

Ottawa, Monday, October 16, 1989

Appeal No. 2899

IN THE MATTER OF an application heard May 12, 1989,
pursuant to section 51.19 of the *Excise Tax Act*, R.S.C.
1970, c. E-13, as amended;

AND IN THE MATTER OF a Notice of Decision of the
Minister of National Revenue dated November 19, 1987,
with respect to a Notice of Objection filed pursuant to
section 51.15 of the *Excise Tax Act*.

BETWEEN

SUPERCRETE PRECAST LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that the appellant is not eligible for a refund of the federal sales tax paid during the period of April 1983 to December 1984 because it has not respected the statutory time limitation for the filing of a refund claim imposed by section 44 of the *Excise Tax Act*. The Tribunal further finds that the appellant sold the precast concrete beams to an entity other than a municipality, contrary to the exempting provision of section 1, Part XII, Schedule III of the *Excise Tax Act*.

John C. Coleman
John C. Coleman
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 2899

SUPERCRETE PRECAST LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - Federal sales tax refund - Whether the appellant filed its refund within the statutory time limitation - Whether the appellant sold the goods in issue to a municipality as defined in the Excise Tax Act - Whether Metro Canada Limited is an agent of British Columbia Transit - Whether the latter is a municipality as defined under the Excise Tax Act.

DECISION: *The appeal is dismissed. The appellant was late in filing its refund claim under section 44 of the Excise Tax Act. Furthermore, the appellant sold the goods in issue to an entity other than a municipality, contrary to the exempting provision of section 1, Part XII, Schedule III of the Excise Tax Act.*

Place of Hearing: Vancouver, British Columbia

Date of Hearing: May 12, 1989

Date of Decision: October 16, 1989

*Panel Members: John C. Coleman, Presiding Member
Sidney A. Fraleigh, Member
W. Roy Hines, Member*

*Counsel for the Tribunal: Lyne Letarte
Clerk of the Tribunal: Janet Rumball*

*Appearances: David F. Lunnen, for the appellant
Michael Ciavaglia, for the respondent*

Statutes Cited: *Excise Tax Act, R.S.C. 1970, c. E-13, subss. 2(1), 29(1), 44(6) and section 44, and section 1, Part XII, Schedule III; An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof, S.C. 1986, c. 9; Canadian International Trade Tribunal Act, S.C. 1988, c. 56, s. 60; Urban Transit Authority Act, R.S.B.C. 1979, c. 421; Urban Transit Authority Amendment Act, R.S.B.C. 1982, c. 53; British Columbia Transit Amendment Act, R.S.B.C. 1984, c. 1.*

Dictionary: *Black's Law Dictionary, H.C. Black, Revised 4th ed., West Publishing Co.*

Author: *Driedger, E.A., Construction of Statutes [1983], p. 85.*

Appeal No. 2899

SUPERCRETE PRECAST LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: JOHN C. COLEMAN, Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

SUMMARY

This appeal was launched following the respondent's refusal to allow a refund of federal sales tax. The appellant sold precast concrete beams to an agent of British Columbia Transit (BCT), the owner of the "Skytrain" system in Vancouver. The appellant claimed that it was entitled to a refund because, firstly, the claim was filed in a timely manner, secondly, the goods were sold to BCT, which should be considered by the Tribunal as a municipality pursuant to the *Excise Tax Act*¹ (the Act) definition, and thirdly, the "Skytrain" is a highway system and goods sold to municipalities for highway systems are exempt from federal sales tax.

The respondent argued that the appellant was late in filing its refund claim, having waited more than two years to submit its claim, contrary to the Act. Further, BCT is not a municipality but a Crown corporation having jurisdiction throughout the province of British Columbia. The respondent also argued that the "Skytrain" system is not a highway system but a railway system. The term highway in the exempting provision does not include the word railway.

The appeal is not allowed. The appellant was late in filing its claim, not having respected the statutory limitation of the Act.

This appeal can also be dismissed on a second ground. BCT is not a municipality as defined by the Act. Accordingly, the Tribunal does not need to consider the highway issue; even if the "Skytrain" were a highway system, BCT could only claim exemption from federal sales tax if it were also a municipality.

1. R.S.C. 1970, c. E-13.

THE LEGISLATION

The relevant provisions of the Act during the period in issue of April 1983 to December 1984 are as follows:

2 (1) *In this Act,*

...

"municipality" means

- (a) an incorporated city, metropolitan authority, town, village, township, district or rural municipality or other incorporated municipal body however designated, or*
- (b) such other local authority as the Governor in Council may determine to be a municipality for the purposes of this Act;*

29 (1) *The tax imposed by section 27 does not apply to the sale or importation of the goods mentioned in Schedule III, other than those goods mentioned in Part XIII of Schedule III that are sold to or imported by persons exempt from consumption or sales tax under subsection 31(2).*

44 (6) *Subject to subsections (7) and (7.1), no refund of or deduction from any of the taxes imposed by this Act shall be granted, and no payment of an amount equal to tax paid shall be made, under this section unless application in writing thereof is made to the Minister by the person entitled to the refund, deduction or amount within four years after the time the refund, deduction or amount first became payable under this section or the regulations.*

SCHEDULE III

PART XII

MUNICIPALITIES

1. *Certain goods sold to or imported by municipalities for their own use and not for resale, as follows:*

...

- (g) precast concrete shapes for bridges in public highway systems,*
- (h) structural steel and aluminum for bridges,*

...

The relevant amendments to the Act as found in *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof*,² which was assented to March 4, 1986, are as follows:

2. S.C., 1986, c. 9.

23 (3) Subsections 44(6) to (7.4) of the said Act are repealed and the following substituted therefor:

44 (6) No refund of or deduction from any of the taxes imposed by this Act shall be granted, and no payment of an amount equal to tax paid shall be made, under this section unless application in writing therefor is made to the Minister by the person entitled to the refund, deduction or amount within two years after the time the refund, deduction or amount first became payable under this section or the regulations.

...

23 (5) Subsection (3) shall be deemed to have come into force on May 24, 1985 and applies in relation to a refund or deduction that is granted or a payment that is made after May 23, 1985, except that in respect of a transaction or event entitling a person to apply for the refund, deduction or payment that occurred before May 24, 1985 the references in subsections 44(6) and (7.1) of the said Act, as enacted by subsection (3), to "two years" shall be read as references to "four years".

A further amendment to the Act, which came into force on May 1, 1986, is relevant:

34 (1) Sections 44 to 49.2 of the said Act, as amended by sections 23 to 33, are repealed and the following substituted therefor:

44.2 Where tax under Part III or V has been paid in respect of any goods and subsequently the goods are sold to a purchaser in circumstances that, by virtue of the nature of that purchaser or the use to which the goods are to be put or both such nature and use, would have rendered the sale to that purchaser exempt or relieved from that tax under subsection 21(2.3), paragraph 21(3.1)(b) or subsection 27(2) or 29(1) had the goods been manufactured in Canada and sold to the purchaser by the manufacturer or producer thereof, an amount equal to the amount of that tax shall, subject to this Part, be paid to the person who sold the goods to that purchaser if the person who sold the goods applies therefor within two years after he sold the goods.

...

34 (2) Subsection (1) shall come into force on the first day of the second month following the month in which this Act is assented to.

The relevant provisions of the *Urban Transit Authority Act*,³ as amended by the *Urban Transit Authority Amendment Act*⁴ and by the *British Columbia Transit Amendment Act*⁵ (the BCT Act) during the period in issue of April 1983 to December 1984, are as follows:

3. R.S.B.C. 1979, c. 421.

4. R.S.B.C. 1982, c. 53.

5. R.S.B.C. 1984, c. 1.

1. In this Act

...

"authority" means British Columbia Transit established under this Act;

...

"municipality" includes a regional district or parts of a regional district and the City of Vancouver;

...

2 (1) There is established a corporation, to be known as the British Columbia Transit, consisting of the persons referred to in section 4.

...

(5) The authority is an agent of the Crown in right of the Province.

3 (1) The purpose and object of the authority is to provide and maintain public passenger transportation systems in the Province and, to carry out its purpose and object, it shall

(a) in accordance with section 18, establish and designate transit service areas;

(b) in accordance with section 18, establish local and regional transit commissions;

(c) negotiate with a municipality in a local transit service area with a view to entering into a transit service agreement;

...

8 (1) The authority has all the powers necessary to carry out its purposes and objects and, without limiting the generality of the foregoing,

(a) may plan, acquire, maintain and operate public passenger transportation systems [, by itself or through the company established under the Metro Transit Operating Company Act];

(b) may acquire and dispose of property for the purposes of this Act;

...

(e) may hear and decide appeals by municipalities, the Metro Transit Operating Company, its subsidiaries and successors, or public passenger transportation systems or operators of transit services from decisions of the commissions;

...

THE FACTS

This is an appeal pursuant to section 51.19 of the Act from a decision of the respondent dated November 19, 1987, dismissing a claim for refund of federal sales tax.

The appellant is a supplier of construction materials and supplied the subject goods, precast concrete tangent beams, to Metro Canada Limited (MCL) for the construction of the Vancouver "Skytrain."

The chronology of events involved is as follows:

March 31, 1981 MCL entered into an agreement with BCT to perform work in respect of

- design, construction and supply of equipment for the "Skytrain."
- August 30, 1982 MCL signed a contract with the appellant. The appellant was to perform work and furnish the subject goods for the construction of the "Skytrain."
- April 1983 to December 1984 The appellant delivered the subject goods to MCL.
- April 13, 1987 The appellant filed a refund claim. It argued that the subject goods were to be used for the construction of a municipal bridge and should therefore be exempted.
- May 4, 1987 The Deputy Minister's Notice of Determination rejected the claim.
- May 15, 1987 The appellant filed a Notice of Objection.
- November 19, 1987 The respondent's decision confirmed the Deputy Minister's determination that neither MCL nor BCT was a municipality as defined by the Act. Therefore, the transactions were not tax exempt.
- November 23, 1987 The appellant filed an appeal with the Tariff Board.

This appeal, being a continuation of proceedings begun before the commencement of the *Canadian International Trade Tribunal Act*,⁶ is taken up by the Canadian International Trade Tribunal by virtue of section 60 of that Act.

The beams at issue were used in the inbound and outbound tracks for the "Skytrain" system and were used only in the elevated parts of that system. The beams are made of precast concrete and steel and are of three types: tangent, curved and turnout.

The appellant's General Manager explained how the contract was administered.

The contract was signed between the appellant and MCL. MCL was understood to be a project manager which would coordinate the design and act as a purchasing agent for BCT. The appellant was to deal with, and report to, an organization called the Joint Project Office (the Office) which consisted of personnel drawn from both MCL and BCT and others. BCT was always referred to as the owner of the "Skytrain" system and, furthermore, was the entity that paid directly to the appellant all progress payments submitted by it and approved by the Office.

The witness admitted that there was some confusion as to who was to give the appellant direction, but since the Office worked well and since invoices were paid in a timely manner by BCT, the appellant accepted the arrangement.

To the best of the witness's knowledge, there was a contract between MCL and BCT, but he could not provide the Tribunal with written proof.

6. S.C. 1988, c. 56.

He completed his testimony by underlining the equivalence, in his experience, between a bridge and the elevated parts of the "Skytrain" system. The only major difference between that system and an overpass, which goes over a major highway, is in the load-bearing material used. The "Skytrain" system is specifically designed to carry light rail trains.

THE ISSUE

The appellant argued that the refund claim filed April 13, 1987, for the period April 1983 to December 1984, was submitted within the four-year limit of section 44.2 of the Act.

Furthermore, the appellant's representative urged the Tribunal to consider MCL as a paid project manager or as an agent of BCT since it never bought or sold the goods at issue. He added that BCT, which paid the appellant for its services, was a municipality within the meaning of section 2 of the Act.

BCT can be said, in the appellant's opinion, to be a metropolitan authority carrying on integrated transit operations within a city and the densely populated surrounding areas that are socially and economically integrated with it. According to this opinion, the provincial legislature has defined BCT as an authority and given it all the powers that a municipality would have to lay out, construct and maintain highways. The appellant concludes that BCT has the powers of a municipality in constructing public passenger transportation systems.

The last argument brought forward by the appellant is that the subject goods sold to a municipality are for use in the construction of bridges in public highway systems.

The appellant's representative drew the Tribunal's attention to the definition of the word highway in Black's Law Dictionary,⁷ which reads:

... Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other....

The generic name for all kinds of public ways, whether carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers ...

The appellant's representative noted that the word bridges as well as the word railroads were included in this definition. He argued, therefore, that the "Skytrain" system was a public highway system. The appeal should be allowed.

The respondent advanced three arguments: the appellant is late in filing its refund claim, BCT is not a municipality as defined by the Act and the "Skytrain" system is not a public highway system.

With respect to the first argument, counsel for the respondent stated that when the goods were sold, between April 1983 and December 1984, all refund claims had to be filed within four years after the transactions. But by legislative amendments effective in May 1986, well before the

7. Revised fourth edition.

appellant's refund claim of April 1987, the time required for any refund claim was two years. The appellant, having claimed a refund more than two years after the relevant transactions took place, is out of time.

As to the second argument, the respondent relied on well-established interpretation principles under which a tribunal must give words their ordinary meaning (a proposition supported by the appellant) and must look at those words in light of the words with which they are associated.

BCT is an authority which can exercise its powers province-wide. It is a provincial Crown corporation and its operations are not confined within any specific municipal boundaries. The words associated with the term metropolitan authority in the definition of a municipality in the Act are linked to a very specific geographic area (incorporated city, town, village, township). Although BCT operates in a metropolitan area, it is not a metropolitan authority; it is a provincial authority.

As its third and last argument, the respondent urged the Tribunal to consider the "Skytrain" system as a railway system and not as a highway system. The respondent admitted that the goods at issue were used in the construction of bridges. However, he referred to the testimony of the appellant's General Manager that the "Skytrain" system had a load bearing capacity different from a highway bridge system.

Furthermore, when referring to the term highway, the respondent observed that the Act did not include the word railway. When the legislator intends the two words to be read together, they are specifically mentioned.

In sum, the respondent argued that the appeal should be dismissed because the appellant was late and sold the goods at issue to a provincial Crown corporation which is not a municipality and the goods were used for the construction of a railway system, not a highway system.

DECISION

The Tribunal would like to thank both parties for their written submissions regarding the possible relevance of the two Supreme Court decisions⁸ rendered a few days prior to the hearing of this appeal. Not having had time to analyse the possible implications of those decisions to the questions at bar, the Tribunal offered both parties two weeks each, consecutively, to submit their opinion. In the event, the Tribunal agrees with both parties that the two Supreme Court decisions, which concern essentially constitutional questions, do not bear on this case.

For the appellant to succeed in its appeal, it must satisfy the Tribunal that it has met all of the exemption criteria:

8. Canadian Pacific Airlines Ltd. et al. v. Her Majesty the Queen in Right of the Province of British Columbia et al., and Air Canada et al. v. Her Majesty the Queen in Right of the Province of British Columbia et al., both decisions rendered on May 4, 1989.

- it filed the refund claim in a timely manner;
- it sold the goods to a municipality for its own use; and
- the goods for a municipality's own use are "precast concrete shapes for bridges in a public highway system" or "structural steel and aluminium for bridges."

During the refund claim period, April 1983 to December 1984, subsection 44(6) allowed for a refund claim to be filed within the next four years. Effective May 24, 1985, subsection 44(6) was repealed and replaced by a new subsection 44(6) which refers to a limitation of two years after the time the refund became payable. However, the transitional provision of subsection 23(5) of the *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof*⁹ provided for an exception continuing the four-year limitation period on applications for refunds with respect to a transaction or event occurring before May 24, 1985.

In the present case, the goods were sold prior to May 24, 1985. The four-year limitation was confirmed by the May 1985 amendment, which remained in force for almost a year. It enabled the appellant to file its refund claim if it so chose.

Effective May 1, 1986, a further amendment to the Act¹⁰ repealed subsection 44(6) and the four-year period for claiming exemptions. It was replaced by section 44 which limits the filing of a refund claim to a period of two years after a claimant has sold goods. This amending provision does not provide for exceptions.

Therefore, as of May 1, 1986, all refund claims had to be submitted within a two-year period from the date the person claiming the refund sold the goods. This is a condition precedent to a valid claim.

The appellant claimed a refund on April 13, 1987, more than two years after it sold the goods at issue (the goods were sold between the period of April 1983 and December 1984).

On this first ground, the appeal fails.

In any event, the Tribunal notes that the appellant fails to meet the second criterion. Even if the Tribunal is prepared to consider MCL as an agent of BCT, it cannot include BCT in the definition of the word municipality found in the Act.

As the appellant indicated to the Tribunal in its brief, the definition of municipality is restricted in the Act to the meaning assigned. The following excerpt from page 3 of the brief reads:

The standard rule is that 'means' restricts, while the word 'includes' enlarges. In Dilworth v. Commissioner of Stamps [1899] A.C. 99 at p. 105 Lord Watson said:

The word 'includes' is generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of a statute; and when it is

9. *Supra*, note 2.

10. *Ibid.*, subsection 34(1).

so used those words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation declares that they shall include.

Furthermore, words must be given their ordinary meaning and interpreted within the context of the act in which they are used.

The words acquire their full meaning when analysed in association with the surrounding terms. As E.A. Dreidger¹¹ notes:

The principles of language applicable to all written instruments apply to statutes as well. Many of the so-called rules of interpretation or canons of construction are but ordinary principles of language.

A. ASSOCIATED WORDS

One ordinary principle of language is that the meaning of a word is influenced by the words with which it is associated.

English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language.¹²

It flows from those principles that the words metropolitan authority in the definition of municipality should be read in association with the terms incorporated city, town, village, etc., which refer to very specific and limited geographical areas.

The BCT Act, as it was during the period at issue, qualifies BCT in subsection 2(5) as an agent of the Crown in Right of the province of British Columbia. Subsection 3(1) of that Act deals with the purposes and objects of BCT. BCT is to provide and maintain public passenger transportation systems in the province. Subsection 8(1) of the BCT Act gives BCT all the powers necessary to carry out its purposes and objects. It may plan, acquire, maintain and operate public passenger transportation systems; it may acquire and dispose of property; it may negotiate with a municipality and it may bear and decide appeals by municipalities, etc. The definitions of the BCT Act include both the terms municipality and authority, and BCT is defined as the latter.

BCT is not a municipality in the ordinary sense of the word. It has jurisdiction to operate throughout the province of British Columbia and is an agent of the Crown in Right of that province.

The Tribunal does not associate BCT with the definition of municipality in the Act.

As to the third criterion, the Tribunal does not need to address the issue of whether the "Skytrain" system is a highway system, as that basis for exemption would be available to the appellant only if BCT were a municipality which had purchased the goods for its own use.

11. Construction of Statutes [1983], p. 85.

12. Per Stamp, J. in *Bourne v. Norwich Crematorium Ltd.* [1967] 2 All E.R. 576.

CONCLUSION

The appeal is dismissed. The Tribunal finds that the appellant is not eligible for a refund of the federal sales tax paid during the period of April 1983 to December 1984 because it has not respected the statutory time limitation for the filing of a refund claim imposed by section 44 of the *Excise Tax Act*. The Tribunal further finds that the appellant sold the precast concrete beams to an entity other than a municipality, contrary to the exempting provision of section 1, Part XII, Schedule III of the *Excise Tax Act*.

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