



Ottawa, Friday, February 7, 1992

**Appeal No. 2983**

IN THE MATTER OF an appeal heard on September 23, 1991, under section 51.19 of the *Excise Tax Act*, R.S.C., 1970, c. E-13, as amended;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated January 15, 1988, with respect to the notices of objection served on June 16, 1987, under section 51.15 of the *Excise Tax Act*.

**BETWEEN**

**LES INDUSTRIES VOGUE LTÉE**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Arthur B. Trudeau  
Arthur B. Trudeau  
Presiding Member

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. 2983**

**LES INDUSTRIES VOGUE LTÉE**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*This appeal was filed under section 51.19 of the Excise Tax Act. At issue is whether the above-ground swimming pool vinyl manufactured by the appellant qualifies under paragraph 26(4)(b) and, since July 1, 1985, section 32, Part I, Schedule V to the Excise Tax Act.*

**HELD:** *The appeal is allowed. Because, when inter-connected with the metal components, it helps carry the pressure exerted by the water in above-ground swimming pools, the vinyl in question qualifies as "structural building sections" within the meaning of the legislative provisions cited above. Further, the requirement of competition in these provisions is met because of the existing competition in the swimming pool market between above-ground pools and air-blown concrete pools.*

*Place of Hearing:* Ottawa, Ontario  
*Date of Hearing:* September 23, 1991  
*Date of Decision:* February 7, 1992

*Tribunal Members:* Arthur B. Trudeau, Presiding Member  
Kathleen E. Macmillan, Member  
Robert C. Coates, Q.C., Member

*Counsel for Tribunal:* Robert Desjardins

*Clerk of the Tribunal:* Janet Rumball

*Witnesses:* Paul Ryan and Joe Starnino, for the appellant  
Alain Lafontaine, for the respondent

*Case Cited:* *The Queen v. Monarch Steelcraft Ltd. [1977] 2 F.C. 560.*

Appeal No. 2983

LES INDUSTRIES VOGUE LTÉE

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member  
KATHLEEN E. MACMILLAN, Member  
ROBERT C. COATES, Q.C., Member

The present appeal was filed under section 51.19 of the *Excise Tax Act* (the Act).<sup>1</sup>

The appellant is engaged primarily in the manufacture of above-ground swimming pools, in particular the various metal components and vinyl liners. In January 1979, the Department of National Revenue, Customs and Excise (Revenue Canada) sent the appellant company confirmation that vinyl liners manufactured in a plant were subject to sales tax on the selling price.

On July 13, 1984, the appellant submitted an application for a rebate of \$20,859.46 for supposed overpayments of sales tax on vinyl liners sold between June 1980 and August 1983. On June 9, 1986, the appellant submitted a second application for a rebate of tax overpayments; the amount on this occasion was \$352,038. The second application covered the period from 1982 to May 31, 1986. Two notices of determination issued by Revenue Canada on March 20, 1987, cancelled the rebate applications submitted by the appellant. On June 16, 1987, the appellant served two notices of objection. On January 15, 1988, in two notices of decision, Revenue Canada rejected the notices of objection on the grounds that above-ground swimming pool vinyl did not qualify for classification under paragraph 26(4)(b) and, since July 1, 1985, section 32, Part I, Schedule V to the Act.<sup>2</sup>

These provisions read as follows:

26.(4) *Where a person*

...

*(b) manufactures or produces otherwise than at the site of construction or erection of a building or other structure, structural building sections for incorporation into such building or structure, in competition with persons who construct or erect buildings or other structures that incorporate similar sections not so manufactured or produced,*

...

---

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

2. Any taxpayer who successfully demonstrated that paragraph 26(4)(b) applied would not have to pay sales tax on the sale of products classified as structural building sections. Effective July 1, 1985, and as a result of this provision being repealed, the goods referred to in Part I, Schedule V, among them the structural building sections in section 32, were subject to a lower rate of sales tax under subsection 27(1.1) of the Act.

*he shall, for the purposes of this Part, be deemed not to be, in relation to any such building, structure, building sections, building blocks or fabricated steel so manufactured or produced by him, the manufacturer or producer thereof.*

...

*32. Structural building sections, for incorporation into buildings or other structures manufactured or produced by a person otherwise than at the site of construction or erection of the building or other structure in competition with persons who construct or erect buildings or other structures that incorporate similar sections not so manufactured or produced.*

Essentially, the issue to be resolved by the Tribunal in this case is whether the vinyl liner constitutes, in the exact words used in the sections quoted above, "structural building sections." This is, in fact, a point of contention that dates back several years and was the subject of a great deal of correspondence in 1985 and 1986 between Revenue Canada and the accounting firm, Samson, Bélair, acting on behalf of the appellant (and a number of other above-ground swimming pool manufacturers).

Before proceeding any further, the Tribunal notes that the respondent has not challenged some of the facts in this case, namely that the appellant company is a manufacturer of vinyl liners and that producing the vinyl liner is done otherwise than at the site where the swimming pools are constructed. The Tribunal also notes that the respondent did not call any witnesses.

The evidence produced by the appellant at the hearing is based on the testimony of Christian Monbourquette, a trained engineer and head of sales for the appellant; Zoltan Ganyu, a product development engineer at Canadian General Tower; Richard Bonny, a swimming pool retailer; Jules Houde, an engineer and professor at the École polytechnique de l'Université de Montréal; and David Pounder, also an engineer. The respondent did not object to Messr. Houde and Pounder being recognized as expert witnesses, one in structural engineering, the other in swimming pool design and construction.

Mr. Monbourquette's testimony dealt in part with the main components of an above-ground swimming pool - namely the vinyl liners, the former plates, the steel wall, the posts and the top seats; the process of manufacturing vinyl liner and the thickness; and the basic assembly procedures to be used by a person who buys an above-ground swimming pool. On this last point, the witness referred to the small sand cove that the installer places at the base of the inside surface of the metal wall in order to minimize vertical and horizontal deformation and, thus, better distribute the pressure of the water and conceal the metal components at the base of the pool.

Mr. Ganyu briefly explained the process used to manufacture the vinyl and stated that its company then sells rolls of vinyl to a number of swimming pool manufacturers, among them Les Industries Vogue Ltée. Mr. Ganyu said that the vinyl they sell has to meet specifications set by the clients. He also mentioned the various tests the company performs on vinyl liner shipped to swimming pool manufacturers. The tests measure such characteristics as tensile strength and modulus at 100 percent elongation. For example, a one-inch-wide piece of vinyl for above-ground swimming pools of the type sold by the appellant would be capable of withstanding 45 pounds of pressure.

Mr. Bonny, who worked as a sales representative for the appellant from 1982 to 1987, but has been in the swimming pool business since 1976, gave a general description of the swimming pool market. He also testified, based on the experience he gained in his five years as an employee of the appellant, that an above-ground swimming pool can sustain serious damage if an opening or hole in the vinyl liner were to grow bigger and give way under the force of the water. The leakage of water from the swimming pool would normally result in the metal wall bending inward. The witness also explained that if the sand cove, which can work its way under the bottom ring of the pool, were to collapse or spread, the weight of the water at that point would be supported by the vinyl liner only; if this were to happen, the vinyl liner would, in his opinion, be subject to tremendous stress because there would be nothing between the vinyl and the metal wall of the swimming pool.

In response to a question from counsel for the appellant, Dr. Houde, an expert in structures, tried to refute Revenue Canada's argument that a section cannot be considered a structural building section unless it can support a load vertically. According to Dr. Houde, there are many types of pressure or load that go in all directions. In the case of an above-ground swimming pool, the force would be perpendicular to the bottom of the pool and would gradually become horizontal as the vinyl curves. In response to a question from counsel for the respondent, Dr. Houde stated that one inch of 16-mil sheet metal can withstand 20 times more pressure than one inch of vinyl liner, that is, approximately 800 pounds, and that it is the wall of the swimming pool that bears the water pressure. Like Messrs. Monbourquette and Bonny, Dr. Houde made numerous references in his testimony to the role of the vinyl liner in cases where the ground is uneven or the sand cove collapses. He stated that in such cases, the vinyl liner compensates for the irregularities and bears the pressure of the water. In these circumstances, he said, "the vinyl is structural. The vinyl liner is what carries the weight of the water at that point." [Translation]

The last witness for the appellant, Mr. Pounder, pointed out that there is both horizontal and vertical tension on the vinyl liner of an above-ground swimming pool full of water. According to Mr. Pounder, the more pronounced the curvature of the vinyl liner at the bottom of the pool, the greater the tension will be at that point. Mr. Pounder also said he agreed with the statements by the other witnesses that a hole in the vinyl liner would more often than not result in the pool collapsing. In this connection, he reiterated the importance of the sand cove: without it, the vinyl liner would not have any support, and an opening at that point would grow and eventually cause the wall to collapse. For Mr. Pounder, there appears to be no doubt that swimming pool vinyl is a structural building section.

The term "structural building sections" has already been interpreted by the courts, and the Tribunal intends to adopt that interpretation in this case. In the 1977 decision in *The Queen v. Monarch Steelcraft Ltd.*,<sup>3</sup> Justice Addy ruled as follows on the meaning of the term:

*In the context of paragraph (b) above it is clear that the word "structural" in the expression "structural building sections" does not bear its usual general meaning of "pertaining to a structure" as the latter word is used in the same paragraph in the expression "any ... building or structure": it does not merely qualify a component as forming part of a structure or building but, much more restrictively, as being one of*

---

3. [1977] 2 F.C. 560.

*the components which inter-connected, ensure that a building has a certain weight or load-bearing capacity or which, in other words, contribute substantially to its strength and solidity and permit it to resist the various forces created by man and nature to which it might be subjected. Structural building sections might be contrasted with mere fixtures or other integral components, systems or elements which contribute primarily to the proper use or enjoyment of the building or structure ...*

Justice Addy went on to say that to constitute a section manufactured for use in a building or other structure, a structural building section,

*... not only must the material composing the section possess a load-bearing capacity, but the section itself must be designed and manufactured with the principal object of its being used ultimately as an integral or constitutional element of the load-bearing system or body of the building, erection or structure.*

Examination of the evidence presented to the Tribunal, in particular Exhibit A-5<sup>4</sup> produced at the hearing, showed that vinyl liner, manufactured according to the specifications applicable to above-ground swimming pools, is made to be fully capable of withstanding the tremendous pressure exerted by the water in an above-ground pool. The evidence also showed that vinyl liner is not used solely to ensure that the pool does not leak, although this is clearly an essential role. In fact, the vinyl liner of an above-ground swimming pool serves to properly distribute the pressure exerted in all directions by the water in the pool and to compensate for any installation problems or minor ground shifting that may occur over the life of the pool. In this regard, a common element in the testimony of the three engineers concerns the high pressure the vinyl liner alone must withstand if the sand cove collapses. The Tribunal is convinced that the vinyl liner of an above-ground swimming pool is subject to the pressure of the water in the pool and that, in places, it alone has to bear the weight of the water. The Tribunal does not accept the respondent's argument that a section is not a structural building section unless there is vertical pressure; the expert testimony and examples given by Dr. Houde clearly showed that the loads could also be horizontal.

The vinyl liner is a constitutional element of the swimming pool's load-bearing system. The Tribunal believes that the vinyl liner is indeed one of the constitutional elements of an above-ground swimming pool that, when inter-connected, contribute significantly to the pool's strength and solidity. As Dr. Houde explained, the metal wall is stabilized, in part, by the posts and, in part, by the vinyl liner folded over the wall; the weight of the water tightens the vinyl liner, which helps support the wall. The testimony given by Mr. Pounder sheds light on the inter-connection of the constitutional elements of a swimming pool. Mr. Pounder went so far as to refer to a "symbiotic process" involving the various components of such a structure. According to Mr. Pounder, the vinyl liner and metal components are designed and manufactured to work together. There is little doubt in the Tribunal's mind that the vinyl liner (because of its traction and its role in equalizing the pressure of the water) and the other major components (the metal wall and posts) act together in resisting the weight of the water and thus contribute to the solidity of an above-ground swimming pool full of water. Vinyl liner is part of the elements which, as Justice Addy wrote, "contribute primarily to the proper use or enjoyment of the ... structure." To conclude on this point, the Tribunal considers the vinyl liner in an above-ground

---

4. Specification for Above Ground Swimming Pool Vinyl, Canadian General Tower, April 3, 1989.

swimming pool to be a "structural building section" for the purposes of paragraph 26(4)(b) and section 32, Part I, Schedule V to the Act.

Although the dispute between the parties over the years focused primarily, if not exclusively, on the question the Tribunal just answered, this appeal provided Revenue Canada with an opportunity to raise also the question of the applicability of another of the conditions set out in the legislative provisions in question, namely the element of competition. Briefly, it will be remembered that paragraph 26(4)(b) states that to be eligible under the section, the manufacturer of structural building sections must be in competition with persons who construct or erect buildings or other structures that incorporate similar sections not manufactured in a plant.

Evidence was produced during the hearing to show that the appellant operates in the swimming pool market. Its products face competition from other manufacturers of above-ground swimming pools and manufacturers of concrete pools. The evidence showed that air-blown concrete pools manufactured on site and above-ground pools like those manufactured by the appellant are in competition when consumers who wish to buy a pool are about to make their decision: when consumers start looking for a pool, they seem to keep an open mind as to the type of pool they will buy, and the price ranges of the two types of pool can overlap. There is no need to reiterate here the importance of price in competition between companies operating in the same market. The Tribunal is therefore of the opinion that the appellant is in competition with other companies in the swimming pool market and that those companies construct or erect air-blown concrete pools on site in the consumer's yard.

In conclusion, the Tribunal feels that vinyl liners for above-ground pools manufactured by the appellant meet the requirements in order to be classified under paragraph 26(4)(b) and section 32, Part I, Schedule V to the Act. Therefore, by reaching this conclusion, the Tribunal does not need to discuss paragraph 26(4)(a) as the appellant had requested.

Finally, with respect to the specific question of limitation of part of one of the claims, which counsel for the appellant recognized during the hearing, the Tribunal, in accordance with section 81.27 of the Act, refers the matter to the Minister of National Revenue for reconsideration.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan  
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member