

Docket: 2013-1768(EA)I

BETWEEN:

INTERNATIONAL CUSTOM PAK INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on January 6, 2014, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Agent for the Appellant:            Hanif Adatia  
Counsel for the Respondent:        Shane Aikat

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**JUDGMENT**

The appeal against an assessment made by the Minister of National Revenue for excise duty payable on packaged spirits pursuant to section 73 and subsection 122(1) of the *Excise Act, 2001 (Act)* and section 1 of Schedule 4 to the Act is dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 11<sup>th</sup> day of February 2014.

“Lucie Lamarre”

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Lamarre J.

Citation: 2014 TCC 44  
Date: 20140211  
Docket: 2013-1768(EA)I

BETWEEN:

INTERNATIONAL CUSTOM PAK INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Lamarre J.

[1] This is an appeal against an assessment made by the Minister of National Revenue (**Minister**) for excise duty payable on packaged spirits pursuant to section 73 and subsection 122(1) of the *Excise Act, 2001 (Act)* and section 1 of Schedule 4 to the Act. More specifically, the appellant was assessed for the following amounts (Amended Reply, paragraph 7):

- a) \$1,903 for the period from April 1, 2010 to April 30, 2010 (the “First Period”);
- b) \$11,457 for the period from May 1, 2010 to May 31, 2010 (the “Second Period”); and
- c) \$7,073 for the period from September 1, 2010 to September 30, 2010 (“the Third Period”).

[2] The parties filed a Partial Agreed Statement of Facts, which is reproduced below:

PARTIAL AGREED STATEMENT OF FACTS

The parties hereto, admit the following facts, provided that the parties may adduce further and other evidence not inconsistent with this Partial Agreed Statement of Facts:

1. The appellant is a privately owned Canadian corporation;
2. The appellant has a user's license under section 14 of the *Excise Act, 2001* (the *Act*);
3. The appellant manufactures personal care products including various sanitizing products in spray and gel form;
4. For the First Period, Second Period and Third Period (as defined in the respondent's Reply to the Notice of Appeal), the appellant purchased bulk, unpackaged alcohol containing at least 95% absolute ethyl alcohol by volume;
5. At the time the bulk alcohol was purchased, such alcohol was packaged in containers greater than 100 litres in capacity;
6. All such alcohol was used in the manufacture of sanitizing gels during the First Period, Second Period and Third Period;
7. During the First Period, Second Period and Third Period, the appellant used 171 litres, 1,031 litres and 637 litres of the bulk, unpackaged alcohol respectively to manufacture 272 litres, 1640 litres and 1,012 litres of sanitizing gels respectively;
8. At the time such sanitizing gels were manufactured, packaged and sold for consumption, such gels were not made in accordance with a formula for which the appellant had approval from the Minister of National Revenue (the "Minister");
9. The formulas, of which the sanitizing gels were made in accordance with, each received approval from the Minister on June 16, 2011;
10. Such sanitizing gels contained all of the alcohol referred to herein at paragraph 7 in a diluted form;
11. Upon manufacture, the sanitizing gels contained greater than 60% absolute ethyl alcohol by volume;
12. At the time the sanitizing gels were manufactured, packaged and sold for consumption, no duty was paid under the *Act* in respect of the alcohol contained therein;
13. The sanitized [*sic*] gels manufactured and packaged by the appellant in the First, Second and Third Periods, were packaged in containers each of which were [*sic*] less than 100 litres in capacity;
14. Such containers were not repackaged before being sold to consumers; and

15. The formulas, of which the sanitizing gels were made in accordance with, were approved and licensed by Health Canada's Natural Health Product Directorate on February 3, 2010 for purposes of the Natural Health Products Regulations and was [*sic*] assigned Natural Product Number 80015660 under such regulations — the formulas were not approved by the Minister for the purposes of the *Act* at that time (such approval of the Minister having been granted on June 16, 2011).

[3] In its notice of appeal, the appellant mentions that it was approached during the H1N1 pandemic to manufacture sanitizing gels. Due to the urgency of the situation, it started manufacturing the sanitizing gels while simultaneously working to complete the formulation submission for Canada Revenue Agency (**CRA**) approval.

[4] The appellant stated that their knowledge in “formulation development” and their use of sanitizing ingredients that were common in the industry assured them that the new sanitizing gel would be equal in performance and safety to the sanitizing spray previously approved by the CRA. In addition, the sanitizing gel formulation had already been approved by Health Canada’s Natural Health Products Directorate and been given a Natural Health Product number.

[5] The appellant also stated in its notice of appeal that a lengthy wait time for CRA approval could have cost it this business. Their intent was merely to expedite delivery of the products so to as retain business and provide timely service to a public in urgent need of the sanitizers.

[6] The appellant acknowledged that it did not comply with section 73 of the Act, which prohibits a licensed user from using or disposing of bulk alcohol other than, among other things, in an approved formulation. It also acknowledged that duty must be imposed for the infraction committed, but requested that, as a matter of fairness, this Court consider reducing the amount of duty assessed, given the unintentional nature of the offence.

[7] At the hearing, Mr. Hanif Adatia, president of the appellant, recognized that it was not true that the appellant had submitted the formulation for sanitizing gels to the CRA. In fact, the formula was approved on June 16, 2011, a few days after it was in fact submitted by Ms. Anna Thow, the CRA officer conducting the audit (the audit was conducted during the month of June 2011, the audit report completed on June 8, 2011, and the formula processed by the senior chemist at the Alcohol and Tobacco Section of the Science and Engineering Directorate (**SED**) of the Canada Border Services Agency on June 10, 2011 and approved on June 16, 2011, as shown

by Exhibit R-3 and Exhibit R-4). At the time of the approval, the gels had already been manufactured, packaged and sold.

[8] Further, the SED senior chemist confirmed that the unapproved gel formulations differed both as to the amount of alcohol used and as to the other ingredients from the approved spray formulations (Exhibit R-3 pages 4 and 6).

[9] This is why it was determined by the auditor that duty should be assessed against the appellant for the alcohol used in the unapproved formulations. No penalty was assessed pursuant to section 243 of the Act.

[10] The applicable provisions of the Act are reproduced hereunder:

**Excise Act, 2001**  
**S.C. 2002, c. 22**

INTERPRETATION

Definitions

2. The definitions in this section apply in this Act.

...

“alcohol” means spirits or wine.

...

“approved formulation” means

(a) any product made with alcohol by a licensed user in accordance with a formula for which the user has approval from the Minister; and

(b) any imported product that, in the opinion of the Minister, would be a product under paragraph (a) if it were made in Canada by a licensed user.

...

“bulk”, in respect of alcohol, means alcohol that is not packaged.

...

“duty” means, unless a contrary intention appears, the duty imposed under this Act and the duty levied under section 21.1 or 21.2 of the *Customs Tariff* and, except in Parts 3 and 4, includes special duty.

...

“licensed user” means a person who holds a user’s licence issued under section 14.

...

“Minister” means the Minister of National Revenue.

...

“non-duty-paid”, in respect of packaged alcohol, means that duty, other than special duty, has not been paid on the alcohol.

...

“packaged” means

...

(b) in respect of alcohol, packaged

(i) in a container of a capacity of not more than 100 L that is ordinarily sold to consumers without the alcohol being repackaged, or

(ii) in a marked special container.

...

“produce” means

(a) in respect of spirits, to bring into existence by distillation or other process or to recover; or

...

“spirits” means any material or substance containing more than 0.5% absolute ethyl alcohol by volume other than

(a) wine;

(b) beer;

(c) vinegar;

(d) denatured alcohol;

(e) specially denatured alcohol;

(f) fusel oil or other refuse produced as a result of the distillation process;

(g) an approved formulation; or

(h) any product containing or manufactured from a material or substance referred to in paragraphs (b) to (g) that is not consumable as a beverage.

...

PART 2  
LICENCES AND REGISTRATIONS  
LICENCES

Issuance

**14.** (1) Subject to the regulations, on application, the Minister may issue to a person

...

(c) a user's licence, authorizing the person to use bulk alcohol, non-duty-paid packaged alcohol or a restricted formulation;

...

Restriction — licensed user

**73.** A licensed user shall not use or dispose of bulk alcohol other than to

(a) use it in an approved formulation;

...

IMPOSITION AND PAYMENT OF DUTY ON ALCOHOL

Imposition — domestic spirits

**122.** (1) Duty is imposed on spirits produced in Canada at the rate set out in section 1 of Schedule 4.

Time of imposition

(2) The duty is imposed at the time the spirits are produced.

...

Duty payable when packaged

**124.** (1) . . .

Payable by responsible person

(2) Duty is payable by the person who is responsible for the spirits immediately before they are packaged.

NON-DUTIABLE USES AND REMOVALS OF ALCOHOL

...

Non-dutiable uses — approved formulations

**144.** Duty is relieved on bulk alcohol and non-duty-paid packaged alcohol used by a licensed user in an approved formulation.

...

Contravention of section 73, 74 or 90

**243.** (1) Unless section 239, 241, 242 or 243.1 or subsection (2) applies, every person who contravenes section 73, 74 or 90 is liable to a penalty equal to

(a) if the contravention relates to spirits, 200% of the duty that was imposed on the spirits; or

(b) if the contravention relates to wine, \$1.24 per litre of that wine.

SCHEDULE 4

(Sections 122 and 123)

RATES OF DUTY ON SPIRITS

1. Spirits: \$11.696 per litre of absolute ethyl alcohol contained in the spirits.

2. Spirits containing not more than 7% absolute ethyl alcohol by volume: \$0.295 per litre of spirits.

[11] In the present case, it is agreed by everyone that the appellant has a user's licence under section 14 of the Act. It is also agreed that, in the periods at issue, the appellant purchased bulk, unpackaged alcohol containing at least 95% absolute alcohol by volume in containers greater than 100 litres in capacity. That alcohol was used in the manufacture of sanitizing gels containing greater than 60% absolute ethyl alcohol by volume and was packaged in containers each of which was less than 100 litres in capacity. Those containers were sold to consumers without being repackaged.



[12] It is also not contested that at the time those gels were manufactured, packaged and sold for consumption, they were not made in accordance with a formula for which the appellant had approval from the Minister.

[13] Therefore, it is clear under sections 73, 122 and 144 of the Act that the appellant was not exempt from paying duty on bulk, unpackaged alcohol at the rate set out in section 1 of Schedule 4 (\$11.696 per litre of absolute ethyl alcohol contained in the sanitizing gels). This duty was payable at the time the sanitizing gels were packaged, that is, when they were packaged in containers of a capacity of not more than 100 litres to be sold to consumers (see subsection 124(2) and the definition of “packaged” in section 2 of the Act).

[14] Even though the appellant had received approval under the *Natural Health Products Regulations* at the time it manufactured the gels, the Act does not give any exemption on that basis. The Act is aimed at taxing alcohol products but grants relief to a licensed user of bulk alcohol and non-duty-paid packaged alcohol in an approved formulation as defined in the Act. The definition of “approved formulation” in section 2 clearly states that the approval must be given by the Minister.

[15] Here, the appellant seeks relief based on fairness. This Court does not have the authority to provide such relief. There is no provision in the Act that grants the judiciary authority to deviate from the strict application of its provisions.

[16] Further, it is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity (*Chaya v. The Queen*, 2004 FCA 327, 2004 DTC 6676, at paragraph 4).

[17] I would also add that I am not convinced that the appellant was not negligent in failing to comply with the Act. According to the evidence, the Minister’s approval was received in fairly short order after the request was made. As a matter of fact, as soon as the request was made by the auditor to the senior chemist, the latter advised the auditor that the submissions were “nominally” approved on the day they were received, so that alcohol used in production as of that day would not be subject to duty (Exhibit R-3, page 6). This tends to show, in my view, that had the appellant submitted the form right at the beginning and had Mr. Adatia checked the “urgent” box on that form (Exhibit R-2), the appellant could have avoided the duty completely.

[18] Finally, the appellant was only assessed the duty payable on the alcohol. It could have faced a harsher situation had the Minister imposed a penalty. Indeed,

under paragraph 243(1)(a) of the Act, every person who produces spirits in a manner that contravenes section 73 (which is the case here) is liable to a penalty equal to 200% of the duty that was imposed on the spirits. In my view, by not having that penalty imposed against it, the appellant has already benefited from significant lenience.

[19] The appeal is dismissed.

Signed at Ottawa, Canada, this 11<sup>th</sup> day of February 2014.

“Lucie Lamarre”

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Lamarre J.

CITATION: 2014 TCC 44

COURT FILE NO.: 2013-1768(EA)I

STYLE OF CAUSE: INTERNATIONAL CUSTOMPAK INC. v.  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 6, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: February 11, 2014

APPEARANCES:

Agent for the Appellant:	Hanif Adatia
Counsel for the Respondent:	Shane Aikat

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Canada