



Ottawa, Thursday, March 31, 1994

Appeal No. AP-92-261

IN THE MATTER OF an appeal heard on September 8, 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 November 23, 1992, with respect to a
notice of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

PIZZA PIZZA LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Nicole Pelletier

Nicole Pelletier
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-261

PIZZA PIZZA LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of three determinations of the Minister of National Revenue dated July 24, 1992, which rejected refund applications of federal sales tax (FST) made by the appellant under section 68.2 of the Excise Tax Act. These determinations were later confirmed by the Minister of National Revenue in decisions dated November 23, 1992. The issue in this appeal is whether pizza boxes, single-slice servers and wooden pizza paddles sold by the appellant to its franchisees are exempt from FST pursuant to Schedule III to the Excise Tax Act.

HELD: *The appeal is allowed in part. The franchisees are not manufacturers or producers under the Excise Tax Act. The goods in issue in this appeal, therefore, do not qualify for an exemption under section 1 of Part I or under section 1 of Part XIII of Schedule III to the Excise Tax Act. However, the activities of the franchisees constitute production under the Excise Tax Act. The pizza boxes and wooden pizza paddles are articles which are used exclusively in the production of pizzas. They are, therefore, exempt from FST pursuant to section 3 of Part V of Schedule III to the Excise Tax Act. This part of the appeal is allowed. The single-slice servers, however, are not used in the production process. Having found that the franchisees are not manufacturers or producers, the Tribunal cannot find that the single-slice servers are exempt from FST. This part of the appeal is dismissed.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 8, 1993
Date of Decision: March 31, 1994

Tribunal Members: Charles A. Gracey, Presiding Member
Kathleen E. Macmillan, Member
Sidney A. Fraleigh, Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

Appearances: Riyaz Dattu and Neil E. Bass, for the appellant
Geoffrey S. Lester, for the respondent

Appeal No. AP-92-261

PIZZA PIZZA LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
KATHLEEN E. MACMILLAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of three determinations of the Minister of National Revenue (the Minister) dated July 24, 1992, which rejected refund applications of federal sales tax (FST) made by the appellant under section 68.2 of the Act. These determinations were later confirmed by the Minister in decisions dated November 23, 1992.

The appellant, Pizza Pizza Limited (Pizza Pizza), is a franchisor of pizza outlets. Under the terms of their contracts, the franchisees, which number approximately 250 in Canada, are required to purchase their supplies of food materials, packaging items and other equipment from the appellant. The franchisees then prepare the pizzas, generally in reply to telephone orders, for delivery to customers for consumption at home or elsewhere. The pizzas are not normally for immediate consumption on the franchisees' premises.

The issue in this appeal is whether pizza boxes, single-slice servers and wooden pizza paddles sold by the appellant to its franchisees are exempt from FST pursuant to Schedule III to the Act.

At the hearing, counsel for the appellant called one witness, Mr. Pierre Filion, Senior District Sales Manager with the appellant. Mr. Filion, who has been with the company since 1978, explained that, to ensure that all pizzas are produced in the same way, Pizza Pizza franchisees are required to follow specific guidelines set out in company procedures manuals for the preparation of pizzas and for the use of the various equipment. All franchisees are also required to undergo full training programs before they are permitted to commence operation of their outlets. The franchisees can produce up to 100 pizzas per hour in an assembly line type operation.

Mr. Filion stated that the uncooked dough is placed on a wooden paddle. The employees apply the sauce, cheese and various other ingredients. The pizza is then transferred from the wooden paddle into the oven for baking. Once the pizza is cooked, it is then placed directly in a pizza box and cut to size. According to the witness, the pizza boxes are integral to the production process as the markings in the inner part of the box provide guidance to the cutters

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

to assure that every slice is of equal size. Mr. Filion explained that uniformity in the size of the slices is an important characteristic of the finished product. He added that the franchisees sell pizza by the slice on single-slice cardboard servers.

At the hearing, counsel for the respondent did not present any evidence.

Counsel for the appellant argued that the goods in issue could qualify for an exemption from FST under more than one provision of Schedule III to the Act. Counsel submitted that the pizza boxes could qualify for an exemption under section 1 of Part I, under section 3 of Part V and under section 1 of Part XIII. He claimed that the wooden paddles could qualify for an exemption under section 3 of Part V and under section 1 of Part XIII, and that the pizza servers could qualify under section 1 of Part I.

Counsel for the appellant argued that the pizza boxes and servers should be exempt under section 1 of Part I of Schedule III to the Act as they are "[u]sual coverings or usual containers sold to ... 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." Counsel also contended that these goods and the wooden paddles should qualify for an exemption under section 1 of Part XIII because they are "machinery and apparatus sold to ... manufacturers or producers for use by them primarily and directly in (i) the manufacture or production of goods." With respect to section 1 of Part I, counsel noted that it was common ground that the boxes and servers constitute "[u]sual coverings or usual containers." To this effect, counsel referred the Tribunal to its decision in *Guelph Paper Box Company Limited v. The Minister of National Revenue*.² Counsel also noted that, in that case, the Department of National Revenue did not contest that donut shops were manufacturers or producers under the Act. Accordingly, counsel contended that, in the present case, the franchisees should be considered as such. In counsel's submission, a Pizza Pizza franchise is not a restaurant, centralized kitchen or similar establishment because it does not provide services related to the service of a meal, nor does it have the seating or ambience that restaurants or caterers provide. Consequently, counsel argued that the franchisees are not excluded from the definition of "producer or manufacturer" under section 42 of the Act.

Counsel for the appellant also contended that the pizza boxes and the wooden paddles should be exempt from FST under section 3 of Part V of Schedule III to the Act as they are articles and materials used exclusively in the manufacture or production of pizzas, which qualify as "tax exempt goods" under section 1 of Part V. Relying on the Federal Court of Appeal decision in *Coca-Cola Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,³ counsel stated that, under the Act, a person can be manufacturing or producing, even if not considered to be a manufacturer or producer. Relying on the definition of "manufacturing or producing" given by the Supreme Court of Canada in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*,⁴ reiterated in *The Royal Bank of Canada v. The Deputy Minister of National Revenue for Customs and Excise*,⁵ and the Federal Court of Canada - Trial Division decisions in *Russell Food Equipment Ltd. v. The Minister of National Revenue*⁶, *Cassidy Ltée v. The Minister of*

2. (1992), 5 T.C.T. 1045, Appeal No. AP-90-145, January 7, 1992.

3. [1984] 1 F.C. 447.

4. [1968] S.C.R. 140.

5. [1981] 2 S.C.R. 139.

6. (1992), 1 G.T.C. 6132.

*National Revenue*⁷ and *Faema Distributeur Inc. v. The Minister of National Revenue*,⁸ counsel submitted that, in the present case, the process of baking pizzas is clearly a manufacturing or production process. On the issue of whether goods need to be physically incorporated into the tax exempt goods to be used in their manufacture or production, counsel relied on the Tribunal decisions in *Label Tech, A Division of Pridamor Inc. v. The Minister of National Revenue*⁹ and in *Tetra Pak Inc. v. The Minister of National Revenue*.¹⁰ In this latter decision, the Tribunal decided that the use of drinking straws in the production of tax exempt juice did not require that they be incorporated into, or become a constituent part of, the tax exempt goods. Accordingly, counsel contended that the pizza boxes and the wooden paddles are used in the manufacture or production of pizzas.

Counsel for the respondent argued that the appellant must choose between the various provisions of Schedule III to the Act and that its counsel cannot argue that the same goods fit under three distinct and rather contradictory sections of the Act. For example, counsel accepted the appellant's argument that the pizza boxes and servers meet the description of "[u]sual coverings or usual containers," thus placing them for consideration under section 1 of Part I. In counsel's submission, the appellant cannot contend that the same goods can also be described as "[a]rticles and materials" under section 3 of Part V or "machinery and apparatus" under section 1 of Part XIII. This would also be the case with respect to the pizza paddles which, counsel submitted, can be more accurately described as machinery and apparatus than as articles and materials.

Counsel for the respondent contended that the franchisees meet the description of "restaurant, centralized kitchen or similar establishment" and are, therefore, excluded from the definition of "producer or manufacturer" under section 42 of the Act. Relying on the Tribunal's decision in *The Chocolate Messenger Ltd. v. The Minister of National Revenue*,¹¹ counsel further contended that the franchisees are excluded by virtue of paragraph (f) of the definition of "manufacturer or producer" under subsection 2(1) of the Act, since they are persons who prepare pizzas in a retail store for sale in the store exclusively and directly to consumers. Consequently, he submitted that the goods in issue cannot qualify for an exemption under either section 1 of Part I or section 1 of Part XIII of Schedule III to the Act.

Counsel for the respondent also argued that the pizza boxes and the wooden paddles cannot be exempt from FST under section 3 of Part V of Schedule III to the Act as the franchisees are not manufacturing or producing goods. Relying on the Federal Court of Appeal decision in *Controlled Foods Corporation Limited v. The Queen*,¹² counsel submitted that the preparation of the pizzas by combining and baking the premixed dough, sauce and toppings is, as intended by the manufacturer of these items, an activity confined to the dispensing of a food product for immediate (or almost immediate) consumption by the consumer and that the preparation of food and beverages for immediate retail sale on the restaurant premises is not manufacturing or producing within the meaning of the Act. According to counsel, the recent *Russell Food, Cassidy Ltée* and *Faema Distributeur* cases are not determinative since the respondent, in these cases, conceded the key issue of whether the "restaurant ... or similar establishment"

7. (1992), 1 G.T.C. 6128.

8. (1992), 1 G.T.C. 6123.

9. Appeal No. AP-91-061, August 17, 1992.

10. Appeal No. AP-91-147, September 3, 1992.

11. Appeal No. AP-90-101, May 19, 1992.

12. [1981] 2 F.C. 238.

used the goods in issue in the manufacture or production of food or drink. As the question of manufacture or production was not before the court, this Tribunal cannot rely on that reasoning as authority in making its decision in this instance.

The Tribunal notes that the appellant has sought to qualify the goods in issue under one or more of the exempting provisions in Schedule III to the Act. Counsel for the respondent has asserted that counsel for the appellant cannot argue that the same goods fit under three distinct and rather contradictory sections of the Act. The Tribunal disagrees. The Federal Court of Canada - Trial Division has dealt with this issue in the *Russell Food, Cassidy Ltée* and *Faema Distributeur* cases. Relying on the Supreme Court of Canada decision in *Irving Oil Limited v. The Provincial Secretary of the Province of New Brunswick*,¹³ and the *Coca Cola* case, the Court found that the fact that goods are not exempted by one provision of the Act does not render them ineligible for exemption under any other provision of the Act whereby they could qualify for exemption.¹⁴ Thus, the Tribunal is of the opinion that only where different sections of the Act are mutually exclusive might inclusion in one section preclude inclusion in another.

The Tribunal considered first whether the franchisees are producers or manufacturers within the meaning of section 42 of the Act. The Tribunal finds that they are excluded from the definition because they fall within the description of "restaurateur, caterer or other person engaged in the business of preparing in a restaurant, centralized kitchen or similar establishment food or drink, whether or not the food or drink is for consumption on the premises." While the Pizza Pizza outlets do not meet the description of a "restaurant" since they provide no seating for customers, the evidence revealed that they are in the business of preparing food for sale to the public. This brings the franchisees clearly within the meaning of the exception to the definition of "producer or manufacturer" under section 42 of the Act. The goods in issue, therefore, do not qualify for an exemption under section 1 of Part I or under section 1 of Part XIII of Schedule III to the Act.

Having determined that the appellant cannot be considered a manufacturer or producer, the Tribunal must decide whether the preparation of pizzas constitutes manufacture or production. Given the description of the processes involved in preparing pizzas, the Tribunal is persuaded that the franchisees are producing pizzas. The *Russell Food*,¹⁵ *Cassidy Ltée*¹⁶ and *Faema Distributeur*¹⁷ decisions were recently appealed to the Federal Court of Appeal. The Court dealt with the issue of whether persons who are not manufacturers or producers under the Act can still be considered to be manufacturing or producing goods within the meaning of section 3 of Part V of Schedule III to the Act. The Court was of the opinion that the fact that goods are sold to persons who are not producers or manufacturers within the meaning of section 42 of the Act does not in any way mean that these items are not for use in the manufacture or production of goods within the meaning of section 3 of Part V. The Court added that Parliament had included in the definitions of "producer or manufacturer" under sections 2 and 42 of the Act categories of persons who can never manufacture or produce, e.g. a "trustee in bankruptcy" in paragraph 2(1)(a) and a "publisher" in section 42. It therefore

13. [1980] 1 S.C.R. 787.

14. *Supra*, note 6 at 6136; note 7 at 6131; and note 8 at 6127.

15. *The Minister of National Revenue v. Russell Food Equipment Limited*, Court File No. A-185-93, October 27, 1993.

16. *The Minister of National Revenue v. Cassidy Ltée*, Court File No. A-183-93, October 27, 1993.

17. *The Minister of National Revenue v. Faema Distributeur Inc.*, Court File No. A-184-93, October 27, 1993.

declared that the corollary must also be true, i.e. that a person who is excluded from one of the definitions can still manufacture or produce. The question is not whether a restaurateur can manufacture or produce, but whether the respondents in that case manufactured or produced. The Court found that each case must, therefore, be determined on its own facts.¹⁸ Relying on the evidence before it, the Tribunal has no difficulty to assert that the activities of the franchisees constitute production.

Therefore, the Tribunal must determine whether the pizza boxes and the wooden paddles must be articles and materials for use exclusively in the manufacture or production of the tax exempt goods in order to qualify for an exemption under section 3 of Part V of Schedule III to the Act. The evidence before the Tribunal clearly establishes that the pizza boxes and wooden paddles are articles. Relying on this evidence, the Tribunal finds that these goods are used exclusively and directly in the production of pizzas and that they are, therefore, exempt from FST under section 3 of Part V. The Tribunal allows this part of the appeal. The single-slice servers, however, are not used in the production process. Having found that the franchisees are not manufacturers or producers, the Tribunal cannot find that the single-slice servers are exempt from FST. This part of the appeal is dismissed.

Accordingly, the appeal is allowed in part.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Kathleen E. Macmillan
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Member

Sidney A. Fraleigh
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18. *Supra*, note 16 at 9-10.