CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, May 17, 1994

Appeal No. AP-93-081

IN THE MATTER OF an appeal heard on November 16, 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 April 23, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

SMED MANUFACTURING INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
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 No. AP-93-081

SMED MANUFACTURING INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act of an assessment of the Minister of National Revenue dated March 3, 1992. The assessment covered the period from December 1, 1989, to December 31, 1990, and stated that the appellant had taken "excessive rebate deductions." The rebate deductions in issue are amounts that the appellant deducted internally in lieu of applying for a refund of federal sales tax which, it claims, it paid in error in respect of sales of task lighting and electrical parts.

HELD: *The appeal is allowed. The Tribunal finds that the activities performed by the appellant in relation to the task lighting and/or electrical parts do not constitute production or manufacturing and that the appellant is not, therefore, liable to pay federal sales tax on the sale price of the task lighting and electrical parts under paragraph 50(1)(a) of the Excise Tax Act. As a result, any moneys paid by the appellant as federal sales tax on the sale price of the task lighting and/or electrical parts constitute amounts paid in error within the meaning of section 68 of the Excise Tax Act. The appellant was, therefore, incorrectly assessed for the amounts which it deducted.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*November 16, 1993*
Date of Decision:	*May 17, 1994*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Arthur B. Trudeau, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Michael McCourt, for the appellant* *Anne Michaud, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-081

SMED MANUFACTURING INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of an assessment of the Minister of National Revenue dated March 3, 1992. The assessment covered the period from December 1, 1989, to December 31, 1990, and stated that the appellant, a licensed manufacturer of modular office furniture, had taken "excessive rebate deductions." The rebate deductions in issue, for which the appellant was assessed, are amounts that the appellant deducted from its monthly federal sales tax (FST) returns to the Department of National Revenue (Revenue Canada) in lieu of applying for a refund of FST under section 68 of the Act. The appellant claims to have paid these moneys in error in respect of sales of task lighting and power harnesses, power jumpers, duplex receptacles and power bars (collectively referred to as "electrical parts"). The amount of the deductions represented the difference between what the appellant paid as FST on the sale price of the task lighting and electrical parts and what it would have paid as FST on the duty-paid value of the task lighting and electrical parts at the time of their importation. The issue in this appeal is whether the appellant was correctly assessed for the amounts which it deducted.

Counsel for the respondent made a preliminary motion concerning the Tribunal's jurisdiction to hear the appeal. She submitted that the issue in this appeal was whether the task lighting and electrical parts are "partly manufactured goods" and that the Tribunal does not have the jurisdiction to make this determination since, according to the definition of "partly manufactured goods" under section 42 of the Act and the case law,[2] "the Minister is the sole judge as to whether or not goods are partly manufactured goods."

The appellant's representative submitted that the issue in this appeal was whether paragraph 50(1)(*a*) of the Act, which provides that FST shall be imposed on the sale price of goods produced or manufactured in Canada, applies or whether paragraph 50(1)(*b*) of the Act, which provides that FST shall be imposed at the time of importation of the goods, applies.

The Tribunal decided to hear all of the facts and submissions relating to the appeal before making any determination and proceeded to hear the appellant's witnesses and the parties' arguments.

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1. R.S.C. 1985, c. E-15.
2. *Her Majesty The Queen v. Skuttle Mfg. Co. of Canada Ltd.*, [1963] C.T.C. 500.

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Mr. Bryan Fance, who is employed in the sales and marketing branch of SMED Manufacturing Inc., appeared on behalf of the appellant. He identified for the Tribunal an example of task lighting and each of the electrical parts in issue and provided the Tribunal with copies of suppliers' invoices, Canada Customs invoices, the appellant's invoices and a copy of the appellant's 1989 "Dollars and Sense" price list. He cross-referenced the product code numbers and descriptions on the invoices and the prices and descriptions in the price list to the task lighting and electrical parts that he identified. He pointed out that the task lighting and electrical parts are described on the appellant's invoices as "other product" and are sometimes sold independent of a sale of what he referred to as an office configuration.

He described the task lighting and electrical parts as "resell goods" and considered them to be accessories to an office configuration manufactured by the appellant and composed of various components, namely, panels, panel work surfaces, case goods and storage modules. An office configuration begins as a computer-assisted design from which an installation diagram is produced. Where the end user requires task lighting and/or electrical parts, they are shown on the design and installation diagram. However, whether task lighting and/or electrical parts are required depends on the needs of the particular end user.

Mr. Fance stated that task lighting was purchased and imported from a manufacturer in the United States and was sold in the same form as when it was imported. The electrical parts were also purchased from a manufacturer in the United States, but were purchased in bulk and, therefore, required some repacking for shipment purposes after they were purchased.

According to Mr. Fance, the appellant sells approximately 30 percent of its office configurations directly to end users and approximately 70 percent through dealers. The configurations are sold as individual pieces, not as one unit, and the pieces are listed individually on the appellant's sales invoices, although, in the 1989 "Dollars and Sense" price list, the office configurations are shown for display purposes both as one unit and as components. All of the components of the office configurations are shipped to the end user or dealer in a "knock down" or disassembled state to be assembled by a dealer or an end user at its premises.

Mr. Garth Thompson of Thompson + Associates Tax Management Inc., a commodity sales tax consultant, also appeared on behalf of the appellant. He stated that, based on his review of the appellant's operations and books, he determined that the appellant imports numerous raw materials and that its customs broker gives the appellant's manufacturer's licence number to allow the raw materials to enter Canada tax-free. He explained that the FST paid on sales of the task lighting and electrical parts was calculated based on their sale price adjusted for freight and installation costs that were included in the sale price. The internal deductions taken by the appellant were equal to the difference between what it actually paid as FST on the sale price of the task lighting and electrical parts on a per-unit basis, with adjustments for price changes, discounts, freight and installation, and what it would have paid as FST on the duty-paid value of the task lighting and electrical parts, with adjustments for changes in exchange rates.

The appellant's representative stated that, under paragraph 50(1)(*a*) of the Act, FST is imposed on goods sold and manufactured or produced in Canada, which he argued means that FST is to be determined when the goods are delivered to the purchaser or at the time when title to the goods passes, whichever is earlier. He referred to the decision in *W.T. Hawkins*

Limited v. The Deputy Minister of National Revenue for Customs and Excise[3] which, he stated, supports the view that a determination of whether or not a product is exempt from or subject to FST is to be made as of the date of sale. He submitted that, in order to determine whether FST is payable under paragraph 50(1)(*a*) of the Act, there must, therefore, be a determination at the time of sale as to whether the goods have been manufactured or produced in Canada.

The appellant's representative argued that the test for manufacturing set out in *The Minister of National Revenue v. Dominion Shuttle Company Limited*[4] has not been met since the appellant does not give the task lighting or electrical parts "new forms, qualities and properties or combinations,[5]" as was confirmed in Mr. Fance's evidence.

The appellant's representative submitted that installation is not manufacturing. He relied on the decision in *Tenneco Canada Inc. v. Her Majesty The Queen*[6] that the installation of exhaust systems on customers' motor vehicles did not constitute the manufacturing or production of goods for sale, but rather constituted a service. He also referred to the decision in *Fiat Auto Canada Limited v. The Queen*[7] that the installation of radios in automobiles did not constitute manufacturing or production under paragraph (*f*) of the definition of "manufacturer or producer" under subsection 2(1) of the Act and to the decision in *Lorne Shields Intertrade Corp. v. The Deputy Minister of National Revenue for Customs and Excise*[8] that the installation of a child-carrier seat onto a bicycle was not manufacturing and that a child-carrier seat was "an accessory much as a bell, horn or light.[9]"

With respect to the amounts which the appellant deducted from its FST returns, the appellant's representative submitted that section 73 of the Act provides for such deductions where no application for a refund is required and that the general authorization for such deductions is provided for in paragraph 16 of Excise Memorandum ET 105.[10] He further submitted that the appellant calculated the amounts that it deducted in accordance with clause 46(*c*)(ii)(A) of the Act, the *Erection or Installation Costs Regulations*[11] to the Act and Excise Memorandum ET 205,[12] which outline how to determine the value of goods installed for FST purposes.

Counsel for the respondent reiterated her position that the Tribunal does not have the jurisdiction to determine whether the task lighting and electrical parts are "partly manufactured goods" and should, therefore, dismiss the appeal. However, she further submitted that, should the Tribunal find that it has the jurisdiction to dispose of this appeal, the issue is whether the task lighting and electrical parts are properly subject to FST on their sale price. Counsel submitted that the task lighting and electrical parts were imported by the appellant as partly manufactured goods and, therefore, FST was not payable on the duty-paid value of the goods.

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3. [1958] Ex. C.R. 152.
4. (1933), 72 Que. S.C. 15.
5. *Ibid.* at 18.
6. [1987] 2 C.T.C. 231 (F.C.T.D.).
7. [1984] 1 F.C. 203.
8. (1985), 10 T.B.R. 215.
9. *Ibid.* at 218.
10. Deductions, Department of National Revenue, Customs and Excise, March 31, 1989.
11. SOR/83-136, February 4, 1983, Canada Gazette Part II, Vol. 117, No. 4 at 625.
12. Goods Erected or Installed, Department of National Revenue, Customs and Excise, March 29, 1989.

In counsel's view, the task lighting and electrical parts meet the definition of "partly manufactured goods" under section 42 of the Act, since they are incorporated into and form a constituent part of the modular system which is sold by the appellant. Counsel referred to the fact that the designs and price list show the office configurations, including the task lighting and electrical parts.

Counsel for the respondent submitted that the authorities, to which the appellant's representative referred, could be distinguished from the facts of this appeal. First, she referred to the *Lorne Shields* decision and submitted that it deals with an exempting provision, not a taxing provision, and that, in that case, the bicycle and seat were not sold together as are the task lighting, electrical parts and office configurations. Second, she submitted that, unlike the facts in this appeal where the appellant manufactures and installs the office configurations, in the *Fiat* decision, one company sold the cars and another company installed the radios. Finally, she submitted that the *Tenneco* decision involved the installation of replacement parts.

After having reviewed all of the evidence and submissions, the Tribunal is of the view that, in order to determine whether the appellant was correctly assessed in this appeal, it must be determined whether the appellant was liable to pay FST on the sale price of the goods in issue. In the Tribunal's view, this is a matter within its jurisdiction.

Subsection 50(1) of the Act provides that FST shall be imposed on the sale price of goods which are (1) produced or manufactured in Canada, (2) imported into Canada, (3) sold by a licensed wholesaler, or (4) retained by a licensed wholesaler for his own use or for rental by him to others. From the evidence, it is clear that the appellant does not fall within the third and fourth categories. However, it must be determined whether the activities performed by the appellant in relation to the task lighting and/or electrical parts constitute production or manufacturing, in which case it would be liable to pay FST on the sale price of the task lighting and electrical parts, or whether the appellant is liable to pay FST on the duty-paid value of the task lighting and electrical parts.[13]

The Tribunal finds that, although the appellant is a manufacturer of office configurations, the activities performed by the appellant in relation to the task lighting and electrical parts do not constitute production or manufacturing.

In making this determination, the Tribunal is guided by the decision of the Supreme Court of Canada in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*[14] that the terms "produce" and "manufacture" are not synonymous and that a product may be produced without being manufactured.

The Tribunal adopts the interpretation of "production" in *The Minister of National Revenue v. Enseignes Imperial Signs Ltée.*[15] In that decision, the Federal Court of Appeal, referring to the decision in *Gruen Watch Company of Canada Ltd. v. Attorney General of Canada*, found that a "thing is produced if what a person does has the result of producing something new; and a thing is

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13. Section 42 of the Act provides that "in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof."
14. [1968] S.C.R. 140.
15. (1990), 116 N.R. 235.

new when it can perform a function that could not be performed by the things which existed previously.[16]"

The Tribunal also adopts the generally accepted definition of "manufacture" taken from the *Dominion Shuttle*[17] decision. "Manufacture" was defined in that decision as the "production of articles for use from raw or prepared material by giving these materials new forms, qualities and properties or combinations whether by hand or by machinery."

The Tribunal finds that the appellant's activities in relation to the task lighting and/or electrical parts do not constitute either production or manufacturing within the meaning given to those words in *Gruen Watch*, *Enseignes Imperial* and *Dominion Shuttle*. The evidence clearly shows that the appellant imports the task lighting and electrical parts and resells them to end users in the same form in which they are imported. The task lighting and electrical parts are complementary to the office configurations manufactured by the appellant, but they are not required, and the appellant does not perform the installation. In the Tribunal's view, the appellant does not do anything to the task lighting and/or electrical parts to cause them to be something new or to perform a new function or to have new forms, qualities, properties or combinations.

The Tribunal observes that paragraph (*f*) of the definition of "manufacturer or producer" under subsection 2(1) of the Act includes:

> *any person who, by himself or through another person acting for him, prepares goods for sale by ... packaging or repackaging the goods.*

The meaning of the words "packaging or repackaging" in this provision was considered by the Federal Court of Canada, Trial Division, in *ECG Canada Inc. v. The Queen*.[18] However, in the Tribunal's view, the Federal Court of Canada in that case did not consider what was meant by the phrase "prepares goods for sale."

It is well established that "administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation.[19]" In this regard, the Tribunal referred to Excise News,[20] issued by Revenue Canada in December 1980, entitled "Expanded Definition of Manufacturer or Producer (Marginal Manufacturing)" and to a memorandum dated July 6, 1981, to regional directors entitled Principles and Philosophy of Marginal Manufacturing. At page 3 of Excise News are listed various examples of activities which do not constitute marginal manufacturing, including "the packaging or crating of goods exclusively for shipment purposes to fill an individual customer's order." The fourth and fifth paragraphs of the memorandum to regional directors stated that "[t]he activities mentioned [including packaging or repackaging] ... are all related to preparing goods for sale in the sense of changing, altering or enhancing the commercial presentation of the goods in anticipation of a sale ... Preparing goods in anticipation of a sale would not include packing goods for shipment only nor would it include preparing goods to meet an individual user's requirement, where there is no 'commercial enhancement'."

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16. *Ibid.* at 239.
17. This definition was also adopted by the Supreme Court of Canada in the *York Marble* case.
18. [1987] 2 F.C. 415.
19. *Gene A. Nowegijick v. Her Majesty The Queen*, [1983] 1 S.C.R. 29 at 37.
20. As reported in *supra*, note 16.

Consistent with Revenue Canada's interpretation, the Tribunal is of the view that the phrase "prepares goods for sale" refers to the preparation of goods which are intended to be sold or with a view to selling the goods, not to goods which have already been sold.

Applying this interpretation to the facts of this appeal, it is clear that the packaging of the electrical parts by the appellant does not constitute marginal manufacturing within the meaning of paragraph (*f*) of the definition of "manufacturer or producer" under subsection 2(1) of the Act. According to the evidence of Mr. Fance, the appellant put the electrical parts into cardboard boxes for shipment purposes in order to fill the individual orders of customers. The Tribunal does not dispute that these activities constitute packaging or repackaging within the plain meaning of the words. However, on the basis of the evidence, the Tribunal finds that such packaging or repackaging was not done to prepare the electrical parts for sale, but was done to prepare the electrical parts, which were already sold, for shipment to the customer. Since the appellant's activities did not prepare the electrical parts for sale, the requirements of paragraph (*f*) have not been met.

Having found that the activities performed by the appellant in relation to the task lighting and/or electrical parts do not constitute production or manufacturing, the Tribunal is of the view that it is not liable under paragraph 50(1)(*a*) of the Act to pay FST on the sale or consumption of the task lighting and electrical parts based upon the sale price. Therefore, any moneys that it paid as FST on the sale price constitute amounts paid in error within the meaning of section 68 of the Act. Rather, the appellant should have paid FST at the time of importation of the task lighting and electrical parts under paragraph 50(1)(*b*) of the Act. The appellant was, therefore, incorrectly assessed for the amounts which it deducted.

Accordingly, the appeal is allowed.

Sidney A. Fraleigh
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Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member