CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, March 7, 1994

Appeal No. AP-93-073

IN THE MATTER OF an appeal heard on November 22, 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 March 11, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

THE KINGSTON BREWING COMPANY LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part. The Tribunal refers the assessment back to the Minister of National Revenue to adjust the amount of federal sales tax, penalty and interest owing.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-93-073

THE KINGSTON BREWING COMPANY LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act of an assessment by the Minister of National Revenue for the period from January 1, 1988, to December 31, 1990. The appellant was assessed $19,960.24 for unpaid taxes, $4,001.86 for penalty and $7,446.75 for interest on the basis that its sales exceeded $50,000 in each year and that it was, therefore, liable to pay federal sales tax. The issue in this appeal is whether the appellant, a small brew pub that brews draught beer for the purpose of sale and consumption on its premises, is exempt from paying federal sales tax under section 50 of the Excise Tax Act as a "small manufacturer" under section 2 of the Small Manufacturers or Producers Exemption Regulations.

HELD: *The appeal is allowed in part. The value of the draught beer which the appellant sold to its customers on its premises exceeded $50,000 in each of the years 1988, 1989 and 1990, and the appellant was, therefore, not exempt under section 2 of the Small Manufacturers or Producers Exemption Regulations from paying federal sales tax. The Tribunal refers the assessment back to the Minister of National Revenue to adjust the amount of federal sales tax, penalty and interest owing in accordance with subsection 81.11(2) of the Excise Tax Act, which provides that "no assessment shall be made for any tax, penalty, interest or other sum more than four years after the tax, penalty, interest or sum became payable under this Act."*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*November 22, 1993*
Date of Decision:	*March 7, 1994*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *W. Roy Hines, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Paul L. Debenham, for the appellant* *James Stringham, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-073

THE KINGSTON BREWING COMPANY LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
W. ROY HINES, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of an assessment by the Minister of National Revenue (the Minister) dated February 19, 1992, for the period from January 1, 1988, to December 31, 1990. The appellant was assessed $19,960.24 for unpaid taxes, $4,001.86 for penalty and $7,446.75 for interest on the basis that its sales exceeded $50,000 in each year and that it was, therefore, liable to pay federal sales tax (FST). The issue in this appeal is whether the appellant, a small brew pub that brews draught beer for the purpose of sale and consumption on its premises, is exempt from paying FST under section 50 of the Act as a "small manufacturer" under section 2 of the *Small Manufacturers or Producers Exemption Regulations*[2] (the Regulations).

Mr. Paul L. Debenham appeared on behalf of the appellant. He raised, as a preliminary issue, the fact that the assessment being appealed related to a period of time greater than the four-year limit for assessments provided for under subsection 81.11(2) of the Act. This subsection provides that "no assessment shall be made for any tax, penalty, interest or other sum more than four years after the tax, penalty, interest or sum became payable under this Act." Counsel for the respondent conceded that the assessment could only relate to a period of time four years prior to the date of the assessment. In short, the assessment period could not relate to a period of time prior to February 19, 1988. Accordingly, FST, penalty and interest relating to the period from January 1 to February 18, 1988, must be deducted from the total assessment amount.

In response to questions by counsel for the respondent, Mr. Debenham, as a witness for the appellant, stated that the appellant brews the beer in vats and then filters and stores it in dispensing tanks. Ales are dispensed directly from the vessel in which they are fermented. Mr. Debenham agreed that the appellant's sales of its draught beer to customers on its premises exceeded $50,000 in each of the years 1988 to 1990.

For the purposes of determining whether tax was payable, Mr. Debenham testified that he interpreted sales to mean the manufacturing cost. He estimated the cost of the appellant's beer based on the appellant's costs of production of the beer, his estimate of the cost of beer sold by large breweries, information received from other brew pubs and a publication of the

1. R.S.C. 1985, c. E-15.
2. SOR/82-498, May 13, 1982, Canada Gazette Part II, Vol. 116, No. 10 at 1869.

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Department of National Revenue (Revenue Canada) concerning how brew pubs are to determine the value of their beer for the purposes of determining FST payable. Based on these estimates, he determined that the appellant's sales fell below the $50,000 limit for small manufacturers and that it was, therefore, not required to pay FST. He confirmed that it had not been presented to him by officials of Revenue Canada that the determined value method could be used to determine whether the appellant was required to obtain a manufacturer's FST licence and pay FST.

Counsel for the respondent referred Mr. Debenham to a notice of determination dated March 2, 1989, in respect of an application for refund dated January 20, 1989, and signed by the appellant's treasurer. In particular, counsel pointed to the following statement in the determination: "You are reminded that should annual sales volumes of taxable goods of your manufacture exceed $50,000.00, you are required to apply for a Federal Sales Tax License." Mr. Debenham could not confirm whether this notice had been brought to his attention.

The appellant's representative argued that there should be consistency of interpretation, such that the value of sales used to determine whether a manufacturer qualifies for the small manufacturers exemption is the same as the value used to determine the amount of FST payable under the Act. He referred to Revenue Canada Ruling 3700/122-1[3] (the Ruling) and Excise Memorandum ET 104[4] which, he submitted, provide that the value for tax of draught beer produced by a brew pub is to be based on the value of goods sold and not on the basis of the retail sale price. In his view, the values set out in the Ruling represent a fair estimate of the small manufacturer's cost of manufacturing or producing draught beer with an allowance for reasonable profit. If the value from the Ruling were used, the appellant's sales would not have exceeded $50,000 in the years subject to the audit underlying the assessment.

The appellant's representative stated that the appellant is essentially a manufacturing and retailing operation, although there is common ownership and control. The appellant uses the beer that it manufactures in its own retailing operation. In his view, the value for determining whether sales of the appellant's beer exceeded $50,000 should be based upon the sales of the beer from the manufacturing operation to the retailing operation of the appellant's business, similar to how it would be determined for large breweries that sell to Brewers Warehousing Company Limited, the provincial monopoly, although under provincial law, the appellant is permitted to sell only to patrons within its establishment. In his view, determining the value of the appellant's sales in this manner would avoid the logical absurdity that exists when one value is used to determine whether there is an exemption from the payment of FST and another value is used to determine the amount of FST payable.

Although the appellant's representative stated, for the record, that the appellant's relationship with the local Revenue Canada office has been exemplary, he was of the view that, if a little more diligence had been exercised on the part of Revenue Canada, the appellant might not have been assessed for such a high amount of tax, penalty and interest. He submitted that Revenue Canada was negligent in that it audited the appellant approximately five times between 1986 and 1991 and, at no time, indicated that the appellant should have been remitting FST. It was not until February 1991, when the appellant applied to register for the collection and remission of excise tax due on wine that it planned to manufacture, that Revenue Canada was alerted to the problem and audited the appellant to produce the assessment under appeal.

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3. Value for Tax of Draught Beer Produced by Brew Pubs, November 1, 1987.
4. Small Manufacturers, Department of National Revenue, Customs and Excise, March 20, 1989.

Finally, the appellant's representative requested that the Tribunal disallow any penalty and interest if it is within the Tribunal's jurisdiction to do so.

Counsel for the respondent submitted that the Regulations must be read in relation to the requirement to pay tax under subsection 50(1) of the Act. The phrase "value of such goods sold" in paragraph 2(1)(*a*) of the Regulations means the "sale price" of the goods as set out in subsection 50(1) of the Act.

Counsel for the respondent referred to the Tribunal's decision in *Rieger Enterprises Inc., Stellaris Craft & Florist Supplies Division and Vista Scenic Hobby Products Division v. The Minister of National Revenue*[5] which, he submitted, supports the view that the exemption from obtaining an FST licence is conditional upon the sale value of taxable goods manufactured or produced not exceeding $50,000.

In the view of counsel for the respondent, the sale price for the purposes of this appeal must be based on how the appellant conducts its business. The appellant sells to consumers at a sale price. It is this sale price that should be used to determine whether the appellant's sales have exceeded $50,000, not the sale price that would be paid if the appellant were selling to a provincial monopoly.

In the Tribunal's view, the appellant was not exempt from paying FST under the Act as a small manufacturer pursuant to section 2 of the Regulations and was, therefore, correctly assessed for unpaid taxes, penalty and interest for the period from February 19, 1988, to December 31, 1990.

Subsection 50(1) of the Act provides for the imposition of FST on the sale price of goods produced or manufactured in Canada. For the purposes of payment of FST, subsection 54(1) of the Act provides that every manufacturer or producer shall apply for a licence. However, pursuant to subsection 54(2) of the Act, the Minister may make regulations exempting any class of small manufacturer or producer from the payment of FST and the requirement to obtain an FST licence.

The Regulations establish that certain small manufacturers or producers listed under subsection 2(1) are exempt from the payment of FST. For the purposes of this appeal, the relevant provision is paragraph 2(1)(*a*) of the Regulations, which provides as follows:

> *(a) manufacturers, other than those who elect to operate under a licence, who sell goods of their own manufacture that are otherwise subject to consumption or sales tax or who manufacture goods for their own use that are otherwise subject to consumption or sales tax, if the value of such goods sold or manufactured for their own use does not exceed $50,000 per calendar year.*

Under subsection 2(2) of the Regulations, the exemption under subsection 2(1) ceases to apply if the "value of the sales" of the manufacturer or producer "exceeds $50,000 during any calendar year." Thus, whether or not the appellant was exempt from paying FST depends upon whether the value of the appellant's sales of draught beer exceeded $50,000 during any year.

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5. 5 T.C.T. 1438, Appeal No. AP-90-078, November 3, 1992.

In the Tribunal's view, because the appellant sells its draught beer only to customers on its premises, the value of the appellant's sales of draught beer is the amount that it charges its customers to purchase its draught beer on its premises. The appellant's representative agreed that the appellant's sales of its draught beer to customers on its premises exceeded $50,000 in each of the years 1988 to 1990. The appellant, therefore, was not exempt from paying FST under subsection 2(1) of the Regulations and was correctly assessed for unpaid taxes, penalty and interest for the period from February 19, 1988, to December 31, 1990.

With respect to the appellant's request that the Tribunal disallow any penalty and interest, the Tribunal finds, as it has found in previous decisions,[6] that it does not have the jurisdiction to cancel or reduce a penalty. Section 79 of the Act provides that a person who defaults in paying FST is required to pay penalty and interest, and there is no provision under the Act giving the Tribunal the power to waive or cancel the payment of the penalty or interest.

Accordingly, the appeal is allowed in part. The Tribunal refers the assessment back to the Minister to adjust the amount of FST, penalty and interest owing in accordance with subsection 81.11(2) of the Act, which provides that "no assessment shall be made for any tax, penalty, interest or other sum more than four years after the tax, penalty, interest or sum became payable under this Act." Since the assessment is dated February 19, 1992, the appellant cannot be assessed for any tax, penalty or interest which became payable prior to February 19, 1988.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Robert C. Coates, Q.C.
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Member

6. *Les Presses Lithographiques Inc. v. The Minister of National Revenue*, Appeal No. 2997, June 26, 1989; and *Oerus Corporation Ltd. v. The Minister of National Revenue*, Appeal No. AP-91-056, September 3, 1992.