

Ottawa, Friday, September 19, 1997

**Appeal No. AP-94-006**

IN THE MATTER OF an appeal heard on March 13, 1997, 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 January 21, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**HUMPTY DUMPTY FOODS LIMITED**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Dr. Patricia M. Close

Dr. Patricia M. Close  
Member

Lyle M. Russell

Lyle M. Russell  
Member

Susanne Grimes

Susanne Grimes  
Acting Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-94-006**

**HUMPTY DUMPTY FOODS LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* of a decision of the Minister of National Revenue that rejected the appellant's application for a refund of federal sales tax allegedly paid in error. The appellant's invoices to its customers provided an all-in price and did not break out the various elements, including transportation costs, that went into making up that price.

The *Excise Tax Act* imposes a "consumption or sales tax ... on the sale price or on the volume sold of all goods ... produced or manufactured in Canada." However, in order to determine the amount of federal sales tax payable on any given goods, including snack foods, the sale price of those goods must first be determined. The *Excise Tax Act* provides that the cost of transportation of goods, in this case snack foods, incurred by the producer in delivering the goods from its premises to the purchaser, where the goods are sold at a price that includes those transportation costs, may be excluded from the sale price. The issues in this appeal are whether the appellant mistakenly remitted federal sales tax on certain transportation costs which it incurred in connection with the transportation of snack foods which it sold to its customers and whether the appellant used the proper methodology to calculate the amount of federal sales tax included therein.

**HELD:** This appeal was heard together with Appeal No. AP-94-083, *Permanent Lafarge (A Division of Lafarge Canada Inc.) v. The Minister of National Revenue*. The appellant in this appeal was represented by the same counsel as the appellant in Appeal No. AP-94-083. In argument at the hearing of these two appeals, counsel for the appellants made a generic argument respecting the appropriate methodology for calculating the appellants' federal sales tax liabilities. For the reasons set out in the Tribunal's decision in Appeal No. AP-94-083, this appeal is dismissed.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: March 13, 1997  
Date of Decision: September 19, 1997

Tribunal Members: Arthur B. Trudeau, Presiding Member  
Dr. Patricia M. Close, Member  
Lyle M. Russell, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael Kaylor, for the appellant  
Stéphane Lilkoff, for the respondent

**Appeal No. AP-94-006**

**HUMPTY DUMPTY FOODS LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member  
DR. PATRICIA M. CLOSE, Member  
LYLE M. RUSSELL, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of *Excise Tax Act*<sup>1</sup> (the Act) of a decision of the Minister of National Revenue dated January 21, 1994, that rejected the appellant's application for a refund of federal sales tax (FST) allegedly paid in error. The issues in this appeal are whether the appellant mistakenly remitted FST on certain transportation costs which it incurred in connection with the transportation of snack foods which it sold to its customers and whether the appellant used the proper methodology to calculate the amount of FST included therein.<sup>2</sup>

Subject to a number of exceptions, none of which are relevant to this appeal, subsection 50(1) of the Act imposes a "consumption or sales tax ... on the sale price or on the volume sold of all goods ... produced or manufactured in Canada." Pursuant to subsection 50(1) of the Act, FST is payable on sales of snack foods. However, in order to determine the amount of FST payable on any given goods, including snack foods, the sale price of those goods must first be determined.

Section 42 of the Act provides, in part, that "sale price" means, the aggregate of:

- (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,
- (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and
- (iii) the amount of the excise duties payable under the *Excise Act* whether the goods are sold in bond or not.

Section 46 of the Act provides, in part:

- (c) in calculating the sale price of goods manufactured or produced in Canada, there may be excluded
    - (ii) under such circumstances as the Governor in Council may, by regulation, prescribe, an amount representing
      - (B) the cost of transportation of the goods incurred by the manufacturer or producer in transporting the goods between premises of the manufacturer or producer in Canada, or in delivering the goods from the premises of the manufacturer or producer in Canada to the purchaser, where the goods are sold at a price that includes those costs of transportation,
- determined in such manner as the Governor in Council may, by regulation, prescribe.<sup>3</sup>

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

2. This appeal was heard together with Appeal No. AP-94-083, *Permanent Lafarge (A Division of Lafarge Canada Inc.) v. The Minister of National Revenue*. The appellant in this appeal was represented by the same counsel as the appellant in Appeal No. AP-94-083.

3. In 1983, the Governor in Council enacted the *Sales Tax Transportation Allowance Regulations*, SOR/83-95, January 21, 1983, *Canada Gazette* Part II, Vol. 117, No. 3 at 497; however, they did not factor into this matter.

The facts in this case are not in dispute. Counsel for the appellant called Mr. Robert de Hamel, the appellant's corporate comptroller, as the appellant's witness. Mr. de Hamel testified that the appellant manufactures and sells snack foods such as potato chips, popcorn and pretzels. During all times relevant to this appeal, the appellant's products were sold to its customers free on board at their sites on a tax-included basis. The appellant's invoices to its customers provided only a total or all-in price. In other words, invoices did not separate the various components which made up the total price, such as the cost of the products themselves, transportation or FST. As such, the invoices did not indicate the sale price of the products, within the meaning in the Act, as it included the cost of transporting the products, an amount which, pursuant to subparagraph 46(c)(ii)(B) of the Act, could be excluded in the determination of the sale price. Mr. de Hamel testified that this "all-in" pricing strategy had been adopted by the appellant because of the competitiveness of the snack food business.

Mr. de Hamel explained that, in calculating the appellant's FST liability for the period ending November 24, 1990, the appellant had employed the following methodology:

Total sales		\$16,244,423.19
Less		
Total samples, sales items	\$344,579.27	
Discounts, rebates and allowances	\$5,004,445.04	
Transportation costs	<u>\$2,443,632.60</u>	<u>\$7,792,756.91</u>
Equals		
Total taxable sales (including FST)		<u>\$8,451,666.28</u>

#### **FST calculation**

$$\$8,451,666.28 \text{ (total taxable sales)} \times 13.5/113.5^4 = \$1,005,264.27$$

Mr. de Hamel testified that the appellant is now of the belief that it should have used the following methodology to determine its FST liability:<sup>5</sup>

#### **Step 1**

Total sales		\$16,244,000
Less		
Total samples, sales items	\$345,000	
Discounts, rebates and allowances	<u>\$5,004,000</u>	<u>\$5,349,000</u>
Total taxable sales (including FST)		<u>\$10,895,000</u>

#### **Step 2**

$$\$10,895,000 \text{ (total taxable sales)} \times 13.5/113.5 = \$1,295,881$$

$$\$2,444,000 \text{ (transportation costs)} \times 13.5/100 = \$330,000$$

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4. The applicable FST rate for snack foods at all times relevant to this appeal was 13.5 percent.
  5. Mr. de Hamel rounded off the numbers in order to simplify calculations performed during his testimony.

**Step 3 - FST calculation**

$$\$1,295,881 - \$330,000 = \$965,000^6$$

Mr. de Hamel testified that, based on the foregoing analysis, the appellant should have remitted FST in the amount of \$965,000 for the period ending November 24, 1990, instead of \$1,005,264.27.

As noted above, this appeal was heard together with Appeal No. AP-94-083. The appellant in this case and the appellant in Appeal No. AP-94-083 were represented by the same counsel. As the fundamental legal issue in each of these two appeals was identical, counsel for the appellants and counsel for the respondent each made a single “generic” argument in respect of the two appeals. The Tribunal has issued its reasons in Appeal No. AP-94-083. Given the fundamental similarity of the issues raised in this appeal and of those in Appeal No. AP-94-083, the Tribunal does not consider it necessary to set out the reasoning which underpins its decision in this appeal.

For the reasons set out in Appeal No. AP-94-083, this appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Dr. Patricia M. Close

Dr. Patricia M. Close  
Member

Lyle M. Russell

Lyle M. Russell  
Member

6. In cross-examination, Mr. de Hamel testified that an alternate methodology which would produce the same result as the three steps set out above would be as follows:

**Step 1**

Total sales		\$16,244,000
Less		
Total samples, sales items	\$345,000	
Discounts, rebates and allowances	<u>\$5,004,000</u>	<u>\$5,349,000</u>
Total taxable sales (including FST)		<u>\$10,895,000</u>

**Step 2**

$$\$10,895,000 \text{ (total taxable sales)} \times 13.5/113.5 = \$1,295,881$$

$$\$10,895,000 - \$1,295,881 = \$9,600,000$$

$$\$9,600,000 - \$2,444,000 \text{ (transportation costs)} = \$7,156,000$$

**Step 3 - FST calculation**

$$\$7,156,000 \times 13.5/100 = \$965,000$$