testimony, the appellant was not then aware of the fact that it was not liable for tax. However, it is also clear from Mr. Neumann's testimony that the appellant merely remitted the tax that it had already charged its customers and was, therefore, not out of pocket of any of the tax that it now claims as a refund of taxes paid in error.

In the precedent case, *Alpha Fuels*, the Tribunal allowed an appeal where the appellant had purchased its goods (fuel) on a tax-paid basis pursuant to the Alternative Tax Accounting Method. The appellant was assessed for unpaid taxes because the firm from whom

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6. Department of National Revenue, Customs and Excise, January 1988.

it had purchased its goods had not remitted to Revenue Canada the taxes that it charged to, and collected from, Alpha Fuels. Revenue Canada, in that case, sought to hold the appellant liable, notwithstanding the fact that it had followed the provisions of the administrative policy. The Tribunal found that, in following that administrative policy, the appellant had fulfilled its tax liability. In the present case, I would find that the appellant's customers fulfilled their tax liability by purchasing their goods on a tax-paid basis as provided for by the Alternative Tax Accounting Method, and it follows logically therefrom that the appellant did not pay tax in error. Rather, the appellant, that was not itself liable for the tax, charged and remitted the tax on behalf of its customers.

Finally, I would note that the arrangement between the appellant and the customers, for the appellant to sell them its goods on a tax-paid basis, had existed unchanged since 1985. It is true that between 1985 and May 1987, it was the appellant that was tax liable, and after that date, the liability shifted to its customers. However, there was no indication that the arrangement between the appellant and the customers to sell its goods on a tax-paid basis had been cancelled or altered in any way. The only reasonable conclusion, therefore, is that the arrangement remained in place. Indeed, there was no need on the part of the appellant's customers to seek to alter the arrangement since it meant that they would meet their tax liability by continuing to purchase their goods on a tax-paid basis. In the absence of any indication that the appellant sought to alter the arrangement into which it freely entered, I cannot find that it paid tax in error.

Charles A. Gracey

Charles A. Gracey
Member