CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, July 13, 1994

Appeal Nos. AP-93-108 and AP-93-109

IN THE MATTER OF appeals heard on December 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 April 20, 1993, with respect to notices of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

INTERFACE FLOORING SYSTEMS INC. AND INTERFACE FLOORING SYSTEMS (MANUFACTURING) INC. **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal Nos. AP-93-108 and AP-93-109

INTERFACE FLOORING SYSTEMS INC. AND INTERFACE FLOORING SYSTEMS (MANUFACTURING) INC. Appellants

and

THE MINISTER OF NATIONAL REVENUE Respondent

During the period at issue, the appellants manufactured carpet tiles in Canada. The appellants then exported the tiles to the United States, where various patterns were printed on the tiles. Thereafter, the tiles were returned to Canada, already packaged and ready for sale. The issue in these appeals is whether, upon their sale in Canada, the carpet tiles were subject to sales tax under paragraph 50(1)(a) of the Excise Tax Act.

HELD: *The appeals are allowed. The Tribunal is of the view that, when the carpet tiles underwent printing operations in the United States, they became the product of that country. Moreover, the tiles did not cease to be the product of the United States as a result of being returned to Canada. As paragraph 50(1)(a) of the Excise Tax Act imposes sales tax only on goods that are "produced or manufactured in Canada" and given that the tiles in issue were produced or manufactured in the United States, sales tax cannot be levied on the tiles under paragraph 50(1)(a) of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*December 8, 1993*
Date of Decision:	*July 13, 1994*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Anthony T. Eyton, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*John L. Syme*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Riyaz Dattu and Neil E. Bass, for the appellants* *Brian Tittemore, for the respondent*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-93-108 and AP-93-109

INTERFACE FLOORING SYSTEMS INC. AND INTERFACE FLOORING SYSTEMS (MANUFACTURING) INC. **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ANTHONY T. EYTON, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

These are appeals under section 81.19 of the *Excise Tax Act*[1] (the Act) of assessments in which the appellants were assessed the sums of $77,311.43 and $346,868.50 in unpaid federal sales tax, interest and penalty on printed carpet tiles which they sold in Canada during the period from January 1, 1989, to December 31, 1990. The assessments were confirmed by the Minister of National Revenue (the Minister) in decisions dated April 20, 1993.

The issue in these appeals is whether, upon their sale in Canada, the carpet tiles were subject to sales tax under paragraph 50(1)(*a*) of the Act.

During the period at issue, the appellants manufactured carpet tiles in Canada. The appellants then exported the tiles to the United States, where various patterns were printed on the tiles. Thereafter, the tiles were returned to Canada, already packaged and ready for sale.

Mr. Richard A. Lefler, Vice-President of Administration for Interface Flooring Systems Inc., gave evidence on behalf of the appellants. Mr. Lefler described the process by which the appellants manufactured the carpet tiles during the period at issue. He indicated that the first step was to manufacture the carpet in sheet form. These sheets were then cut into tiles approximately 18 in. square. All of these activities occurred at the appellants' manufacturing plant in Belleville, Ontario.

Mr. Lefler testified that, if the carpet tiles to be produced were to be sent to the United States to have a design printed on them, they would be manufactured in Belleville in a slightly different manner than plain carpet tiles (i.e. tiles with no design).

Mr. Lefler described the printing operations performed in the United States as a form of "carousel" printing. He indicated that, depending on the number of colours in the pattern to be applied, there could be five or six different screens in different positions on the carousel. He testified that the carpet tiles would be "indexed" around the carousel and that, at each station, one colour would be applied. Mr. Lefler testified that, after the dyestuffs were applied, the tiles went through processes of steaming, washing and drying. The steaming process fixed

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

the dyestuffs onto the yarn, the washing process washed away any excess dye, and the drying process essentially "cured" the dye.

Mr. Lefler indicated that, after the carpet tiles were inspected, they were packaged and returned to Canada. No further packaging or work was performed on the tiles prior to their sale in Canada. He indicated that the printed tiles were normally sold by the appellants' sales personnel to dealers/installers that would, in turn, sell them to end users.

In response to a question from the Tribunal, Mr. Lefler indicated that the name appearing on the boxes in which the printed tiles were packaged was that of the appellants' U.S. parent company which performed the printing operations.

Normally, when goods such as the printed carpet tiles are returned to Canada, the importer or owner of the goods must pay sales tax on the duty-paid value of the goods, under paragraph 50(1)(*b*) of the Act. However, under subsection 88(1) of the *Customs Tariff*,[2] the Minister may, in certain circumstances, grant relief from the payment of a portion or all of that tax. One such circumstance is when goods, which were produced in Canada and exported to another country to have work performed on them, are subsequently returned to Canada.[3] Before deciding to grant relief in such a case, the Minister must be satisfied that it would not have been practicable to do the work in Canada, but that facilities to do that work will be established within a time specified by the Minister.[4]

In the present case, the appellants were granted relief by the Minister under paragraph 88(1)(*c*) of the *Customs Tariff*, in the form of a remission order, in respect of the carpet tiles that they were sending to the United States for printing. The effect of the remission order was to relieve the appellants from paying sales tax on the Canadian value of the tiles when the tiles were returned to Canada. The appellants were required to pay sales tax only on the value of the goods associated with the printing operations performed on the tiles in the United States. In the absence of the remission order, the appellants would have been required, under paragraph 50(1)(*b*) of the Act, to pay sales tax on the full duty-paid value of the goods upon their return to Canada.

Counsel for the appellants began their argument by pointing out that the Act imposes a tax on imported goods, whereas the provisions of the *Customs Tariff* relevant to these appeals provide relief in kind and, thus, cannot be used to impose a tax. Counsel submitted that the effect of the remission order was to relieve the appellants from the payment of sales tax on the Canadian value of the goods for all time. In other words, the appellants were relieved from paying sales tax on the Canadian value of the goods not only at the time that the tiles were returned to Canada but also at the time that they were sold in Canada.

Counsel for the appellants then turned to the Minister's decisions which confirmed the assessments. Counsel first took issue with the Minister's statement that "[s]ales tax was not charged on the duty[-]paid value of the imported goods but only on the value-added abroad." Counsel submitted that the Minister's statement is incorrect in that, technically, sales tax was charged on the duty-paid value of the returned tiles. However, counsel submitted that the appellants were relieved from paying the tax attributable to the Canadian value of the goods by virtue of the remission order.

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2. R.S.C. 1985, c. 41 (3rd Supp.).
3. *Ibid.*, paragraph 88(1)(*c*).
4. *Supra*, note 2, subparagraph 89(*a*)(iii).

Counsel for the appellants then referred the Tribunal to the statement in the Minister's decisions to the effect that, to be granted relief under paragraph 88(1)(*c*) of the *Customs Tariff*, goods exported from Canada must be "the product of Canada." Counsel submitted that, in fact, paragraph 88(1)(*c*) of the *Customs Tariff* provides that the "goods exported from Canada were the product of Canada." In counsel's submission, that the goods were the product of Canada on export was a precondition to the granting of relief under paragraph 88(1)(*c*) of the *Customs Tariff*. However, in counsel's view, the goods need not necessarily have been the product of Canada upon their return to Canada.

Counsel for the appellants next referred the Tribunal to certain authorities[5] in support of their position that, while the tiles were the product of Canada when they were exported to the United States, in light of the printing operations performed in the United States, they ceased to be the product of Canada and, in fact, became the product of the United States.

Finally, counsel for the appellants referred the Tribunal to the specific wording of subsection 50(1) of the Act, which, they pointed out, has four paragraphs, (*a*) through (*d*), which set out the instances in which consumption or sales tax is payable. Counsel noted that the word "or" appears at the end of paragraph 50(1)(*c*). They submitted, on this basis, that the paragraphs should be read disjunctively. For example, if tax is imposed on goods under paragraph 50(1)(*b*), it cannot be subsequently levied under paragraph 50(1)(*a*). In counsel's words, sales tax is a "single incidence" tax and is, therefore, payable only once on the same article. Counsel argued that the Minister, having accepted that sales tax is payable on the tiles when returned to Canada, cannot tax the same tiles again when they are sold in Canada. Counsel submitted that to allow the Minister to impose tax a second time offends the presumption against double taxation.

Counsel for the respondent began his argument with the assertion that the carpet tiles in issue were produced or manufactured in Canada. Counsel submitted that, in determining whether the tiles were the product of Canada, from their time of export from Canada through to their return to Canada and subsequent sale, the Tribunal should consider what happened to the tiles while they were in Canada. In argument, counsel for the appellants had made note of the fact that the tiles did not undergo any further manufacturing or processing when they were returned to Canada. Counsel for the respondent submitted that the Tribunal should consider not only what happened to the tiles upon their return to Canada but also what happened to them prior to their export from Canada.

In response to counsel for the appellants' argument regarding double taxation, counsel for the respondent submitted that, as a result of the operation of section 88 of the *Customs Tariff*, the appellants paid tax on the U.S. value added upon return of the goods. He further submitted that, with respect to the sale of the tiles in Canada, the appellants had been assessed sales tax only on the Canadian value of the tiles. In this way, the appellants had been required to pay sales tax on the total value of the goods, albeit in two instalments. On that basis, counsel submitted that there would be no double taxation.

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5. *C.J. Michael Flavell v. The Deputy Minister of National Revenue for Customs and Excise*, 5 T.C.T. 1189, Canadian International Trade Tribunal, Appeal No. AP-91-130, May 4, 1992; *Essex Topcrop Sales Limited v. The Minister of National Revenue*, 5 T.C.T 1165, Canadian International Trade Tribunal, Appeal No. AP-91-121, April 6, 1992; *Attorney General of Canada v. Maltby Inc.*, 4 T.C.T. 6263, Federal Court - Trial Division, Court File No. T-2135-88, August 16, 1991; and *Bank of Nova Scotia v. The King*, 1 D.T.C. 172, [1930] S.C.R. 174.

The Tribunal is of the view that sales tax was not payable on the tiles upon their sale in Canada. The Minister's decisions state that tax on the Canadian portion of the value of the tiles is payable under paragraph 50(1)(*a*) of the Act. That paragraph provides, in part, that sales tax shall be levied on the sale price 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.*

In the Tribunal's view, it is clear that, in order for tax liability to arise under paragraph 50(1)(*a*) of the Act, there must first be goods which are "manufactured or produced in Canada."

The Tribunal agrees with counsel for the respondent that, when the tiles were manufactured at the appellants' Canadian plant, they were clearly the product of Canada. Had this not been the case, the Minister would have been unable to grant the appellants relief under paragraph 88(1)(*c*) of the *Customs Tariff*. However, the Tribunal is of the view that, when the printing operations were performed on the tiles in the United States, they became "produced or manufactured" in that country. The Tribunal based its view on the test set out by the Supreme Court of Canada in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*.[6] In that case, the Supreme Court of Canada was called upon to determine whether various processes performed on slabs of unfinished marble to prepare them for use as flooring constituted production or manufacturing. The evidence before the Supreme Court of Canada indicated that the slabs were subjected to a number of processes, including grouting, gluing, grinding, polishing and cutting. In finding that the processes did constitute manufacturing, the Supreme Court of Canada adopted the following definition from a case decided by the Superior Court of the Province of Quebec:

> *manufacture is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.*[7]

The *York Marble* case is also authority for the proposition that, under the Act, manufacture and production are not synonymous.[8] The Supreme Court of Canada found that, even if the operations performed on the marble were not "manufacturing," it had no doubt that they were "production."

The *York Marble* decision has been cited with approval in other cases in which the courts have had to determine whether an activity constitutes production or manufacturing.[9] In *The Queen v. Stuart House Canada Limited*,[10] a company that purchased aluminum foil in bulk, cut it to a certain length, wound it onto cardboard tubes, placed the smaller rolls into cardboard

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6. [1968] S.C.R. 140.

7. *The Minister of National Revenue v. Dominion Shuttle Company Limited* (1933), 72 Que. S.C. 15.

8. *Supra*, note 5 at 147.

9. For example, see *The Minister of National Revenue v. Enseignes Imperial Signs Ltée* (1990), 116 N.R. 235, Federal Court of Appeal, File No. A-264-89, February 28, 1990; and *Hobart Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise* (1985), 10 C.E.R. 64, Federal Court of Appeal, File No. A-1868-83, September 18, 1985.

10. [1976] 2 F.C. 421.

boxes and sold it wholesale was found not to be a manufacturer or producer of aluminum foil. In its decision, the Federal Court of Canada was of the view that the expression "new forms, qualities and properties or combinations" must be read conjunctively such that:

> *there must be some change in the form, in the qualities and in the properties of the material or in the form, in the qualities and in the combinations of the materials used in order to constitute either manufacture or production in the ordinary meaning of these words.*[11]

Prior to undergoing printing operations in the United States, the carpet tiles were simply squares of plain carpet. At that point in time, they were the product of Canada. However, after undergoing the dying, washing and curing processes in the United States, the tiles had a variety of colours, designs and patterns. In the Tribunal's view, the printing operations performed on the carpet tiles in the United States gave those tiles new forms, qualities and properties. The Tribunal is of the view that, as a result, the tiles ceased to be "produced or manufactured" in Canada and were "produced or manufactured" in the United States. The tiles did not cease to be produced or manufactured in the United States as a result of being returned to Canada. Moreover, the evidence before the Tribunal indicates that nothing was done to the tiles by the appellants prior to their sale to render them "produced or manufactured in Canada." Although a major component of the tiles was manufactured in Canada, the Tribunal finds that, at the time of their sale in Canada, the tiles were produced or manufactured in the United States.

The Tribunal noted earlier that, in order for sales tax to be levied on goods under paragraph 50(1)(*a*) of the Act, the goods must be produced or manufactured in Canada. Given the Tribunal's finding that the carpet tiles were produced or manufactured in the United States, it follows that the carpet tiles were not subject to sales tax under paragraph 50(1)(*a*) of the Act.

For the foregoing reasons, the appeals are allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Desmond Hallissey
Desmond Hallissey
Member

11. *Ibid.* at 426.