

Ottawa, Friday, May 13, 1994

**Appeal No. AP-93-099**

IN THE MATTER OF an appeal heard on January 11, 1994,  
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 2, 1993, with respect to a notice  
of objection served under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**MEDI ATHLETI-K-INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed in part.

Lise Bergeron

Lise Bergeron  
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan  
Member

Arthur B. Trudeau

Arthur B. Trudeau  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-93-099**

**MEDI ATHLETI-K-INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The appellant is a company which manufactures, among other products, therapeutic pillows and cradle arm slings. The issue in this appeal is whether the goods in issue are orthopaedic braces under section 20 of Part VIII of Schedule III to the Excise Tax Act and, thus, exempt from federal sales tax under subsection 51(1) of the Excise Tax Act, or whether they are health products, sold to licensed manufacturers which do not sell the goods exclusively and directly to consumers and, thus, exempt from federal sales tax under paragraph 50(5)(k) of the Excise Tax Act.*

**HELD:** *The appeal is allowed in part. The cradle arm slings are orthopaedic braces. Patients use them to support a fractured shoulder, arm or forearm and to enable them to carry out their daily activities. According to the Tribunal, the fact that Parliament included products such as canes and crutches (to which the cradle arm slings were compared) in Part VIII of Schedule III to the Excise Tax Act shows that it intended to exclude all types of orthopaedic braces. However, the Tribunal finds that the therapeutic pillows are not orthopaedic braces. They are used only to provide support and comfort when patients are lying down. They do not assist patients in carrying out their daily activities. They simply assist patients in maintaining a certain position while asleep. Further, the therapeutic pillows are not health products because they are not materials or substances, and they are not used in the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: January 11, 1994  
Date of Decision: May 13, 1994*

*Tribunal Members: Lise Bergeron, Presiding Member  
Kathleen E. Macmillan, Member  
Arthur B. Trudeau, Member*

*Counsel for the Tribunal: Joël J. Robichaud*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Joseph Khlal, for the appellant  
Anick Pelletier, for the respondent*

**Appeal No. AP-93-099**

**MEDI ATHLETI-K-INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member  
KATHLEEN E. MACMILLAN, Member  
ARTHUR B. TRUDEAU, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of an assessment of the Minister of National Revenue (the Minister) dated June 30, 1990. The appellant served a notice of objection to this assessment. The Minister amended the assessment in a notice of decision dated April 2, 1993.

The appellant is a company which manufactures, among other products, therapeutic pillows and cradle arm slings. The issue in this appeal is whether the goods in issue are orthopaedic braces under section 20 of Part VIII of Schedule III to the Act and, thus, exempt from federal sales tax (FST) under subsection 51(1) of the Act, or whether they are health products, sold to licensed manufacturers which do not sell the goods exclusively and directly to consumers and, thus, exempt from FST under paragraph 50(5)(k) of the Act.

The owner and President of Medi Athleti-K-Inc., Mr. Joseph Khlát, represented the appellant and testified on its behalf. He provided a background of the appellant and stated that the company was incorporated in 1984. He explained the nature of discussions between the appellant and officials of the Department of National Revenue (Revenue Canada) who, during the assessment period, allegedly confirmed that the appellant was not required to charge FST on the goods in issue sold to pharmacies.

According to Mr. Khlát, the cradle arm sling is a type of bandage which helps support a fractured shoulder, arm, elbow or wrist. The cradle arm sling can be worn with or without a cast and, in most cases, is prescribed by a physician. It has an adhesive closure that allows for adjustment of the height of the arm in order to ensure proper support. Mr. Khlát described the therapeutic pillow as an S-shaped pillow with a small circle on each side, the circumference of one circle being larger than that of the other. He explained that the small circle provides support to patients' necks when they are sleeping on their backs and the big circle provides support to the neck when they are sleeping on their sides. Based on documents entered as

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

exhibits, including a letter from Dr. Sarto Imbeault, a physiatrist responsible for clinical training at the Université de Montréal and the Notre-Dame Hospital, and Director of Physiatrics Education at that hospital, as well as an extract from a text entitled, "*Maux de tête et migraines : les comprendre, les vaincre*" [(translation) Headaches and Migraines: Understanding Them, Overcoming Them], Mr. Khlat claimed that the therapeutic pillow can relieve headaches related to cervical problems.

During cross-examination, Mr. Khlat stated that the two goods in issue are consumer products. However, he reiterated that, in most cases, the goods in issue are prescribed by a physician. According to Mr. Khlat, the cradle arm sling is used only to support a shoulder, arm or forearm, fractured or weakened by some disorder, and the therapeutic pillow is used only to support the neck when sleeping in order to relieve headaches or sore necks. He stated that the goods in issue are sold to orthopaedic centres, chiropractic offices, pharmacies and pharmaceutical product wholesalers.

Counsel for the respondent called a witness, Mr. Stephen L. Grundy, a certified orthotist. In this capacity, he stated that he manufactures custom-made orthopaedic braces and that he fits them to the affected part of a patient's body. At the request of counsel, the Tribunal recognized Mr. Grundy as an expert witness in the field of orthotics. Mr. Grundy described an orthopaedic brace as a support, either custom-made or adjusted for a patient, worn directly on a part of the body to support a weakened limb or to correct a deformity. He explained that an orthopaedic brace is worn by patients to improve their daily quality of life. According to Mr. Grundy, the cradle arm slings and therapeutic pillows are not orthopaedic braces.

At the outset, Mr. Grundy testified that a cradle arm sling can be worn by anyone, that is, it is not necessary for it to be custom-made. Also, it is not worn directly on a part of the body. When a person fractures a limb, it is the cast and not the cradle arm sling which constitutes the corrective device. Mr. Grundy did state, however, that cradle arm slings are also worn by patients to enable them to carry out their daily activities. He compared the cradle arm slings to a cane or crutches used by patients to assist them in their activities, that is, to make them more comfortable. He mentioned that, as in the case of the cradle arm sling, it is not the cane or the crutches that are doing the work, but rather the cast. Mr. Grundy added that these products, in most cases, are prescribed by a physician and that patients can obtain them from a pharmacy or a hospital. Lastly, Mr. Grundy indicated that the therapeutic pillow simply supports a patient's neck and maintains it in a certain position during sleep. It can be used by anyone to sleep comfortably. It is not custom-made and is not worn by a patient on a part of the body.

During cross-examination, Mr. Grundy explained that he only manufactures and fits orthopaedic braces prescribed by a doctor for patients with a weakened limb due to some type of paralysis or disease, such as spina bifida. He explained that, as an orthotist, he does not treat patients suffering from fractures. These individuals are treated by orthopaedists. Mr. Grundy added that orthopaedics is a very broad field and that he only deals with a part of that field, that is, the custom manufacturing of orthopaedic braces. He testified that the braces that he manufactures are not always used to correct a deformity, but that, in some instances, they are

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2. J.P. Meloche (Montréal: Éditions de l'Homme, 1988).

used only to support a limb in order to enable patients to carry out their activities. Lastly, Mr. Grundy admitted that a cervical collar could be considered an orthopaedic brace even though it is not custom-made nor adjusted to a patient's neck. However, he believed that such collars should be custom-made and adjusted to a patient's neck in order to be more effective.

Mr. Khlat argued that the cradle arm slings, which are, for the most part, prescribed by a physician, should be exempt from tax under section 20 of Part VIII of Schedule III to the Act as braces used to support an injured or fractured shoulder, arm or forearm. He stated that the cradle arm sling has a function comparable to that of a cane or crutches, both of which are exempt from tax under section 20 of Part VIII of Schedule III to the Act. Mr. Khlat went on to say that these products can be obtained over the counter in pharmacies and in orthopaedic centres. He then compared the cradle arm sling in issue to a cervical collar which, in his opinion, fulfil the same function. The collar supports the neck, and the cradle arm sling supports the arm when there is a fracture or during the healing process. In support of his position, Mr. Khlat cited the Tribunal's decision in *Airway Surgical Appliances Ltd. v. The Minister of National Revenue*,<sup>3</sup> in which cervical collars were found to be orthopaedic braces.

In the case of the therapeutic pillows, Mr. Khlat tried to make a distinction between these goods and those in issue in the Tariff Board's decision in *OBUS Forme Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,<sup>4</sup> according to which, to qualify for the exemption, the upright supports had to be used in the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof. He indicated that the upright supports in issue in *OBUS Forme* cannot be compared to the therapeutic pillows because the latter are used to treat a disease, namely, headaches related to cervical problems. The therapeutic pillows should be exempt from tax because they are used solely to support the neck during sleep, and they are often prescribed by a physician to ease headaches related to cervical problems. Lastly, Mr. Khlat stated that his company had been adversely affected by the complexity of the Act and by the various interpretations thereof by officials of Revenue Canada.

Based on an interpretation of the scope of the expression "orthopaedic braces" in *OBUS Forme* and on the definitions of the terms "*orthopédie*" (orthopaedics) and "*support*" (brace) in various dictionaries, counsel for the respondent claimed that the cradle arm slings and therapeutic pillows do not qualify for exemption under section 20 of Part VIII of Schedule III to the Act. More specifically, counsel argued that the goods in issue are not exempt because their design is not based on the specific needs or requirements of patients, they are available to the public, they are displayed, they are not used to correct a deformity and, lastly, they are designed or used primarily to provide mere support or comfort.

Citing the meaning of the term "materials" in the definition of health products used in the decision in *OBUS Forme*, counsel for the respondent claimed that the goods in issue are not health products. Moreover, she claimed that the goods in issue are not used in the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof.

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3. Appeal No. AP-91-149, April 10, 1992.

4. (1982), 8 T.B.R. 309.

The Tribunal must decide whether the cradle arm slings and therapeutic pillows are orthopaedic braces. There is no definition of this expression in the Act. As Mr. Grundy stated, orthopaedics is a very broad field. The Lexis, dictionnaire de la langue française<sup>5</sup> defines "*orthopédie*" (orthopaedics) as "*branche de la chirurgie qui traite les affections de l'appareil locomoteur (os, articulations, muscles, tendons, nerfs) et cherche à y suppléer en cas de manque*" (branch of surgery which deals with injury to the locomotor system [bones, joints, muscles, tendons, nerves] and tries to relieve it when there is a deficiency). Black's Medical Dictionary<sup>6</sup> defines "orthopaedics" as "[o]riginally the general measures, surgical and mechanical, which can be used for the correction or prevention of deformities in children. Now, that branch of medical science dealing with skeletal deformity, congenital or acquired." Le Nouveau Petit Robert<sup>7</sup> defines "*support*" (brace) as being "*[c]e qui supporte; ce sur quoi une chose repose*" (that which supports; that on which something rests).

Given these definitions, Mr. Grundy's testimony and the Tariff Board's decision in *OBUS Forme*, counsel for the respondent argued that the goods in issue are not orthopaedic braces because they are not used to treat a specific physical disorder, and they are not tied or clamped to the body. The Tribunal is of the opinion that goods can be considered orthopaedic braces even if they are not used to correct a deformity. This was confirmed in Mr. Grundy's testimony, in which he stated that an orthopaedic brace is not necessarily used to correct specific disorders, but can be used simply to facilitate a patient's daily activities.

The cradle arm slings are used by patients with strains or fractures to support either a fractured shoulder, arm or forearm and, thereby, to allow patients to carry out their daily activities. They are used in certain situations to help correct specific physical disorders. In addition, they are tied or clamped to the body. The Tribunal finds that it must interpret the words of the Act in their global context, that is, within the context of the paragraph and part of the Act in which they are found, while taking into consideration the object and spirit of the Act. As a result, the exemption provisions of Part VIII of Schedule III to the Act must be read as a whole. In the Tribunal's opinion, the fact that Parliament included products such as canes and crutches (to which the cradle arm slings were compared) shows that it intended to exclude all types of orthopaedic braces. There is nothing in the wording of section 20 of Part VIII of Schedule III to the Act which provides for a restrictive interpretation of the expression "orthopaedic brace." The Tribunal further finds, as was the case in *Airway* with cervical collars, that the cradle arm slings serve to protect the affected limb against quick or painful movements and that they support it during the healing process. The Tribunal, therefore, considers the cradle arm slings to be orthopaedic braces under section 20 of Part VIII of Schedule III to the Act. Consequently, the cradle arm slings are exempt from FST under subsection 51(1) of the Act. The Tribunal, therefore, allows this part of the appeal.

However, the Tribunal finds that the therapeutic pillows are not orthopaedic braces. It is clear from the evidence that the therapeutic pillows are used only when a patient is lying down to provide support and comfort when sleeping. They do not assist patients in carrying out their daily activities. The Tribunal, relying on the Tariff Board's decision in *OBUS Forme*, finds that the therapeutic pillows are not health products because they are not materials or substances, and they are not used in the diagnosis, treatment, mitigation or prevention of a disease, disorder,

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5. (Paris: Librairie Larousse, 1989) at 1297.

6. Thirty-fifth ed. (Totowa: Barnes & Noble Books, 1987) at 511.

7. (Montréal: DICOROBERT, 1993) at 2172.

abnormal physical state, or the symptoms thereof.<sup>8</sup> More specifically, in *OBUS Forme*, the Tariff Board ruled that an upright support could not be considered a material because it is a finished product, manufactured to a very specific design, size and shape. This part of the appeal is, therefore, dismissed.

For the foregoing reasons, the appeal is allowed in part.

Lise Bergeron

Lise Bergeron  
Presiding Member

Kathleen E. Macmillan

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Member

Arthur B. Trudeau

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Member

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8. *Supra*, note 4 at 314.