CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, February 9, 1994

Appeal No. AP-92-255

IN THE MATTER OF an appeal heard on June 2, 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 September 30, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

KRISPY KERNELS (CANADA) INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-255

KRISPY KERNELS (CANADA) INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is in the business of producing and selling a wide variety of flavoured and unflavoured nuts and seeds. The appellant's application for a refund of taxes paid in error with respect to barbecue-flavoured peanuts was disallowed on the basis that the goods in issue were excluded from the exemption provided under section 1 of Part V of Schedule III to the Excise Tax Act. The issue in this appeal is whether barbecue-flavoured peanuts are "salted nuts" for purposes of paragraph 1(g) of Part V of Schedule III to the Excise Tax Act.

HELD: *The appeal is dismissed. The Tribunal is of the view that paragraph 1(g) of Part V of Schedule III to the Excise Tax Act must be interpreted with reference to the introductory wording of section 1 and the types of foods enumerated in that section. These factors lead the Tribunal to conclude that snack foods, such as the goods in issue, were not meant to be exempted under section 1. The Tribunal is also of the opinion that the French version of paragraph 1(g), which reads "les noix et les graines salées," supports a dismissal of this appeal. The fact that paragraph 1(g) refers to nuts and seeds generally leads the Tribunal to conclude that the provision was not meant to be read as restrictively as the appellant suggested.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*June 2, 1993*
Date of Decision:	*February 9, 1994*
Tribunal Members:	*Lise Bergeron, Presiding Member* *Michèle Blouin, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Michael Kaylor, for the appellant* *Gilles Villeneuve, for the respondent*

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Appeal No. AP-92-255

KRISPY KERNELS (CANADA) INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member
MICHÈLE BLOUIN, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of a determination of the Minister of National Revenue dated March 31, 1992.

The appellant is in the business of producing and selling a wide variety of flavoured and unflavoured nuts and seeds. By way of an application dated November 29, 1991, the appellant requested a refund of federal sales tax allegedly paid in error with respect to a number of different types of nuts and seeds. By notice of determination dated March 31, 1992, the respondent disallowed the appellant's application on the basis that the goods in issue were excluded from the exemption provided under section 1 of Part V of Schedule III to the Act. By notice of objection dated April 24, 1992, the appellant objected to the determination. By notice of decision dated September 30, 1992, the respondent denied the appellant's objection and confirmed the determination.

At the hearing, counsel for the appellant confirmed that the appellant was abandoning its claim with respect to bacon peanuts, barbecue sunflower seeds, smoked almonds and oriental almonds. Therefore, the only goods in issue are barbecue-flavoured peanuts. The issue in this appeal is whether barbecue-flavoured peanuts are "salted nuts" for purposes of paragraph 1(*g*) of Part V of Schedule III to the Act.

The English and French versions of paragraph 1(*g*) of Part V of Schedule III to the Act read as follows:

FOODSTUFFS

1. Food and drink for human consumption (including sweetening agents, seasonings and other ingredients to be mixed with or used in the preparation of the food and drink), other than

...

(g) salted nuts and salted seeds.

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

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DENRÉES ALIMENTAIRES

1. Aliments et boissons destinés à la consommation humaine (y compris les édulcorants, assaisonnements et autres ingrédients devant être mélangés à ces aliments et boissons ou être utilisés dans leur préparation), sauf :

...

(g) les noix et les graines salées.

The appellant's first witness was Mr. Alain Beaulieu. Mr. Beaulieu has been a factory manager with the appellant for the last four years. Mr. Beaulieu described some of the 30 varieties of nuts and seeds made by the appellant and the manner in which some of them are produced. These included peanuts sold as "salted peanuts" and peanuts sold as "barbecue peanuts." He explained that the appellant produces many different types of nuts, with different types of seasonings on them, so that it can respond to consumer demand. He testified that the primary difference between salted peanuts and barbecue peanuts is the difference in taste, with salted peanuts deriving their taste from salt and barbecue peanuts deriving their taste from the seasoning in which salt is just one of many ingredients. Mr. Beaulieu also explained that the main reason for using salt as an ingredient in producing nuts other than salted nuts is that it acts as a preserving agent.

During cross-examination, Mr. Beaulieu agreed that salt also acts as a stabilizer when used in nuts other than salted nuts and acknowledged that salt is a key ingredient by weight in these other nuts. He also confirmed that the appellant had, until recently, sold the goods in issue under the name "salted peanuts barbecue" (*arachides salées barbecue*) and agreed that different types of potato chips have salt listed as an ingredient. In response to questions from the Tribunal, Mr. Beaulieu stated that the appellant changed its packaging of the goods in issue to make the differences between salted peanuts and barbecue peanuts clearer for confused consumers. In redirect, Mr. Beaulieu agreed that honey peanuts, which have salt in them, taste sweet, not salty. He also agreed that the fact that the word "salted" does not appear in the product name for regular potato chips has nothing to do with whether the product is a salted product.

The appellant's second witness was Mr. Jean-Claude Martel, Director of Sales, Eastern Canada, for Griffith Laboratories. Mr. Martel indicated that he has been in his present position since 1984 and with the company for 24 years. Mr. Martel also indicated that Griffith Laboratories is the company that makes the barbecue seasoning used by the appellant in making its barbecue peanuts. Mr. Martel testified that the main reason for using salt in a seasoning is that it acts as a preserving agent and as a carrier. Further, he stated that, in the barbecue seasoning used by the appellant, salt loses its identity and taste, and the seasoning has an appearance and taste different from salt alone. He expressed the view that the term "salted" refers to something that gives a salty taste.

During cross-examination, Mr. Martel agreed that, on the basis of weight, salt is a dominant ingredient in the seasoning. In response to questions from the Tribunal, Mr. Martel indicated, after tasting a sample barbecue peanut, that the peanut did have, among other tastes, a salty taste and confirmed that there were grains of salt on the peanut. In redirect, Mr. Martel stated that the taste of the barbecue seasoning was different from the taste of salt alone.

Counsel for the appellant argued that the evidence presented to the Tribunal indicated that, although the barbecue seasoning used by the appellant had salt as one of its main ingredients, this salt was used for purposes other than conveying the taste of salt. Counsel

submitted that paragraph 1(*g*) of Part V of Schedule III to the Act contemplates "salted nuts," that is, nuts that convey the taste of salt alone. Counsel then analyzed section 1 using the "words-in-total context" approach to statutory interpretation.[2] This approach reveals, he submitted, that, unlike other snack food items in paragraph 1(*f*), the reference to "salted nuts" in paragraph 1(*g*) contains a qualifying adjective (salted) which leads to the view that Parliament intended to tax only those peanuts that taste just of salt when eaten. In support of this argument, counsel referenced paragraph 1(*e*), where nuts that are "coated or treated" with certain specified coatings, some of which contain salt, but not including barbecue seasoning, are subject to federal sales tax. Counsel also referred to certain cereals and unsalted crackers which, although they contain salt as an ingredient, are not generally considered to be a salted product.

Counsel for the appellant then reviewed case law which, he submitted, supported the view that a new product which is made up of different ingredients which are themselves, taken separately, exempt from tax must be brought within a specific tax exemption of its own.[3] Counsel argued that the evidence shows that the salt used in the making of the barbecue seasoning loses its identity and its taste as salt, and thus barbecue peanuts constitute a new product. Counsel suggested that the Tribunal members ask themselves: if they went to a store to buy "salted peanuts," would they return with "barbecue peanuts" or "salted peanuts?" Counsel also submitted case law which, he argued, stood for the proposition that, in order to be taxable or tax-exempt, a product must fall squarely within the words chosen by Parliament.[4] Finally, in this regard, counsel referred to the statement by the Exchequer Court of Canada in *M.F.F. Equities Limited v. Her Majesty the Queen*,[5] where the Court stated that, in order to determine whether a particular product falls within an expression found in a legislative provision, "resort must be had to the common understanding of such words when used in relation to articles of commerce.[6]" Counsel submitted that the mere fact that there is salt in barbecue seasoning does not make such seasoning a salted seasoning, nor does it make the peanut to which it is applied a salted peanut.

Turning to the meaning of the word "salted," counsel for the appellant submitted that it must mean something other than "containing salt;" otherwise, the honey roasted peanuts and other coated peanuts listed in paragraph 1(*e*) of Part V of Schedule III to the Act would not have to have been included there. They were included separately, he suggested, because they are not "salted nuts."

Counsel for the respondent first set out what he stated were matters not in dispute, namely, that the goods in issue are peanuts and that they contain salt. The issue, he submitted, is whether they are salted nuts or seeds under paragraph 1(*g*) of Part V of Schedule III to the Act. Counsel stated that it was the evidence of Mr. Beaulieu that, in the case of the goods in

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2. Set out by the Supreme Court of Canada in *Stubart Investments Limited v. Her Majesty The Queen*, [1984] 1 S.C.R. 536.

3. Counsel referred, for example, to *W.T. Hawkins Limited v. The Deputy Minister of National Revenue for Customs and Excise*, [1957] Ex.C.R. 152. Counsel also referred to *Gaston Charbonneau v. Her Majesty The Queen* (1978), 79 D.T.C. 5008 (F.C. - T.D.) and *Walt Disney Music of Canada Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1983), 9 T.B.R. 72 which, he suggested, follow the reasoning in *Hawkins*.

4. See *Her Majesty The Queen v. Mead Johnson of Canada Limited*, [1966] S.C.R. 457, and *Pfizer Corporation and Pfizer Company Limited v. Her Majesty The Queen*, [1966] S.C.R. 449.

5. [1969] 1 Ex.C.R. 508.

6. *Ibid.* at 518.

issue, salt predominates over artificial flavouring. Counsel also argued that the Tribunal could and should take judicial notice of the fact that the goods in issue are normally sold as snack foods. Counsel also noted that, although Mr. Martel testified that salt loses its character in the barbecue seasoning, in response to questions from the Tribunal, Mr. Martel agreed that the goods in issue had a salty taste and texture.

Counsel for the respondent then considered the meanings of the words "salted" and "*salé*" in French. He submitted that, according to both The Oxford English Dictionary[7] and Le Grand Robert de la Langue Française,[8] "salted" and "*salé*" mean containing salt as an ingredient or seasoned with salt, or used as a preservative or for conservation purposes, and that, when applying such meanings to the goods in issue, it becomes clear that they are "salted nuts." With respect to the appellant's recent packaging change, counsel suggested that the appellant's argument was contradictory to the extent that it emphasized that a consumer's perception of the goods was important, but that the manufacturer's was not. Counsel stated that the evidence shows that it was the manufacturer's perception, at least until three months ago, that the goods in issue were salted nuts.

Turning to consider the statutory scheme of section 1 of Part V of Schedule III to the Act, counsel for the respondent suggested that paragraphs 1(*a*) to 1(*d*) deal with beverages and paragraphs 1(*e*) to 1(*m*) with snack foods and that this scheme reflects Parliament's intention to exclude snack foods from the exemption. Counsel acknowledged that the case of unsalted nuts, which would be exempted, may at first seem to represent an anomaly, but that this may be explained by the fact that a nut, in its natural state, is a fruit and, as such, would be considered food as opposed to snack food. With respect to the appellant's arguments regarding paragraph 1(*e*) specifically, counsel suggested that a distinction should be made between salting something and sweetening something. Finally, counsel suggested that it would be absurd to exempt nuts such as jalapeno peanuts or barbecue peanuts while not exempting salted peanuts.

In reply, counsel for the appellant submitted that the Tribunal could not impute to Parliament an intention which Parliament has not exhibited in the words that it has chosen to employ. Further, he argued that Parliament, having dealt specifically with a number of sweeteners in paragraph 1(*e*) of Part V of Schedule III to the Act, must have intended, in paragraph 1(*g*), to tax only salted nuts and not all other nuts which may contain some salt, but that are not salted nuts. With respect to the dictionary definitions of the words "salted" and "*salé*," counsel agreed that the definitions offered by counsel for the respondent were representative, but stated that these definitions must be read in the context in which they are used. Counsel argued that to do otherwise would lead to the conclusion that all food products with salt in them are salted products. Counsel suggested that, in conjunction with food, "salted" means the use of salt, and salt alone or almost alone, as the seasoning for the purpose of giving the product a salty taste.

The Tribunal agrees with the parties that this case turns on the meaning of the phrase "salted nuts" in paragraph 1(*g*) of Part V of Schedule III to the Act and, therefore, the issue is whether the goods in issue come within this provision. The Tribunal also agrees with the appellant's view that the "words-in-total context" approach to statutory interpretation is the appropriate one.

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7. Vol. XIV, 2nd ed. (Oxford: Clarendon Press, 1989) at 411.
8. Vol. VIII, 2nd ed. (Montréal: Les Dictionnaires ROBERT - CANADA S.C.C., 1987) at 553.

However, applying this approach does not lead the Tribunal to read paragraph 1(*g*) of Part V of Schedule III to the Act in the manner suggested by the appellant. More specifically, the Tribunal is of the view that paragraph 1(*g*) cannot be read by itself and without reference to the introductory words to section 1. The words "[f]ood and drink for human consumption" and the fact that the types of food enumerated in paragraphs 1(*e*) to 1(*m*) are clearly snack foods lead the Tribunal to conclude that the types of food contemplated to be exempted under section 1 are those foods other than snack foods. From this perspective, barbecue peanuts, clearly a snack food, are not the type of food meant to be exempted.

The Tribunal is also of the opinion that the French version of paragraph 1(*g*) of Part V of Schedule III to the Act supports a dismissal of this appeal. It reads "*les noix et les graines salées*." The fact that it refers to nuts and seeds generally leads the Tribunal to conclude that the provision was not meant to be read as restrictively as the appellant suggested. The Tribunal agrees with the respondent that to do so would lead to a situation where different types of peanuts that are snack foods would be exempt, and others would not. In addition, the Tribunal agrees that, with respect to nuts, paragraph 1(*e*) can be seen as relating to sweetened nuts and paragraph 1(*g*) to salted nuts. As Mr. Martel testified, although the taste is not the same as salt alone, the goods in issue do taste salty and have a salty texture. A restrictive interpretation of paragraph 1(*g*) would thus frustrate the meaning attributed to the paragraph as discussed above.

Accordingly, the appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Desmond Hallissey
Desmond Hallissey
Member