

Section de première instance de  
la Cour fédérale du Canada



Federal Court of Canada  
Trial Division

**Date: 19971022**

**Docket: T-1040-94**

**BETWEEN:**

KRISPY KERNELS

Appellant

**AND:**

THE DEPUTY MINISTER OF NATIONAL REVENUE

Defendant

**REASONS FOR ORDER**

**RICHARD J.**

**Nature of the proceedings**

[1] This is an appeal from a decision of the Canadian International Trade Tribunal (CITT) dated February 9, 1994 under appeal number AP-92-255. The CITT dismissed the appeal from the determination made by the Deputy Minister of National Revenue for Customs and Excise. Pursuant to s. 81.28(2) of the *Excise Tax Act* R.S.C. 1985, c. E.-15 (the *Act*), this appeal is to

be deemed an action. The parties to this action have agreed that the facts and evidence upon which the action should proceed are set forth in the transcript of evidence before the CITT, dated June 2, 1993.

**Issue**

[2] The issue is whether the barbecue nuts, as manufactured and sold by the Plaintiff, are salted nuts and thus subject to federal sales tax pursuant to paragraph 1(g) of Part V of Schedule III to the *Act*.

**Statutory provisions**

[3] The relevant provisions of the *Act* are as follows:

Section 50. Consumption or sales tax. -

(1) There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sales price or on the volume sold of all goods

(a) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii) or (iii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier.

Section 51. Goods exempted.

(1) The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III, other than those goods mentioned in Part XIII of that Schedule that are sold to or imported by persons exempt from consumption or sales tax under subsection 54(2).

Schedule III

Part V

FOODSTUFFS

Section 1. Food and drink for human consumption (including sweetening agents, seasonings and other ingredients to be mixed with or used in the preparation of the food and drink), other than

- (a) wine, spirits, beer, malt liquor and other alcoholic beverages;
- (b) non-alcoholic malt beverages;
- (c) carbonated beverages and goods for use in the preparation of carbonated beverages;
- (d) non-carbonated fruit juice beverages and fruit flavoured beverages, other than milk-based beverages, containing less than twenty-five per cent 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,

and goods that, when added to water, produce a beverage described in this paragraph;

- (e) candies, confectionery that may be classed as candy, and all 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 coated or treated with candy, chocolate, honey, molasses, sugar, syrup or artificial sweeteners;

(f) chips, crisps, puffs, curls and sticks (such as potato chips, corn chips, cheese puffs, potato sticks, bacon crisps and cheese curls) and other similar snack foods; popcorn and brittle pretzels; but not including any product sold primarily as a breakfast cereal or any product manufactured or produced in a retail outlet for sale in that outlet exclusively and directly to customers;

(g) salted nuts and salted seeds;<sup>1</sup>

(h) granola products, but not including any product sold primarily as a breakfast cereal or any product manufactured or produced in a retail outlet for sale in that outlet exclusively and directly to consumers;

(i) snack mixtures containing cereals, nuts, seeds, dried fruit or any other edible product, but not including any mixture sold primarily as a breakfast cereal or any mixture manufactured or produced in a retail outlet for sale in that outlet exclusively and directly to consumers;

(j) ice lollies and flavoured, coloured or sweetened ice waters, whether or not frozen, but not including any product manufactured or produced in a retail outlet for sale in that outlet exclusively and directly to consumers.

(k) ice cream, ice milk, sherbet, frozen yoghurt or frozen pudding, or any product containing any of those goods, when packaged in individual servings, but not including any product manufactured or produced in a retail outlet for sale in that outlet exclusively and directly to consumers.

(l) fruit bars, rolls and drops and similar fruit-based snack foods, but not including any product manufactured or produced in a retail outlet for sale in that outlet exclusively and directly to consumers.

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<sup>1</sup> The French version of paragraph 1(g) reads as follows: "les noix et les graines salées".

(m) individually wrapped and packaged snack foods that are similar to chocolate bars, but not including any product manufactured or produced in a retail outlet for sale in that outlet exclusively and directly to consumers.

### **Evidence**

[4] The plaintiff presented two witnesses : Mr. Beaulieu, its factory manager, and Mr. Martel, the sales director of the company that produces the barbecue seasoning used by the plaintiff in the subject goods. The defendant did not call any witness.

### **Evidence of Mr. Beaulieu**

#### Transcript - page 12

- Q. I would like to begin, Mr. Beaulieu, by looking at Exhibit A-5 for the salted peanuts. Do you have that one in front of you, A-5 for the salted peanuts?
- R. Arachides salées, 200 grams?
- Q. Yes, that is correct.  
Could you please identify for the Tribunal the ingredients which you use to make the product shown on Exhibit A-5?
- R. Okay, dans les arachides blanchies salées, comme ingrédients nous avons: l'arachide, huile végétale, huile végétale hydrogénée et le sel.
- Q. Could you please explain, in general terms, the process which your company uses to make the salted peanuts on Exhibit A-5?
- R. Okay, dans le procédé, c'est cuit dans un poêle à l'huile et à la sortie du poêle à l'huile, nous avons une salière pour donner la saveur du salé que le sac indique.  
C'est vraiment le sel qui donne la saveur de salé.

Transcript - page 14

- Q. Mr. Beaulieu, what is the difference between the sample which you have in your hand, Exhibit A-8, the unsalted peanut, and the product shown in Exhibit A-5 that you referred to earlier, the salted peanut? What is the difference between the two?
- R. Je pense qu'il y a une très grande différence. C'est que même si c'est deux sacs qui semblent identiques, c'est du 200 grammes les deux, c'est évident, le même format. Par contre, lui, que j'ai dans les mains, il est non-salé et on voit la salière qui ne contient pas de sel et la différence entre les deux, c'est que si on en regarde la liste d'ingrédients à l'endos du sac, c'est que ça ne contient aucun sel dedans. C'est naturel.

Transcript - page 17

- Q. Why is salt used as one of the ingredients in order to make Exhibit A-6, the honey nuts?
- R. Que ce soit pour l'arachide au miel ou autre, le sel, quand même pour nous, il a une certaine valeur de préservation ou de soutien à tout l'assaisonnement qu'on peut donner à un enrobage, que ce soit au miel ou autre. Mais ce n'est pas -- le goût de sel n'apparaît pas comme saveur.

Transcript - page 18

- Q. Now, let us turn finally to Exhibit A-2, the barbecue nuts, A-2. Again, would you please identify for the Tribunal the ingredients, if you will, which are used to make Exhibit A-2, the barbecue nut?
- R. Les ingrédients, c'est déjà une préparation qu'on achète d'un tiers. Et la liste d'ingrédients qui apparaît c'est, l'arachide, l'huile végétale, huile végétale hydrogénée, sel, glutamate monosodique, protéines végétales hydrolysées, et arômes artificiels.
- Q. You have indicated that you purchase the barbecue seasoning from another company, is that correct?
- R. Exact.
- Q. Could you identify by name the company from which you buy the barbecue seasoning?
- R. Oui, laboratoire Griffith.

Transcript - page 19

- Q. What do you do with that barbecue seasoning? Could you describe again the process that your company uses to apply the barbecue seasoning to the nut?
- R. La différence avec tout à l'heure c'est que c'est cuit aussi dans le poêle à l'huile et après ça, l'arachide est non-salée, elle s'en va directement dans un dumbleur qui l'assaisonne de saveur barbecue. Le dumbleur c'est un gros tonneau qui enrobe.

Transcript - page 28

- Q. Les produits en litige sont commercialisés comme des grignotines, j'imagine?
- R. Comme grignotines, aliments Krispy Kernels.
- Q. Non, mais je vais dire selon vous, c'est considéré un "snack food"?
- R. C'est considéré comme un "snack" ou un produit santé.

Transcript - page 29

- Q. Pourriez-vous identifier la Pièce B-1 pour le bénéfice du Tribunal?
- R. C'est un sac d'arachides salées barbecue.
- Q. Salées barbecue.
- R. Oui, c'est un peu le lien que je faisais tout à l'heure. Ça c'est des vieux emballages qui datent quand même de longtemps et que on est en train de remodeler. Quand tu vois le nouvel emballage qui ne contiendra plus le salé barbecue puis ça portait trop ailleurs.
- Q. Mais essentiellement c'est le même produit qu'on retrouve à la Pièce A-2?
- R. C'est le même produit.

**Evidence of Mr. Martel**

Transcript - pages 45-47

Q. Mr. Martel, your company as you described makes seasonings for food. In so doing, is salt one of the ingredients, one of the main ingredients, in fact, which you use in making such seasonings?

R. Oui, définitivement.

Q. Why is that? What purpose does salt serve in the making of seasonings?

R. Le sel, en fait, a deux, entre autres, dans certains autres domaines alimentaires, il y a des caractéristiques de conservation, des choses du genre, mais ça ne nous concerne pas tellement ici.

En ce qui nous concerne ici, c'est surtout il y a peut-être deux caractéristiques: C'est que on l'utilise comme ce qu'on appelle carrier ou souteneur, ou je ne sais pas en français comment on pourrait le dire, mais c'est que vu que nos assaisonnements sont faits à base d'huile concentrée, quand on parle d'assaisonnements ou d'épices, on parle pas d'épices moulues ici. On parle d'huile d'épices. On parle d'huile de cayenne, on parle d'huile de poivre, on parle d'huile -- c'est excessivement concentré, donc on a besoin d'un produit qui va nous permettre de donner de la densité au produit ou de donner du volume au produit pour pouvoir l'appliquer. Sinon, ça serait beaucoup trop concentré.

Une autre caractéristique du sel c'est qu'on l'emploie dans la grande, grande majorité -- j'avancerais même un chiffre d'au-dessus de 95 pour cent des assaisonnements dans tous les domaines d'ailleurs -- ça serait de soutenir le goût, un peu l'effet d'un rehaussant de saveur un peu.

Le sel est un petit peu un élément qui va donner -- je copie un petit peu une publicité d'une compagnie de sel, ça donne un peu de couleurs aux aliments. Ça ajoute. C'est pas nécessairement pour son goût salé, c'est que ça soutient, ça arrondit des affaires.



Transcript - page 56

- Q. M. Martel, si je comprends bien, comme vous avez mentionné dans votre témoignage la liste ou plutôt l'ingrédient prédominant dans l'assaisonnement de barbecue, c'est le sel, c'est ça?
- R. Très dominant en poids, pas en goût.

Transcript - page 57

Maintenant vous avez mentionné, M. Martel, que c'est votre compagnie qui préparait l'assaisonnement des arachides barbecue.

LE TÉMOIN: oui.

MEMBRE BLOUIN: J'aimerais que vous goûtiez à ces arachides qui ont été entrées comme Exhibit A-12 et que vous les regardiez comme il faut et que vous me disiez si effectivement il y a du sel sur les arachides.

LE TÉMOIN: Ça va être assez difficile pour moi parce que je connais la formule.

MEMBRE BLOUIN: Mais est-ce qu'elles goûtent le sel?

LE TÉMOIN: Entre autres, il y a autres choses.

Transcript - page 63

- Q. Why is it that a significant ingredient in Exhibit A-14, in the barbecue flavouring is salt and yet it has a different taste from salt, why?
- R. Bien c'est comme j'ai expliqué tout à l'heure. L'assaisonnement contient à peu près une quinzaine d'ingrédients et puis si on parle de poids, c'est très significatif le sel. Si on parle d'effet organolyptique de goût, il y a au moins une dizaine d'ingrédients là-dedans qui sont beaucoup plus forts que le sel qui, vraiment, vont enlever ce goût de sel.

Transcript - page 65

Q. Would you just explain once more the purpose of using the salt in the barbecue seasoning?

R. Bien comme je disais tout à l'heure, il y a tout le temps les deux raisons que nous on retrouve dans tous nos produits quasiment, là. Le sel, c'est vraiment d'enrober le goût, de vraiment lier ces choses-là ensemble. Si on enlevait le sel totalement, par exemple, le goût de ce mélange-là serait totalement -- il aurait un profit différent. Ça serait autre chose.

Le sel aussi sert de -- pardonnez-moi l'expression mais -- carrier, ça sert de -- on pourrait pas -- comment je pourrais l'expliquer? On ne pourrait pas appliquer l'assaisonnement concentré sur aucun produit pour la consommation. Ça serait beaucoup trop concentré. On ne serait pas capable de le répandre. On ne serait pas capable de lui donner de l'expansion. On parlerait d'une application qui serait très très basse et puis très difficile aussi au point de vue machinabilité d'appliquer l'assaisonnement sur des produits semblables.

**Findings**

- [5]
- 1) salt is an essential ingredient;
  - 2) salt is used as a preservative, a carrier and a flavour enhancer;
  - 3) salt is the most important ingredient by weight in the barbecue seasoning;
  - 4) barbecue nuts have a taste of salt and salt grains are visible on the nuts;
  - 5) barbecue nuts are sold as snack items;
  - 6) until recently the Plaintiff labelled them as salted barbecue nuts; and
  - 7) when salt is added to a nut, it must have a carrier such as oil added as an ingredient; the nut is roasted in oil.

### Ordinary Meaning of the Word "salted"

The Oxford English Dictionary defines "salted" as:

2. a) Having salt as an ingredient; containing salt or impregnated with salt. Now used esp. of prepared foods, as salted almond, peanut, etc.
- b) Treated with salt.

The Oxford English Dictionary, Volume XIV, 2d ed., Clarendon Press, 1989, Oxford, at 411.

Le Grand Robert de la Langue Française defines "salée" as:

2. Assaisonné ou conservé avec du sel.

Le Grand Robert de la Langue Française, Tome VIII, Deuxième ed., Le Robert, 1987, Paris, at 553.

Webster's New World Dictionary, Second College Edition defines "salted" as:

Salted:

- Adj.
1. containing salt
  2. preserved with salt
  3. tasting or smelling of salt

### Rules of Interpretation

[6] In the Notre-Dame de Bon-Secours case,<sup>2</sup> Mr. Justice Gonthier summarized the rules for interpreting tax legislation.<sup>3</sup>

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<sup>2</sup> *Québec (Communauté Urbaine) v. Corp. Notre-Dame de Bon-Secours* [1994] 3 S.C.R. 3.

<sup>3</sup> *Ibid* at p. 20.

The interpretation of tax legislation should follow the ordinary rules of interpretation;

A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;

The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;

Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute;

Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

### **Analysis**

[7] The goods in issue fall squarely within the accepted dictionary definitions. At best the barbecue nuts are a subcategory of salted nuts but are nevertheless covered by the expression "salted nuts".

[8] The evidence of common parlance relied on by the Plaintiff comes from one witness only, an employee of the Plaintiff, and falls far short of establishing that the word "salted" when used with the word "nuts" has acquired a meaning other than its ordinary meaning and describes only one discrete product.

[9] The plaintiff's position is that failing to distinguish between nuts which are seasoned by way of salt from those which are seasoned with a combination of salt and other ingredients, the CITT erred in law in its interpretation of paragraph 1(g) of Part V of Schedule III.

[10] The plaintiff submits that the goods in issue are not "salted nuts" since the overwhelming taste is not that of salt. This introduces a taste test that is not called for by the wording of the statute and which, in any event, would be unmanageable.

[11] The evidence advanced by the plaintiff's own witnesses establishes with respect to the goods in issue, that salt is an essential and important ingredient, that it acts as a carrier, a preservative and a flavour enhancer and that it can be toasted and observed. The fact that other ingredients are also present and act as a further flavouring agent does not remove the goods in issue from the category of salted nuts. Even those salted nuts which do not have other flavouring agents added are roasted in oil. Therefore the mere addition of ingredients other than salt does not remove the goods from the category of salted nuts.

**Conclusion**

[12] The barbecue flavoured nuts in question have or contain salt as an important and essential ingredient, come within the meaning and intent of "salted nuts and salted seeds" in paragraph 1(g) of Part V of Schedule III of the *Act*.

[13] Accordingly, the plaintiff's action and appeal are dismissed without costs.

**John D. Richard**

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Judge

Ottawa, Ontario  
October 22, 1997