CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, December 13, 1994

Appeal No. AP-94-041

IN THE MATTER OF an appeal heard on October 12, 1994, under section 81.22 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 June 3, 1994, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

HOME HARDWARE STORES LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part. The Tribunal refers the matter back to the Minister of National Revenue for reconsideration in a manner consistent with the Tribunal's decision.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-94-041

HOME HARDWARE STORES LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Counsel for the respondent raised four issues. Of these four issues, two were conceded on behalf of the respondent with a request that the assessment be referred back for reconsideration. The two remaining issues that were argued at the hearing were: (1) whether the Tribunal has jurisdiction with respect to the respondent's administrative policy regarding values for tax on paint contained in Circular ET 135 and, if so, whether the appellant used the correct value for tax in calculating its federal sales tax liability on the sale of the paint; and (2) whether the appellant is exempt from paying federal sales tax on certain goods alleged to be enumerated in Schedule III.1 of the Excise Tax Act.

HELD: *The appeal is allowed in part. The appellant fails on the two issues argued at the hearing. The determined value provided to paint manufacturers by Circular ET 135 is not sanctioned by either statute or regulation. The Tribunal believes that its jurisdiction is limited to interpreting the law and, consequently, if asked to determine the tax liability of the appellant in the present circumstances, it would have to assert that the tax has to be computed on the actual sale prices. If the Department of National Revenue is prepared to accept a different value for tax for purposes of calculating the appellant's tax liability, it is not within the Tribunal's authority to determine what that different value for tax should be. As for the second issue, the Tribunal finds that subsection 2(3) of the Excise Tax Act deems the imported Schedule III.1 goods to be produced or manufactured in Canada when in the hands of the appellant. Therefore, as a producer or manufacturer, the appellant is liable for tax on the sale of those goods.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*October 12, 1994*
Date of Decision:	*December 13, 1994*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Raynald Guay, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Aris Anagnos, for the appellant*

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Christopher Rupar, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-041

HOME HARDWARE STORES LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 81.22 of the *Excise Tax Act*[1] (the Act) of an assessment of the Minister of National Revenue (the Minister) in respect of the period from February 14, 1987, to March 31, 1990.

During the assessment period, the appellant manufactured paint. The paint was transferred to the warehousing operation of Home Hardware Limited, which, in turn, invoiced its retailers for the price of the paint. In addition, the appellant purchased pet food, pool chemicals, television receivers, video recorders and players, microwave ovens, pet litter and laundry detergent.

In computing its federal sales tax (FST) liability on the sale of the paint, the appellant used the "determined value" method in accordance with the respondent's administrative policy contained in Circular ET 135.[2] Circular ET 135 provided paint manufacturers with an alternative value on which to calculate their tax liability in lieu of strict adherence to the requirements of section 50 of the Act. In accordance with Circular ET 135, by letter dated March 18, 1980, the respondent provided the appellant with two options for determining the value of the paint on which FST was to be paid. The starting point of either option was the "net list price" of the paint charged by the appellant to its retailers. The net list price was defined as the transfer cost of the paint plus certain additions.

In November 1988, a review by external accountants for the appellant concluded that the value of the paint had been overstated for FST accounting purposes. The appellant had calculated its tax liability on the basis of a "1/2 C-List" price, which the accountants determined was an inflated value. They concluded that tax should have been paid on the basis of a lower transfer value that they believed was authorized by virtue of the respondent's letter of March 18, 1980. By the appellant's calculation, it had overpaid FST totalling $399,934 for the period from November 1986 to October 1988. The appellant, therefore, took an internal deduction from its tax return to the Minister on November 21, 1988, for the alleged FST overpayment.

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1. R.S.C. 1985, c. E-15.
2. Paint — Tax Computation, Department of National Revenue, Excise, June 14, 1968.

By Notice of Assessment No. SWO-0001, dated February 13, 1991, the Minister assessed the appellant for unpaid FST, including interest and penalty, totalling $329,836.05. The appellant's FST liability was assessed using the sale price[3] as opposed to the 1/2 C-List price, as it was determined that the former value resulted in a lower tax liability. By notice of objection dated May 8, 1991, the appellant objected to the assessment.

By letter dated January 13, 1992, the appellant supplemented its objection to the Minister by requesting a credit totalling $20,206.50 for tax allegedly paid in error on camcorders. Then, by application dated January 17, 1992, the appellant applied for a refund of FST in the amount of $26,889.75. On February 21, 1992, the respondent issued a notice of determination approving $21,722.94 of the appellant's application for refund. The notice indicated that any FST overpaid on the sale of the camcorders prior to March 31, 1990, "will be included in your appeal of notice of assessment #SWO-0001 dated February 13, 1991."

By letter dated September 23, 1992, the appellant again supplemented its objection to the Minister by requesting a credit for FST allegedly paid in error with respect to goods listed in Schedule III.1 of the Act. The appellant purchased these goods from the importers and subsequently resold them.

On April 12, 1994, Home Hardware Stores Limited appealed the Minister's assessment to the Tribunal. On June 3, 1994, the Minister sent the appellant a notice of decision "only for administrative purposes," as the appellant had already appealed the assessment directly to the Tribunal.

Counsel for the respondent raised four issues. Of these four issues, two were conceded on behalf of the respondent with a request that the assessment be referred back for reconsideration. The two remaining issues that were argued at the hearing were:

> (1) whether the Tribunal has jurisdiction with respect to the respondent's administrative policy regarding values for tax on paint contained in Circular ET 135 and, if so, whether the appellant used the correct value for tax in calculating its FST liability on the sale of the paint; and
>
> (2) whether the appellant is exempt from paying FST on certain goods alleged to be enumerated in Schedule III.1 of the Act.

The appellant's witness and representative was Mr. Aris Anagnos. He explained to the Tribunal that when the appellant used the 1/2 C-List price to calculate its FST liability it was very similar to the transfer price used to calculate the appellant's alleged overpayment. However, between 1980 and 1988, the appellant added several surcharges to the 1/2 C-List price in response to a changing tax regime. These additions resulted in a variance between the 1/2 C-List price and the transfer price that Mr. Anagnos said truly represented the net list price of the paint. However, the appellant continued to use the 1/2 C-List price to calculate its FST liability.

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3. As required by section 50 of the Act.

Mr. Anagnos argued that the transfer price that the appellant claims entitlement to use is sanctioned by the respondent's letter of March 18, 1980.

Counsel for the respondent argued that the Tribunal lacks the jurisdiction to disregard the statutorily prescribed value on which FST liability is to be calculated in favour of a value adopted through administrative concession. Counsel explained that the appellant has been paying FST based on a determined value sanctioned by Circular ET 135. The determined value represents an administrative concession to paint manufacturers that is not sanctioned by and is not consistent with the Act. After having elected to use the 1/2 C-List price for eight years, the appellant realized that its tax liability would be reduced if it employed a different value. Counsel explained that it was not open to the appellant to choose the value on which its tax liability would be calculated. Rather, it could continue to use the 1/2 C-List price or use the sale price as prescribed by the Act. Counsel told the Tribunal that the appellant was assessed on the basis of the sale price, as prescribed by section 50 of the Act, because it resulted in a lower tax liability than would arise through the use of the 1/2 C-List price. The Tribunal was also reminded that it has consistently held that it does not have the jurisdiction to assess whether a determined value has been properly applied.[4]

With regard to the second issue, Mr. Anagnos argued that the appellant was exempt from paying FST on goods enumerated in Schedule III.1 of the Act. Therefore, any tax paid on such goods was paid in error.

In effect, Mr. Anagnos argued that the appellant, as a licensed manufacturer or producer, was entitled to purchase Schedule III.1 goods exempt from FST pursuant to paragraph 50(5)(*k*) of the Act. Under paragraph 50(1)(*a*) of the Act, sales tax is levied against goods produced or manufactured in Canada and payable by the producer or manufacturer. However, the goods in issue were not produced or manufactured in Canada nor does subsection 2(3) of the Act deem them to be such when in the hands of the appellant. Therefore, the appellant could subsequently sell the goods without the imposition of FST.

Counsel for the respondent reminded the Tribunal that these arguments are similar to those heard by it in *Essex Topcrop Sales Limited v. The Minister of National Revenue*.[5] In that case, the Tribunal found that the Act was ambiguous as to whether Schedule III.1 goods were deemed to be produced or manufactured in Canada when in the hands of a person who had not imported the goods. The Tribunal found, therefore, that the goods had not been produced or manufactured in Canada by Essex Topcrop Sales Limited. As such, it was not liable for tax under paragraph 50(1)(*a*) of the Act when it sold the goods. Counsel submitted, however, that subsequent to the *Essex* decision, the Federal Court - Trial Division recently reviewed the same provisions of the Act and found that there was no ambiguity in the legislation.[6] The court found

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4. See, e.g., *Artec Design Inc. v. The Minister of National Revenue*, Appeal No. AP-90-117, March 2, 1992; and *Color Your World Corp. v. The Minister of National Revenue*, Appeal No. AP-93-285, August 10, 1994.
5. Appeal No. AP-91-121, April 6, 1992.
6. *W.R. McRae Company Limited v. Her Majesty the Queen* (1994), 2 G.T.C. 7131, Federal

that subsection 2(3) of the Act deems Schedule III.1 goods, that had been imported into Canada, to be produced or manufactured in Canada whether in the hands of the importer or any subsequent wholesaler, such as the appellant. Counsel submitted that the Tribunal is bound by the finding of the Federal Court on this issue. Therefore, the appellant was liable for FST when it sold goods that are enumerated in Schedule III.1 of the Act.

At the outset, the Tribunal notes that counsel for the respondent acknowledged that the assessment should be returned to the respondent for reconsideration of two matters. First, the respondent has acknowledged that "video recorder," as used in Schedule III.1 of the Act, does not include camcorders. Second, certain spray bottles that were jobbed by the appellant should have been assessed tax on the basis of the appellant's purchase price of the goods and not their sale price. Therefore, the assessment should be adjusted for amounts payable or credits owing to the appellant with respect to these goods during the assessment period.

As for the correct net list price to be employed for use of the determined value authorized by Circular ET 135, the Tribunal confirms that it is outside its jurisdiction to find that one price is more appropriate than another. As stated in the *Artec Design* case,

> *[t]he Tribunal is a creature of statute and any regulations flowing therefrom. As such, its jurisdiction and the powers it may exercise must be found in statutory instruments such as the Excise Tax Act and regulations enacted thereunder.*[7]

The determined value provided to paint manufacturers by Circular ET 135 is not sanctioned by either statute or regulation. In fact, it is inconsistent with the Act in that it authorizes the use of a value for tax that is different from the sale price as imposed by section 50 of the Act. The Tribunal believes that it "must interpret the law as it stands and, consequently, if asked to determine the tax liability of the appellant in the present circumstances, it would have to assert that the tax has to be computed on the actual sales prices,[8]" as it was. If the Department of National Revenue is prepared to accept a different value for tax for purposes of calculating the appellant's tax liability, it is not within the Tribunal's authority to determine what that different value for tax should be.

As for the appellant's tax liability on the sale of goods enumerated in Schedule III.1 of the Act, the Tribunal considers itself bound by the finding of the Federal Court in the *McRae* decision. The court found that subsection 2(3) of the Act deems imported goods that are enumerated in Schedule III.1 of the Act "to be goods produced or manufactured in Canada and not imported goods[9]" "irrespective of whose hands they are in.[10]" Therefore, the Tribunal cannot accept the contention that subsection 2(3) of the Act only deems Schedule III.1 goods to be produced or manufactured in Canada

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Court - Trial Division, Court File No. T-1595-93, April 22, 1994.

7. *Supra*, note 4 at 3.

8. *B.E.A. Per Capita Consulting Corporation v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. 3094, September 18, 1990, at 3.

9. Subsection 2(3) of the Act.

10. *Supra*, note 6 at 7135, per Noël, J.

when in the hands of the importer. The goods maintain their status of being produced or manufactured in Canada when in the hands of a subsequent wholesaler, such as the appellant.

As a wholesaler of Schedule III.1 goods, the appellant is included as a producer or manufacturer under paragraph 2(1)(*i*)[11] of the Act. Under paragraph 50(1)(*a*) of the Act, a producer or manufacturer must pay FST on all goods produced or manufactured in Canada. The Act has deemed imported Schedule III.1 goods to be produced or manufactured in Canada when in the hands of the appellant. Therefore, the appellant, as a producer or manufacturer, was liable for FST when it sold the goods.

11. *(i) any person who sells goods enumerated in Schedule III.1, other than a person who sells those goods exclusively and directly to consumers.*

Accordingly, the appeal is allowed in part. The Tribunal refers the matter back to the Minister for reconsideration in a manner consistent with the Tribunal's decision.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
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