CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, February 10, 1999

Appeal Nos. AP-98-007 and AP-98-010

IN THE MATTER OF appeals heard on November 9, 1998, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

RICHARDS PACKAGING INC. AND DUOPAC PACKAGING INC. **Appellants**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

AND

EASTMAN CHEMICAL CANADA INC. **Intervener**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-98-007 and AP-98-010

RICHARDS PACKAGING INC. AND DUOPAC PACKAGING INC. Appellants

and

THE DEPUTY MINISTER OF NATIONAL REVENUE Respondent

and

EASTMAN CHEMICAL CANADA INC. Intervener

These are two appeals under the *Customs Act*. The product in issue is polyethylene terephthalate (PET) resin in pellet form used to manufacture bottles. The first issue in these appeals is whether the Tribunal can set aside re-determinations made by a designated officer because, allegedly, they were not made under the conditions deemed advisable by the Minister of National Revenue under paragraph 61(e) of the *Customs Act*. The second issue is whether the product in issue qualifies for duty-free treatment under Code 7902 of the *Chemicals and Plastics Duties Reduction or Removal Order, 1988*. This issue requires the Tribunal to determine if the definition of the word "composition" in Supplementary Note 2(a) to Chapter 39 of Schedule I to the *Customs Tariff* applies. With respect to this issue, the Tribunal must also determine if the cobalt acetate used in the manufacture of the PET resin is a colourant or a catalyst within the meaning of Supplementary Note 2(a).

HELD: The appeals are dismissed. With respect to the first issue, the Tribunal's jurisdiction in the current matter derives from section 67 of the *Customs Act* which refers to decisions made by the respondent under section 63 or 64. The decision made by a designated officer is not one contemplated in sections 63 and 64. Furthermore, as a statutorily created appellate body whose mandate is to deal with appeals under the *Customs Act*, the Tribunal has no jurisdiction to review a designated officer's re-determination. With respect to the second issue, the evidence is that the yellowing that develops in the PET resin is due, among other things, to the presence of by-products, especially acetaldehyde, which carries an unwanted taste. Cobalt acetate helps in preventing this yellowing process, but, further to its action, is rendered inactive. It is neither a colourant nor a catalyst as contemplated in Supplementary Note 2(a).

Date of Hearing:	November 9, 1998
Date of Decision:	February 10, 1999
Tribunal Members:	Peter F. Thalheimer, Presiding Member Pierre Gosselin, Member Richard Lafontaine, Member
Counsel for the Tribunal:	Gilles B. Legault
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Michael Sherbo, for the appellants Darell Kloeze, for the respondent Robert J. Whitten, for the intervener

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Appeal Nos. AP-98-007 and AP-98-010

RICHARDS PACKAGING INC. AND DUOPAC PACKAGING INC. **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

EASTMAN CHEMICAL CANADA INC. **Intervener**

TRIBUNAL: PETER F. THALHEIMER, Presiding Member
PIERRE GOSSELIN, Member
RICHARD LAFONTAINE, Member

REASONS FOR DECISION

These are two appeals under section 67 of the *Customs Act*[1] (the Act) from several decisions of the Deputy Minister of National Revenue, dated March 23 and 26, 1998 (Appeal No. AP-98-007) and May 19, 1998 (Appeal No. AP-98-010). The appellants, which are represented by the same representative, asked that the appeals be joined since they involve the same product and the same issues.

The product in issue is polyethylene terephthalate (PET) resin in pellet form used to manufacture bottles. There are two issues in these appeals. The first, which is of a jurisdictional nature, is whether the Tribunal can set aside re-determinations made by a designated officer because, allegedly, they were not made under the conditions deemed advisable by the Minister of National Revenue under paragraph 61(e) of the Act. The second, which is with respect to tariff classification,[2] is whether the product in issue qualifies for duty-free treatment under Code 7902 of the *Chemicals and Plastics Duties Reduction or Removal Order, 1988*[3] (the Order), adopted pursuant to subsection 68(1) of the *Customs Tariff*.[4] For the reasons explained below, the Tribunal is of the view that it is clear that it does not have the jurisdiction to deal with the first issue. Consequently, the summary of the relevant legislation, facts and arguments that follow relates only to the classification issue.

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. According to section 2 of the Act, tariff classification means "the classification of imported goods under a tariff item in Schedule I to the *Customs Tariff* and, where applicable, under a code in Schedule II or VII to that Act or under any order made pursuant to section 62 or 68 of that Act."
3. SOR/88-74, December 31, 1987, *Canada Gazette* Part II, Vol. 122, No. 2 at 750.
4. R.S.C. 1985, c. 41 (3rd Supp.).

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The relevant portion of the Order reads as follows:

> Moulding compositions of the following, including partially formulated moulding compositions:
>
> 7902
>
> **Saturated polyesters** of tariff item No. 3907.99.00 and **goods** of tariff item No. 3907.40.10, 3907.40.90, 3907.50.00, 3907.60.00 or 3915.90.50, excluding the following:
>
> Polyethylene terephthalate, having a titanium dioxide delustrant content between 0.2% and 0.6%; Aromatic saturated polyester polyols. (Emphasis added)

The classification of the product in issue under tariff item No. 3907.60.00 of Schedule I to the *Customs Tariff* as polyethylene terephthalate is not in question. In fact, the two main questions raised with respect to the classification issue relate to the meaning of the words "[m]oulding composition" used in the Order and, alternatively, to the meaning of the word "composition" in Supplementary Note 2(a) to Chapter 39 of Schedule I to the *Customs Tariff*, which reads as follows:

> For the purpose of classification within any one subheading of this Chapter, the expression "composition" means only those polymers, copolymers, polymer blends and chemically modified polymers containing non-polymeric substances such as:
>
> (i) initiators, activators and catalysts, to assist in the action or use of the polymeric substances in some intended process;
>
> (ii) colourants. (Emphasis added)

At the hearing, the appellants, the respondent and the intervener each called an expert witness in the area of chemistry. In addition, the appellants and the intervener each called a witness to testify as to the practice in the industry.

Mr. Perry Watson, Chief Operating Officer at Richards Packaging Inc., first testified on behalf of the appellants. Mr. Watson said that Richards Packaging Inc. imports and uses PET resin as a raw material in the manufacture of plastic containers for the food, chemical and water industries. Mr. Watson indicated that the clarity of the plastic container is critically important, especially with respect to certain products, such as bottled water, because, if a yellow hue developed in the PET resin, it would be detrimental to the sale of the end product. Mr. Watson explained that, further to discussions with his suppliers on how to improve the goods and eliminate the yellow hue, it was decided to add cobalt acetate in the production process of the PET resin. Mr. Watson also testified about three communications from his suppliers[5] which, he said, confirm that cobalt acetate is added to the product in issue as a colourant. Mr. Watson added that competitors, and generally the processors of plastic materials, consider the product in issue a moulding composition, a fact which he said is corroborated by letters from other competitors in the appellants' industry.[6]

Dr. William Edward Fidler, who holds a PhD in chemistry, was called as an expert witness for the appellants and told the Tribunal that the product in issue is a combination of ethylene glycol, diethylene glycol and terephthalic acid, and that cobalt acetate, a non-polymeric substance, was added as a colourant in some cases. Dr. Fidler explained that cobalt carries a purple-violet colour which results from its inherent combination of blue and red. He further explained that purple is the perfect complement to yellow and that, by adding a little cobalt acetate in the production of the product in issue, a neutral tint is obtained. This, he

5. Exhibit A-1.
6. Exhibit A-2.

maintained, is recognized in a patent dealing with the clarity of copolyester which was assigned to Eastman Chemical Company in 1997.[7] In Dr. Fidler's opinion, there is no doubt that cobalt acetate has imparted its own colour to the product in issue, that it has masked the unwanted hue in the PET resin and, therefore, that it constitutes a colourant, even though the final colour depends upon the inherent colour of the base material. In cross-examination, Dr. Fidler mentioned that cobalt acetate also serves as a catalyst both for polymerization and for reducing the yellowing. Dr. Fidler also admitted that he did not know exactly where, in the manufacturing process, cobalt acetate was added. But, if used as a colourant, he said, it is very likely that the cobalt acetate would be added at the pelletization stage, just prior to going into the pelletizing extruder, whose compounding action would thoroughly mix the additives. In response to questions raised by the panel, Dr. Fidler explained that cobalt acetate would be introduced at the beginning of the production process when it is used as a polymerization catalyst. Dr. Fidler also said that, based on the number of parts per million (ppm) of cobalt found in the product in issue, it is possible that the cobalt acetate was used as both a catalyst and a colourant. However, he admitted that no one could be sure whether the cobalt acetate was added early or late in the process, as a catalyst or as a colourant.

Mr. Brian J. Finch, Chief, Polymer Products Laboratory, Laboratory and Scientific Services Directorate of the Department of National Revenue (Revenue Canada), testified at the hearing as an expert witness called by the respondent. Mr. Finch testified that samples of the three types of product in issue were sent to Revenue Canada's laboratory for analysis. According to the test results, none of the samples was a "composition" based on the definition of that word in Supplementary Note 2(a) to Chapter 39. Mr. Finch explained that, further to receiving new information as to the presence of cobalt acetate, supplementary test results revealed only the presence of cobalt, in concentrations of 41, 64 and 80 ppm. Based on these numbers, further calculations were made using the chemical formula to determine the proportion of cobalt acetate in the samples. In the case of one brand name, 64 ppm of cobalt represented 110 ppm of cobalt acetate. Mr. Finch also testified that 10,000 ppm represents only 1 percent by weight and that the portion of cobalt acetate in the product in issue, as indicated above, is thus considerably less than 1 percent by weight and, therefore, could be considered a manufacturing impurity. He acknowledged that the reports concluded that the product would be considered a composition only if cobalt acetate acted as a colourant. On this last point, Mr. Finch admitted, in cross-examination, that the ultimate conclusion in the reports, that cobalt acetate does not impart its own reddish-violet colour but masks the unwanted yellowish hue of the PET resin, was based on information that Revenue Canada's laboratory obtained from Eastman Kodak Company. Mr. Finch reiterated, in cross-examination, that cobalt acetate does not impart its own reddish-violet colour, although, he admitted, it does change the colour of the PET resin.

Dr. Louis T. Germinario, Research Associate, Physical & Analytical Chemistry, at Eastman Chemical Company, testified as an expert witness on behalf of the intervener. Dr. Germinario explained the manufacturing process of PET resin. At the beginning of the melt phase, ethylene glycol, terephthalic acid and catalysts are added to a reactor vessel. At the end of the melt phase, the product is pelletized. The pellets are solidstated so as to build up the intrinsic viscosity required to make bottles of sufficient strength. Depending on the production process that is being used (Dr. Germinario referred to different methods of production based on the different patents that exist), a series of catalysts are added either to help in the polymerization process or to improve the colour. Dr. Germinario also explained that one of the yellow complexes that is formed in the polymers is associated with the presence of acetaldehyde. As a catalyst to prevent the formation of acetaldehyde, he said, cobalt must be added at the beginning of the production process at the same time than other catalysts; otherwise, the acetaldehyde remains, and the polymer does not

7. Exhibit A-10.

respect the industry's specifications for clear bottle grade PET resin. Dr. Germinario also explained that, in addition to creating an unwanted colour, acetaldehyde creates an unwanted taste. In response to questions raised by the panel, Dr. Germinario clarified that if cobalt is used as a colourant, that is, in the latter stage of the manufacturing process, the product will have a high level of acetaldehyde, and, thus, will still not respect the industry's specifications because the final products, that is, the bottles, will carry the taste of acetaldehyde. Dr. Germinario also said that phosphorous is added to render the catalysts inactive once they have done their work. This prevents the formation of other by-products, including acetaldehyde. In Dr. Germinario's view, the amount of cobalt found in Revenue Canada's laboratory test results is consistent with cobalt having been used in catalytic activities. In cross-examination, Dr. Germinario admitted that, in the manufacturing process that he described, the action of cobalt acetate gives the final product a different colour and less of a yellow hue. However, in response to a question from the panel, he further qualified this process as a colour control process whereby the formation of a colour is prevented.

Mr. Jean M. Grondin, Sales Manager, U.S. & Canada Plastics Sales, at Eastman Chemical Company, appeared as a witness on behalf of the intervener. Mr. Grondin affirmed that the industry letters, produced by the appellants as Exhibit A-2 to support their contention that clear PET resin constitutes "[m]oulding compositions," do not include major converters of PET resin in Canada. Mr. Grondin also explained that neither he nor his customers ever referred to a moulding composition when talking about PET resin, rather it is always referred to as "PET bottle polymer." Regarding the presence of acetaldehyde and its unwanted taste, Mr. Grondin confirmed that this is a major concern of the industry, especially the bottled-water industry. In cross-examination, he admitted that this would not be a concern if the end users were not sensitive about tasting acetaldehyde.

The appellants' representative argued, with respect to the classification issue, that the product in issue is a moulding composition within the meaning of Code 7902 of the Order. The representative added that, while these terms are not defined in the *Customs Tariff*, the evidence presented by Mr. Watson, who has 30 years of experience, is that the product in issue is referred to as a moulding composition. This evidence, the representative continued, is supported by statements made by representatives of the industry. Alternatively, the representative contended that the product in issue still qualifies under Code 7902 when the words "moulding" and "compositions" are interpreted individually. First, he argued, there is no question that the product in issue is for moulding. Second, the evidence reveals that the product in issue, being a polymer, qualifies as "composition" under the ordinary definition of that word, which, he said, refers to "[t]he combining of distinct parts or elements to form a whole.[8]" The representative added, in this regard, that the definition of the word "composition" in Supplementary Note 2(a) to Chapter 39 does not apply in this case, since it is expressly limited to the classification of goods within the headings of Chapter 39. There are situations, he further said, where definitions apply throughout the nomenclature, but this is clearly not one of those situations, as highlighted by the words contained at the beginning of Supplementary Note 2(a). However, even when applying that definition, the representative continued, the product in issue still qualifies under Code 7902 because cobalt acetate, which is a non-polymeric substance, is used as either a colourant or a catalyst. In his view, there is ample evidence, including a patent held by the intervener itself, which recognizes that cobalt acetate can be used as a colourant. The representative maintained, in this regard, that there is no evidence to sustain that it is impossible to use cobalt as a colourant. Furthermore, it was recognized that some end users may not even care about the degradation in taste that can be caused by by-products when cobalt is added at a later stage. However, if the Tribunal were to find that cobalt is not a colourant, the representative further argued that, at the least, it constitutes a catalyst that is used to assist in

8. *Transcript of Public Argument*, November 9, 1998, at 8.

the production of a clear bottle and, thus, that the product still qualifies as a catalyst under the definition in Supplementary Note 2(a).

The central point of the respondent's position is to dispute that the product in issue is a "composition" as defined in Supplementary Note 2(a) to Chapter 39. On the basis of that definition and given the evidence, counsel for the respondent argued that the question is whether the cobalt found in the samples of the product in issue either acted as a colourant or constituted a catalyst for the purpose of that note. Counsel argued that subsection 68(3) of the *Customs Tariff*, which follows in part, requires the Tribunal to consider the definition in Supplementary Note 2(a):

> The words and expressions used in Schedule II, wherever those words and expressions are used in Schedule I, have the same meaning as in Schedule I.

Counsel for the respondent added that the cobalt acetate present in the product in issue is in the nature of a manufacturing impurity, that is, 1 percent or less by weight, which is an exception to the application of the definition of "composition" in Supplementary Note 2(a) to Chapter 39 that is set forth in Supplementary Note 2(b). Counsel further argued that cobalt acetate is not a colourant, since it does not impart its own reddish-violet colour to the product in issue, but rather masks the yellow colour of the PET resin. Furthermore, counsel added, the evidence reveals that, using cobalt acetate as a colourant is not the best manufacturing process. Thus, in light of that evidence, counsel suggested that it is not likely that the product in issue was even made based on that process. Counsel maintained that, according to Dr. Germinario, cobalt acetate was used at the very beginning of the melting phase as a catalyst to prevent yellowing from forming. Moreover, cobalt acetate not only prevents that colour from forming but also impedes the formation of acetaldehyde and its accompanying taste. The main function of cobalt, counsel added, is clearly to act as a catalyst so as to prevent degradation by-products such as yellowing and bad taste. That being said, the cobalt acetate used in this process is not a catalyst within the meaning of Supplementary Note 2(a) because it is neutralized once phosphorous is added. Supplementary Note 2(a), counsel argued, deals with the situation where a catalyst is added to play a further role, for example, to help the expansion of a polymer for some definite purposes, such as for insulation. In the case at hand, cobalt is no longer a catalyst after the addition of phosphorous, and it does not assist in the further action or use of the product in an intended process, as provided in Supplementary Note 2 (a).

The intervener's representative basically supported the respondent's position. He added that, contrary to the expert witness called by the appellants, the testimony of Dr. Germinario is based on his own current and direct knowledge as a research associate supporting the manufacture of clear bottle grade PET resin. The representative also questioned the evidence submitted by the appellants, pointing out that letters from the industry in support of the appellants' position included letters from the appellants themselves.

With respect to the jurisdictional issue, the appellants asked the Tribunal to set aside the re-determinations made by a designated officer under paragraph 61(e) of the Act, on the grounds that they are not valid decisions because they were not made under conditions deemed advisable by the Minister of National Revenue, which were described in a memorandum. Those re-determinations preceded the further re-determinations made by the respondent which are appealed to the Tribunal.

The Tribunal's jurisdiction in the current matter derives from section 67 of the *Customs Act* which refers to decisions made by the respondent under section 63 or 64. The decision made by a designated officer is not one contemplated in sections 63 and 64. Furthermore, as a statutorily created appellate body whose mandate is to deal with appeals under the Act, the Tribunal has no jurisdiction to judicially review a

designated officer's re-determination. This is a matter for the Federal Court of Canada. The Tribunal notes that the appellants' representative argued that it is now too late to apply to the Federal Court of Canada for a review of the designated officer's re-determinations. This may be the case, but the Tribunal cannot assume jurisdiction either for practical reasons or on the basis of equity. The Tribunal further notes that there can be situations where it may need to ascertain whether it is legally seized of an appeal under the Act: for instance, where an appellant claims that the respondent has made a decision under section 63 or 64 of the Act, but the respondent denies such a decision even exists;[9] or, where an appellant claims that the respondent's decision was not made within the statutory time limit.[10] However, this is not one of these situations, especially since the criteria that the designated officer allegedly applied incorrectly are not provided for in the statute, but in an administrative policy document.[11] Finally, the Tribunal notes that a Tribunal's decision concluding in this case that the designated officer's re-determinations are invalid would most likely lead to the conclusion that the respondent's further re-determinations are invalid as well, which, ultimately, would mean that the Tribunal is not legally seized of the appeals and has no jurisdiction to even deal with the classification issue. This conclusion would not be helpful for the appellants.

Regarding the classification issue, the Tribunal finds the evidence of Dr. Germinario compelling in light of the fact that the appellants were unable to provide convincing evidence as to the use of cobalt acetate as a colourant in the product in issue and given the Tribunal's conclusion that the definition of the word "composition" in Supplementary Note 2(a) to Chapter 39 applies in this case.

With respect to Supplementary Note 2(a) to Chapter 39, the Tribunal believes that subsection 68(3) of the *Customs Tariff* directs the Tribunal to consider the definition of the word "composition" contained therein. In the Tribunal's view, once that first step is made, the definition is no longer limited to the classification within the subheadings. The reasons for that decision are as follows. First, in *Atlas Alloys, A Division of Rio Algom Limited* v. *The Deputy Minister of National Revenue*,[12] the Tribunal accepted to use a definition set forth in section 4 of the *Customs Tariff*, even though that provision provided that it applied to Schedules I and II and was silent as to the codes contained in a customs duties reduction or removal order. The Tribunal concluded that tariff codes provided in an order made under section 68 of the *Customs Tariff* and those in Schedule II to the *Customs Tariff* were part of "an integrated system of concessionary provisions for the reduction or removal of customs duties.[13]" The situation at hand is similar. This approach is also in keeping with two important principles of legislative interpretation. The first principle, which relates to the grammatical or literal method of interpretation, recognizes the need to determine the meaning of a word within the context of the statute.[14] The second principle, referred to as "uniformity of expression," relates to the contextual and logical method of interpretation and deems that a word must maintain the same

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9. See V*ilico Optical Inc.* v. *The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-94-365, May 7, 1996; and *Philips Electronics Ltd.* v. *The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-95-224, December 18, 1997.
10. See *Douglas Anderson and Creed Evans* v. *The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-89-234, April 6, 1992, at 2 (on appeal to the Federal Court of Canada, the decision was returned to the Tribunal, but only on the classification issue, not on the jurisdiction issue).
11. Memorandum D11-6-1, *Determination/Re-determination and Appraisal/Re-appraisal of Goods*, Department of National Revenue, June 19, 1986.
12. Canadian International Trade Tribunal, Appeal No. AP-95-194, November 22, 1996.
13. *Ibid.* at 6.
14. *C.J. Michael Flavell* v. *The Deputy Minister for National Revenue for Customs and Excise*, [1997] 1 F.C. 640 at 662-63.

meaning throughout the statute or regulation in which it appears.[15] Furthermore, paragraph 15(2)(*b*) of the *Interpretation Act*[16] provides that an interpretation provision must be read and construed "as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.[17]" While subsection 68(3) of the *Customs Tariff* could have been clearer as to its application to orders made under subsection 68(1), the fact that it only refers to Schedule II appears to be more in the nature of an omission than the expression of an intention that this interpretation provision should definitively not apply to such orders. In this case, the Order itself uses words contained in Schedule I and, as submitted by counsel for the respondent, it makes reasonable sense to rely on the definition in Supplementary Note 2(a). Finally, as to the argument of whether the Tribunal should consider the definition of the word "composition" in Supplementary Note 2(a), given that the expression used in Code 7902 is "[m]oulding compositions," the Tribunal notes that, in *Simmons Canada Inc. and Les Entreprises Sommex Ltée* v. *The Deputy Minister of National Revenue*,[18] it accepted to rely on the definition of the word "furniture" in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[19] in order to interpret the term "upholstered furniture" contained in a code.

Once it is decided that the definition in Supplementary Note 2(a) to Chapter 39 applies, the Tribunal is of the view that the words "[f]or the purpose of classification within any one subheading of this Chapter" at the beginning of the note do not restrict its application to matters of classification within subheadings of that chapter. The intent of subsection 68(3) of the *Customs Tariff* is clear; words in Schedule II, and, as a result of the Tribunal's decision above, words in the Order should also have the same meaning as in Schedule I "wherever those words and expressions are used in Schedule I." Thus, the Tribunal is convinced that, in applying subsection 68(3) in the context of Supplementary Note 2(a), it must simply apply the definition regardless of its introductory sentence.

With respect to the evidence in this case, the Tribunal notes that the onus of proof in this matter is on the appellants. In *Assessment Commissioner* v. *Mennonite Home Association*,[20] the Supreme Court of Canada held that "[i]t is, of course, clearly established that although the words of the statute must plainly assess the tax in order to bring the subject within the levy, the subject must, in turn, clearly establish that his case falls within the exemption in order to claim his benefits[21]" (emphasis added). This principle has been applied by the courts in case law involving different tax statutes.[22] The Tribunal is of the view that the principle applies with respect to these appeals, given the overall scheme of the Act, the *Customs Tariff* and

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15. P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Yvon Blais, 1991) at 279.
16. R.S.C. 1985, c. I-21.
17. As per subsection 2(1) of the *Interpretation Act*, the word "enactment" includes any act or regulation, and "regulation," in turn, includes an order made in the execution of a power conferred by or under the authority of an act.
18. Canadian International Trade Tribunal, Appeal Nos. AP-96-063, AP-96-085 and AP-96-089, September 15, 1997.
19. Customs Co-operation Council, 2nd ed., Brussels, 1996.
20. (1972), [1973] S.C.R. 189.
21. *Ibid.* at 194.
22. *St. Lawrence Power Co.* v. *Minister of Revenue*, Ontario High Court of Justice, 23 O.R. (2d) 61, November 22, 1978; *Colonial Realty Service Ltd.* v. *Canada (Minister of National Revenue)*, Tax Court of Canada, [1987] T.C.J. No. 210, March 27, 1987; and *Optimism Place Second Stage Residences* v. *Stratford (City)*, Ontario Court (General Division), 11 O.R. (3d) 534, October 26, 1992.

related statutes, which is to levy taxes and duties on imported goods,[23] and because the appellants are seeking the application of an exception provision that removes the customs duties normally applicable on such goods.

The Tribunal further notes that the appellants produced, as exhibits, letters from the producers of the product in issue that affirmed that they used cobalt acetate as a colourant. Rule 22 of the *Canadian International Trade Tribunal Rules*[24] allows for the production of such documents as evidence, even though the appellants have not made available to the Tribunal testimony with respect to the matters set out in the documents other than that of Mr. Watson. However, Rule 22 does state that the Tribunal may give these documents "whatever weight is appropriate." The Tribunal also notes that the expert called by the appellants' representative testified, on the basis of that information, that, while he was unaware when, in the manufacturing process, cobalt acetate was added, it would be added, in his view, at a latter stage, very likely at the pelletization stage.

On the other hand, Dr. Germinario, the expert called by counsel for the respondent, testified that the yellowing of the PET resin is due, among other things, to the presence of by-products, especially acetaldehyde, which also carries an unwanted taste. Dr. Germinario said that, in order to prevent the formation of acetaldehyde, cobalt and other catalysts are added at the same time at the beginning of the manufacturing process. After the catalysts have accomplished their action, phosphorous is then added to neutralize them. According to his testimony, if cobalt acetate is used as a colourant in what he described as the final stage of the manufacturing process, the PET resin will have a high level of acetaldehyde, and the end products will carry its unwanted taste. The Tribunal notes, in this regard, that, despite the suggestion of the appellants' representative that perhaps this was not an issue for the appellants and its customers, his own witness, Mr. Watson, testified that the product in issue is processed into plastic containers which are used in the food, chemical and bottled water industries. Clearly, the unwanted taste would be detrimental to the food and the bottled water industries, as revealed by the evidence. The Tribunal also believes that, if cobalt acetate were to be used as a colourant, high levels of acetaldehyde in the PET resin would make it fail the industry's specifications for the manufacture of clear bottles.

The Tribunal is further persuaded that cobalt acetate is not a "colourant" within the ordinary meaning of the word,[25] since it is convinced that it was added to prevent the colour from forming rather than to modify the hue of the PET resin. Dr. Germinario described the use of cobalt as part of a colour control process, and the patent on which the appellants relied in Exhibit A-10 mentions "color control agent residues," not colourant, when referring to cobalt and other substances.

Thus, in a nutshell, the Tribunal is convinced that cobalt acetate is added to the PET resin as a catalyst in the polymerization process to control the formation of acetaldehyde. The Tribunal notes that, at the hearing, the appellants' representative strove to have cobalt acetate recognized as a catalyst for the purpose of paragraph (i) of Supplementary Note 2(a) to Chapter 39. However, it is clear from the specific wording of that provision that the "catalysts" contemplated therein are those that assist in the action or use of the polymeric substances in some intended process. The evidence, on the contrary, is that the polymerization

23. See sections 2 ("duties") and 17 of the Act.
24. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.
25. The appellants' representative offered the following definition: "Something, especially a dye, a pigment, an ink, or a paint, that colors or **modifies the hue** of something else," (emphasis added) Appellants' brief at 10.

catalysts of the product in issue have been rendered inactive with the addition of phosphorous in order to avoid undesirable by-products to form.

For all these reasons, the appeals are dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Richard Lafontaine
Richard Lafontaine
Member