Docket: 2013-4000(GST)G

BETWEEN:

IKE ENTERPRISES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 5, 2016, at Vancouver, British Columbia.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Michel Bourque Jacqueline A. Fehr
Counsel for the Respondent:	Victor Caux Matthew Turnell

JUDGMENT

The Appeal from the reassessment made under the *Excise Tax Act* for the reporting periods from May 1, 2009 to December 31, 2011, by Notice of Reassessment dated July 26, 2013, is hereby granted and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the food products described as crystallized ginger and granola were zero-rated while the sticks were excluded, all in accordance with the attached Reasons for Judgment.

The Appellant is entitled to costs in accordance with the applicable Tariff reflecting its success on two of the three products. Alternatively, the parties may choose to apportion costs *pro-rata* to the volume of sales of the subject products during the reporting periods. If the parties are unable to agree, written submissions shall be submitted to the Court within 60 days from the date hereof.

Signed at Ottawa, Canada, this 12th day of April 2017.

"Guy Smith"

Smith J.

Citation: 2017 TCC 59
Date: 20170412
Docket: 2013-4000(GST)G

BETWEEN:

IKE ENTERPRISES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

[1] The Appellant appeals from a Notice of Reassessment issued by the Minister of National Revenue (the "Minister") under the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the "Act") for the reporting periods from May 1, 2009 to December 31, 2011.

I. Overview

[2] The Act provides that food or basic groceries are zero-rated meaning that they are subject to GST at the rate of 0%. However, it also provides a list of food items that are excluded and therefore subject to GST at the regular rate.

[3] The Minister alleges that the Appellant failed to collect and remit GST on the sale of certain food products that were excluded by virtue of section 1 of Part III of Schedule VI of the Act. Those food products are as follows:

1. Crystallized ginger;

2. Sticks (made of wheat, rice and spelt);

3. Granola.

[4] For reasons set out below, the appeal should be referred back to the Minister for reconsideration and reassessment on the basis that the crystallized ginger and granola are zero-rated while the sticks are excluded and thus taxable.

II. The Relevant Facts

[5] The Appellant is a manufacturer and wholesale distributor of natural food products carrying on business as "Left Coast Naturals". Ian Walker testified on its behalf. As one of the founders and its current president, he described the company's underlying philosophy as the distribution of "organic natural healthy foods made from whole foods and natural ingredients".

[6] The company started *circa* 1997 as a manufacturer and distributor of proprietary natural food products but evolved over time to include the manufacture of private label products for retailers such as Loblaws, Trader Joe's and Whole Foods. This eventually led to the distribution of natural food ingredients in bulk that customers would use for food preparation in their deli departments or for sale in their bulk bins. Other customers, such as bakeries, used the bulk ingredients directly in their baked products. The Appellant's business also evolved to include the distribution of pre-packaged organic food products made by various other manufacturers.

[7] The three food products in question were all sold in bulk to retailers for sale in their bulk bins. As will be noted below, some were also sold in various pre-packaged sizes.

Crystallized ginger

[8] According to Mr. Walker, the Appellant eventually became a large bulk distributor of crystallized ginger sourced from a manufacturer in China. He explained that this product originated from the ginger root, that it was peeled, cubed and boiled in a sugar syrup to reduce the natural spiciness and then coated with sugar crystals to ensure that the end product did not stick together in a clump.

[9] The crystallized ginger was typically packaged in clear plastic bags and delivered to customers in ten to twenty-five pound cardboard boxes. This was then put into bulk bins that were typically labelled "Organic crystallized ginger" or used by customers in their deli department to make food products such as buns, scones, muffins, etc. The Appellant also sold this product in a 525 gram clear plastic re-sealable container.

[10] In terms of classification for GST purposes, Mr. Walker indicated that they consulted with and relied on their customs import broker. They also considered the use of the product by their customers and determined that it was mainly being used as a baking ingredient similar to dried fruit. One particular customer, identified as Terra Breads, used the ginger directly in its baked goods.

[11] With respect to the 525 gram containers, Mr. Walker explained that it was sold to natural food stores or grocery stores and sometimes sold in the bulk bin department as a more convenient format based on individual customer preferences.

[12] In terms of marketing to its customers, the crystallized ginger appeared in the Appellant's product and price lists under the category of "Baking Ingredients" for marketing material directed to bakeries or under the category of "Organic Dried Fruit" for other customers who typically placed it in their bulk bins.

[13] During cross-examination, Mr. Walker acknowledged that the 525 gram packages contained a nutritional label identifying the main product as ginger followed by sugar. It also specified that for every 40 grams serving, there was 30 grams of sugar. Mr. Walker clarified that this included naturally occurring sugar. The actual percentage of added sugar was not specified.

[14] Mr. Walker resisted the suggestion that the crystallized ginger could be used as a sweet treat or candy unless it was candied ginger where sugar was the primary ingredient. His evidence was that the Appellant had never sold crystallized ginger as a candy and that he had never seen it being sold in the candy section of his customers' bulk bins. He did acknowledge that prior to the period in question, the Appellant had also distributed 160 gram packages of crystallized ginger under the brand name "Skeet and Ike's Snacks", for which it likely charged GST. That package was not in issue in this appeal.

[15] Rebecca Lawrence testified on behalf of the Respondent and identified herself as an appeals officer with the Canada Revenue Agency with a business degree and concentration in accounting. She indicated that she had reached the conclusion that the crystallized ginger was excluded from being zero-rated on the basis that it was a candy or confectionary that could be classed as a candy.

[16] She indicated that she had sampled the ginger sold by the Appellant and found it to be "very sweet" as it was coated with sugar, but that it also had a slightly hot ginger flavour. She explained that in her opinion, crystallized ginger could be either eaten as-is or used as a baking ingredient for various baked goods.

[17] She also indicated that she had purchased crystallized ginger from a local confectioner known as Purdy's Chocolates. She noted that it had the same nutritional value or sugar content per serving as the Appellant's ginger. The Appellant's counsel objected to this testimony on the basis of, *inter alia*, relevance.

Sticks (made of wheat, rice and spelt)

[18] The Appellant also sold three varieties of "sticks" that Mr. Walker described as being a wheat-based "cracker like product" with a "savoury but bland" taste. One included regular wheat while the other included spelt, being an ancient variety of wheat with lower gluten. The third variety was rice sticks that included "unbleached wheat flour, canola oil, puffed wild rice, salt and turmeric".

[19] According to Mr. Walker, the "sticks" were rectangular shaped and were made from a dough mixture that was sliced and then fried. All three varieties were manufactured in the US by a company called Old School Snacks.

[20] The sticks were delivered to customers in clear plastic bags of three to ten pounds packaged in a cardboard box. A smaller 150 gram re-sealable clear plastic tub was prepared in the Appellant's facilities with a label indicating "Left Coast Bulk Foods". Most of the sticks were sold to stores for their bulk bin business and, according to Mr. Walker, located near the trail mix or rice crackers. They were included in a product list under "Organic Snacks".

[21] During cross-examination, Mr. Walker acknowledged that these products were marketed as "sticks", eaten as-is without further preparation, and sold as an organic or natural snack. In terms of texture, the sticks were described as "crunchy" with a slightly salty taste (the turmeric was used as a preservative or colour-enhancer).

[22] Rebecca Lawrence testified that the sticks were deemed excluded because of their properties and labelling and specifically because of their description as "sticks". She described them as "hard, crunchy and brittle" with a texture "like a pretzel" and opined that they would typically be eaten by the handful or bowlful.

[23] During cross-examination, Ms. Lawrence acknowledged that the main reason for finding that they were excluded was the use of the word "sticks" but also admitted that the preparation of the sticks was similar to a cracker that was zero-rated.

The Granolas

[24] The Appellant manufactured a granola product that was sold in bulk to customers for their bulk bins. Although the Minister initially treated this product as being excluded and therefore subject to GST, she later accepted the Appellant's position that it was zero-rated since most customers sold it in the cereal section of their bulk bins.

[25] At issue are two pre-packaged granola products distributed by the Appellant and manufactured by a local BC company known as "Martin's Marvellous Naturals". They were sold in 360 gram cardboard packages that were rectangular in shape (approximately three inches square and eight inches high) and had a few openings so it was possible to view the granola wrapped in a cellophane bag. The package carried the list of ingredients, the usual nutritional information and various other information (i.e. gluten free, no nuts, only seeds, etc.) as well as the notation "Marvellous with vanilla yogurt…or snack on it right out of the box!"

[26] According to Mr. Walker, these products were "sold in every single store in the cereal section, with the cereals". Since they were produced locally, they did not consult a customs broker but noted that the manufacturer sold it as being zero-rated.

[27] He testified that the granola was a "loose-flowing cereal" and that it was "next to impossible to snack on it", meaning right out of the box, since there were no chunks. It would typically be eaten with milk or yogurt.

[28] During cross-examination, he explained that while there was no specific marketing material describing the granola product as a cereal, there were promotional lists promoting the brand "Martin's Marvellous Naturals" with a list of their various products including the subject granola under the "cereal section".

[29] Rebecca Lawrence confirmed that since there was no labelling for the bulk granola sold in the bulk bins, the Minister accepted that it was zero-rated since it was sold with other cereals. The difficulty she had with the Martin's Marvellous granola packages was the absence of labelling or packaging to suggest it was being sold as a cereal. The words "cereal" or "breakfast cereal" did not appear on the packaging.

[30] However, during cross-examination, when asked whether she agreed that the pre-packaged granola was sold in the breakfast aisle of a typical grocery store, she admitted that "Yes, it might be".

III. The legislative scheme and case law

[31] Turning to the statutory framework, subsection 165(1) of the Act sets out the basic rule for the imposition of GST calculated at the rate of 5%. However, subsection 165(3) then provides that the rate on goods that are zero-rated is 0%.

[32] Subsection 123(1) provides that a "zero-rated supply" ("fourniture détaxée") refers to goods that are described in Schedule VI of the Act that includes ten basic categories of which one is "Basic Groceries":

> Basic Groceries
>
> 1 Supplies of food or beverages for human consumption (including sweetening agents, seasonings and other ingredients to be mixed with or used in the preparation of such food or beverages), other than supplies of
>
> (a) wine, spirits, beer, malt liquor or other alcoholic beverages;
>
> (b) [Repealed, 1997, c. 10, s. 137]
>
> (c) carbonated beverages;
>
> (d) non-carbonated fruit juice beverages or fruit flavoured beverages, other than milk-based beverages, that contain less than 25% by volume of
>
> (i) a natural fruit juice or combination of natural fruit juices, or
>
> (ii) a natural fruit juice or combination of natural fruit juices that have been reconstituted into the original state,
>
> or goods that, when added to water, produce a beverage included in this paragraph;
>
> (e) candies, confectionery that may be classed as candy, or any goods sold as candies, such as candy floss, chewing gum and chocolate, whether naturally or artificially sweetened, and including fruits, seeds, nuts and popcorn when they are coated or treated with candy, chocolate, honey, molasses, sugar, syrup or artificial sweeteners;

(f) chips, crisps, puffs, curls or sticks (such as potato chips, corn chips, cheese puffs, potato sticks, bacon crisps and cheese curls), other similar snack foods or popcorn and brittle pretzels, but not including any product that is sold primarily as a breakfast cereal;

(g) salted nuts or salted seeds;

(h) granola products, but not including any product that is sold primarily as a breakfast cereal;

(i) snack mixtures that contain cereals, nuts, seeds, dried fruit or any other edible product, but not including any mixture that is sold primarily as a breakfast cereal;

(j) ice lollies, juice bars, flavoured, coloured or sweetened ice waters, or similar products, whether frozen or not;

(k) ice cream, ice milk, sherbet, frozen yoghurt or frozen pudding, non-dairy substitutes for any of the foregoing, or any product that contains any of the foregoing, when packaged or sold in single servings;

(l) fruit bars, rolls or drops or similar fruit-based snack foods;

(m) cakes, muffins, pies, pastries, tarts, cookies, doughnuts, brownies, croissants with sweetened filling or coating, or similar products where

(i) they are prepackaged for sale to consumers in quantities of less than six items each of which is a single serving, or

(ii) they are not prepackaged for sale to consumers and are sold as single servings in quantities of less than six,

but not including bread products, such as bagels, English muffins, croissants or bread rolls, without sweetened filling or coating;

(n) beverages (other than unflavoured milk) or pudding, including flavoured gelatine, mousse, flavoured whipped dessert product or any other products similar to pudding, except

(i) when prepared and prepackaged specially for consumption by babies,

(ii) when sold in multiples, prepackaged by the manufacturer or producer, of single servings, or

(iii) when the cans, bottles or other primary containers in which the beverages or products are sold contain a quantity exceeding a single serving;

(o) food or beverages heated for consumption;

(o.1) salads not canned or vacuum sealed;

(o.2) sandwiches and similar products other than when frozen;

(o.3) platters of cheese, cold cuts, fruit or vegetables and other arrangements of prepared food;

(o.4) beverages dispensed at the place where they are sold;

(o.5) food or beverages sold under a contract for, or in conjunction with, catering services;

(p) food or beverages sold through a vending machine;

(q) food or beverages when sold at an establishment at which all or substantially all of the sales of food or beverages are sales of food or beverages included in any of paragraphs (a) to (p) except where

(i) the food or beverage is sold in a form not suitable for immediate consumption, having regard to the nature of the product, the quantity sold or its packaging, or

(ii) in the case of a product described in paragraph (m),

(A) the product is prepackaged for sale to consumers in quantities of more than five items each of which is a single serving, or

(B) the product is not prepackaged for sale to consumers and is sold as single servings in quantities of more than five,

and is not sold for consumption at the establishment; and

(r) unbottled water, other than ice.

[My emphasis.]

[33] The term "Basic Groceries" itself is not defined in the Act except that a reading of the opening statement of section 1 of Part III of Schedule VI suggests that:

i) a food or beverage must be for human consumption; and

ii) this includes "sweetening agents, seasonings and other ingredients to be mixed with or used in the preparation of such food or beverages".

[34] Thus at the first stage of the analysis, the question will be whether the product in question is a food or beverage for human consumption. For example, some decisions have determined that certain products were not food for human consumption: *Vincent Chow Crane Martial Arts Ltd. v. R.*, (1999) G.S.T.C. 67 (TCC General Proceedings) and *Kandawala v. R.*, 2004 TCC 659.

[35] Once it has been established that a food or beverage is intended for human consumption (including seasoning and ingredients to be mixed with or used in the preparation of such food), the next consideration is whether that item has been specifically excluded. In other words, has Parliament, in its wisdom, excluded such food or beverage in paragraphs 1(a) to (r) noted above.

[36] I will add that a further analysis may be required to determine whether the statutory exclusion contains an overriding exception, such as, for example, paragraphs 1(f), (h) or (i) that exclude certain food items "unless they are sold primarily as a breakfast cereal". There are other overriding exceptions.

[37] In *1146491 Ontario Ltd. v. Her Majesty the Queen*, [2002] T.C.J. No. 248, (2002) G.S.T.C. 54, Justice C. Miller had to determine whether a salad kit (that included lettuce and various ingredients wrapped in zip-locked bags) for the preparation of a Caesar salad or Greek salad, was zero-rated as basic groceries or excluded as a prepared food. He provided the following overview (para. 12):

> [12] The Government made it clear from the early days of the Goods and Services Tax that basic groceries were not to be included in the tax base. Rather than attempting to define what is included in basic groceries, subsection 1(o.1) of Part III of Schedule VI sets out a list of exceptions from basic groceries. In reviewing the list, two themes become evident as to what type of foods are not to be considered basic groceries: snacks or junk food, including anything that most people would not find particularly healthy; foods intended to be eaten immediately after opening or removing from the packaging (…) Specifically, looking at the foods contained in subsections 1(o.1), (o.2), (o.3), (o.4) and (o.5), the common thread can perhaps more aptly be described as a total convenience food. These are foods that require no preparation - it is all done for you."

[38] Justice Miller concluded that the salad kits qualified as basic groceries since they had to be taken home to be assembled and that, while they were certainly more convenient than a mere head of lettuce, they were not ready-made.

[39] In *Kandawala v. Her Majesty the Queen*, 2004 TCC 659, 2004 G.T.C. 483 (Tax Court of Canada (Informal Procedure)), Justice G. Rip (as he then was) reiterated that the correct approach was to consider whether the food product in question was a supply of food for human consumption and if it was, to determine "whether it was excluded by any of the listed exceptions" (para. 6). He then listed several factors to be considered to determine whether a particular food item was excluded (para. 14):

> a) whether the item is specifically exempted by the enumerated list of exceptions found in Part III of Schedule VI to the Act;
>
> b) whether the item is one which would reasonably be considered a convenience food;
>
> c) whether the item is intended to be consumed immediately after opening or removing the packaging;
>
> d) whether the item requires the consumer to undertake additional preparation prior to consumption;
>
> e) whether the item is one that will be consumed (as opposed to, for instance, something that will be applied externally);
>
> f) whether the item is one that has traditionally been thought of as a basic food item;
>
> g) whether the item bears the attributes one normally associates with food (i.e. it is tasteful, its packaging displays a list of ingredients, it assuages hunger, etc.).

[40] In *Aliments Koyo Inc. v. Her Majesty the Queen*, 2004 TCC 286, 2004 G.T.C. 252, (Tax Court of Canada (Informal Procedure)), 2004 CCI 286, Justice Lamarre Proulx had to determine whether a "strawberry-flavoured soy beverage" was "a zero-rated supply" (para. 2). The Appellant in that case referred to the product as "soy milk" and described it as "a healthy highly nutritious vegetable alternative to dairy milk" (para. 5) that was not captured by the statutory exclusions that are directed at foods "without good nutritional value" (para. 9). Justice Lamarre Proulx rejected this argument finding that the soy milk was excluded by paragraph 1(d), adding that:

> [22] I do not read Part III of Schedule VI as requiring that a criterion of wholesomeness be met as a condition for obtaining the zero-rating of a supply, and I have neither the discretion nor the power to read such a criterion into Part III. Although a soy beverage may be a healthful food product, if it comes within one of the exceptions, it will not be a zero-rated supply.

[41] Counsel for the Respondent also referred to a number of decisions from the Canadian International Trade Tribunal (CITT), including *General Mills Canada Inc. v. Deputy Minister of National Revenue*, 1998 CarswellNat 6116 which involved the classification of goods for purposes of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.). The issue was whether a snack food called "fruit roll-up" was captured by the classification of "fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit…" or whether, as argued by the Respondent, it was "in the nature of confectionary". The Tribunal concluded that (para. 17):

> [17] (…) The evidence indicates that…[t]he two major ingredients by weight are the malto-dextrin and the sugar. These ingredients allow the goods in issue to be more like a confectionery than a purée and, when combined with the purée, create the end product, which, in the Tribunal's view, is a product marketed and sold as a confectionery, as reflected in their packaging and their description as cherry snacks made with real fruit. Thus, in the Tribunal's view, the evidence establishes that the goods in issue are goods put up in the form of a sugar confectionary (…).
>
> [My emphasis.]

[42] The Respondent also referred to the CITT decision of *Pfizer Canada Inc. v. Commissioner, CCRA*, [2003] C.I.T.T. No. 86, 8 T.T.R. (2d) 427, where the Tribunal was asked to determine whether "Halls cough drops" were a medicament or a confectionery. It concluded that based on "their marketing, packaging and use, which is for medicinal purposes … the goods in issue do not fall within the meaning of "confectionery" …"

[43] The Respondent also raised the issue of statutory interpretation for taxing statutes, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] S.C.J. 56:

> 11. (…) There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on

> textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.
>
> (…)
>
> 13. The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation (…)

[My emphasis.]

[44] Both parties submitted a number of definitions of food products from various sources. In *1146491 Ontario Ltd.*, *supra*, Justice C. Miller rejected various dictionary definitions of food products in favour of "the common understanding of a word" (para. 10):

> 10. There was agreement between counsel that the correct approach to this matter of interpretation can be found in the decision of *Shaklee Canada Inc. v. Minister of National Revenue* (1995), 191 N.R. 227 (Fed C.A.), which suggests it is appropriate to look at the common understanding of a word. Having agreed on this, both counsel went on to provide a number of dictionary definitions of salad. Frankly, these are of little or no assistance (…) What I will do however is determine if the Market Fresh salad kits are basic groceries or are exceptions to basic groceries.

[45] Finally, as noted in *Aliments Koyo Inc.*, *supra*, "According to the rules of statutory interpretation, a word must be taken in its ordinary meaning unless that word is given a specific meaning in the statute". (para. 24)

IV. Analysis

[46] As noted above, there was no question that the subject products were food for human consumption and the only issue before the Court was whether they were excluded by section 1 of Part III of Schedule VI of the Act.

[47] In considering this matter, it is important to keep in mind that while the Act is a general taxing statute the purpose of which is to raise government revenues, it also incorporates important policy objectives, one of which is to ensure that basic groceries are not subject to GST. It does so by providing that they are zero-rated.

[48] To the extent that the exclusions listed in section 1 of Part III of Schedule VI serve to exclude certain food and beverages for human consumption, I am of the view that these provisions should be narrowly construed. To take a broad interpretation of such exclusions would defeat the policy objective noted above.

[49] As indicated by Chief Justice Bowman (as he then was) in *United Parcel Service Canada Ltd. v. The Queen*, 2006 TCC 450, at paragraph 23:

> 23. In interpreting any legislation, including the GST provisions as well as the *Customs Act*, it is important to follow an approach that, where possible, achieves a sensible, practical and common sense result (*Maritime Life Assurance Co. v. The Queen*, [1999] G.S.T.C. 1 (T.C.C.), aff'd [2000] G.S.T.C. 89 (F.C.A.)) and one that is consonant with the scheme of the Act (*Highway Sawmills Ltd. v. M.N.R.*, 66 DTC 5116, per Cartwright J.)
>
> [My emphasis.]

[50] I will add that, since food and beverages are marketed and sold in an infinite variety of formats, it will be necessary to consider various indicia including packaging, labelling and product placement to determine whether such food or beverages can properly be characterized as basic groceries or whether they have been specifically listed or described in the statutory exclusions.

Crystallized ginger

[51] The Respondent takes the position that the crystallized ginger distributed by the Appellant is excluded by section 1(e) of the Act in that it is a "confectionery that may be classed as candy". As indicated above, a number of dictionary definitions were put before the Court including "confectionery", "comfit" and "sweetmeats" and it was argued that if the Court concluded that it was a confectionery, as it should, it did not matter that it was sold as a dried fruit or baking ingredient, since it was excluded. It was not possible that it be both.

[52] The Respondent's witness acknowledged that she had no training in food nutrition or consumer behaviour but testified that she had on occasion eaten crystallized ginger as a snack suggesting that it was a convenience food. She also indicated that she had recently purchased crystallized ginger at a local confectioner. I find that her testimony on this issue has limited probative value given her lack of expertise of the subject matter. Moreover, there was no evidence as to whether the crystallized ginger purchased by her was of the candied variety or not. It was established, in any event, that it was not the Appellant's product.

[53] The Appellant argued that its crystallized ginger was sold as either a "baking ingredient" or in the category of "organic dried fruit" (although it was in fact a root). While acknowledging that ginger could indeed be "candied", Mr. Walker indicated that the sugar content listed on the packaging label for its crystallized ginger included naturally occurring sugar with a light sprinkling of sugar. The first ingredient was still ginger.

[54] The Appellant's evidence was that it had never sold this product as a candy or confectionery nor seen it sold as such by its customers in their bulk bins.

[55] Taking a textual approach to the interpretation of section 1(e) of the Act, I find that the opening words "candies, confectionery that may be classed as candy, or any goods sold as candies", clearly suggest that it is primarily intended to exclude food that is commonly viewed and sold as candy where the first ingredient is in fact sugar or some other natural or artificial sweetener.

[56] As noted above, the Court must look at the common understanding of a word. I find that an average consumer would agree that a variety of dried fruit have naturally occurring sugar and can be eaten as a snack and yet cannot be compared to such items as candy apple or "fruit roll-up" (as considered in *General Mills Canada*, *supra*, where malto-dextrin and sugar were found to be the two major ingredients). While the ginger root is not a dried fruit, I accept the Appellant's position that it is similar to dried fruit and that it was properly included in a list of items under the heading "Organic dried fruit", the primary use of which was as a baking ingredient.

[57] I will add that Counsel for the Respondent acknowledged that chocolate chips and baker's chocolate are not captured by section 1(e) as a result of a CRA administrative position. I find that it is likely that most consumers would be surprised to learn that products sold in the baking section of a typical grocery store, could be subject to GST because they can be classified as candy or confectionery. I would have found that these items were simply baking ingredients and therefore zero-rated as basic groceries.

[58] Although there is little doubt that dried fruit, including the ginger root, can be candied and sold by a confectioner or even purchased and eaten as a snack, I am satisfied on a balance of probabilities that the crystallized ginger sold by the Appellant was neither a candy nor a confectionery for purposes of the exclusion set out in section 1(e). It was sold as a baking ingredient similar to a dried fruit. On

that basis, I conclude that the Appellant's crystallized ginger is zero-rated for purposes of the Act.

Sticks

[59] As noted above, the sticks sold by the Appellant were manufactured by a company called "Old School Snacks" and the evidence clearly established that they were sold as snacks and eaten as-is without further preparation.

[60] The Respondent argues that they fall within section 1(f) of the Act as being "chips, crisps, curls or sticks" and "other similar snack foods". The Respondent maintains that they are basically a convenience food and that nothing turns on their characterization as healthy snacks.

[61] The Appellant argues that the sticks are a wheat-based and cracker-like product sold as an "organic snack". The implication is that they are basically a bread product that is both wholesome and healthy. The significance of this description is that while section 1(m) excludes "cakes, muffins, pies, pastries (…)" from basic groceries, it then provides an exemption for "bread products". In other words, bread products are considered basic groceries and that would likely include crackers or even bakery-style bread sticks. The Respondent's witness admitted that the sticks in question were made like crackers that are zero-rated.

[62] The difficulty of course is that the Appellant's sticks were not sold as crackers or "bread sticks" or even as a bread product. Moreover, although the Appellant's witness explained that were made from "a dough mixture", he also stated that the pieces were then fried. I think most consumers would agree that bread products including crackers are in fact oven-baked and not fried.

[63] In the end, I find that nothing turns on the fact that the sticks were marketed as a healthy organic snack. On balance, I find that the sticks are a convenience food captured by the use of the words "other similar snack foods" and more specifically the use of the word "sticks" in section 1(f) of the Act.

The Granolas

[64] As noted above, while the Minister initially treated all the Appellant's granola products as being excluded, it later accepted that the granola sold for the bulk bins was zero-rated.

[65] The Respondent's witness indicated that CRA had given the Appellant the benefit of the doubt since the granola was neither labelled nor packaged. I find it is likely that she also logically accepted the Appellant's position that all its retail customers included the granola in the cereal section of their bulk bins.

[66] At issue are the pre-packaged granola products manufactured by "Martin's Marvellous Naturals". The difficulty with this product is that the irregular-shaped package does not conform to what most consumers would view as a typical cereal box. It is also unusual in that the package has several eye-shaped openings so that consumers can view the product and finally, in addition to the usual listing of ingredients and mandatory nutritional information, it has the notation "Marvellous with vanilla yogurt…or snack on it right out of the box!" It is apparent that the manufacturer intended to produce a package that would differentiate it in the market place from other more conventional cereal packages that are typically labelled "breakfast cereal".

[67] According to the Respondent, the labelling and packaging lead to the conclusion that it was not "sold primarily as a breakfast cereal" as set out in section 1(h) of the Act and that it was sold as a snack. Moreover, the Respondent argued that the product was included on a product or price list under the heading "cereals and granolas", suggesting that it could be one or the other.

[68] The Appellant argued that the Martin's Marvellous product was sold by its retail customers in the cereal section of the store to be eaten as a cereal. The Appellant's witness maintained that even if the packaging suggested it could be eaten "right out of the box", it was not really possible to do so given the loose consistency of the product. In any event, I am of the view that most consumers would agree that many types of breakfast cereals can be snacked "right out of the box" and the suggestion on the packaging that you can do so, does not change a breakfast cereal into a snack item or convenience food.

[69] While both counsel provided a definition of "breakfast cereal", I find that the common understanding of that expression is a cereal or similar product that is eaten with milk or hot water (as in porridge) but also with yogurt.

[70] While I agree that packaging and labelling will generally carry the day, I find that product placement within the grocery store is equally determinative. The Appellant's evidence was that its customers sold the product in question in the cereal aisle of the grocery store and the Respondent's witness did not dispute this.

[71] On the basis of the foregoing, I conclude that the Martin's Marvellous granola products were sold primarily as breakfast cereals. They are therefore zero-rated by virtue of section 1(h) of the Act.

V. Conclusion

[72] To conclude, the crystallized ginger and granola products are zero-rated and therefore not subject to GST while the sticks are excluded and thus taxable. I find that this conclusion is consistent with the authorities and underscores the importance of ensuring that the "Government's Policy of exempting basic groceries from tax is implemented sensibly and appropriately." (*1146491 Ontario Ltd.*, *supra*, at para. 11)

[73] The Appellant is entitled to costs in accordance with the applicable Tariff reflecting its success on two of the three products. Alternatively, the parties may choose to apportion costs *pro-rata* to the volume of sales of the subject products during the reporting periods. If the parties are unable to agree, written submissions shall be submitted to the Court within 60 days from the date hereof.

Signed at Ottawa, Canada, this 12th day of April 2017.

"Guy Smith"

Smith J.

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