

Ottawa, Monday, June 26, 1989

Appeal No. 3061

IN THE MATTER OF an application heard March 1, 1989,
pursuant to section 81.19 of the *Excise Tax Act*, R.S.C.
1985, c. E-15, as amended (the Act);

AND IN THE MATTER OF a Notice of decision of the
Minister of National Revenue dated August 10, 1988, with
respect to a Notice of objection filed pursuant to section
81.15 of the Act.

BETWEEN

FEDERAL ELECTRIC (1976) LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal declares that the transformers and related items, which were the object of a Notice of Decision of the respondent dated August 10, 1988, are goods which are not exempt from federal sales tax, in accordance with paragraph 1(*t*), Part XIII, Schedule III of the Act.

John C. Coleman

John C. Coleman
Presiding Member

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.
Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 3061

FEDERAL ELECTRIC (1976) LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - Determination of sales tax - Whether goods, bought from March to May 1987, under the terms of a fixed price contract signed in October 1986, should be exempt from sales tax regardless of paragraph 1(t), Part XIII, Schedule III of the Act which came into force in February 1987, excluding the subject goods from the exemption provision of the Act.

DECISION: *The appeal is dismissed. The transformers and related items are not goods exempt from federal sales tax, in accordance with paragraph 1(t), Part XIII, Schedule III of the Act. These deliveries and the time when the property of the goods passed occurred after the legislative amendment.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: March 1, 1989

Date of Decision: June 26, 1989

Panel Members: John C. Coleman, Presiding Member
Robert J. Bertrand, Q.C., Member
Arthur B. Trudeau, Member

*Counsel for the
Tribunal:* Lyne Letarte

Clerk of the Tribunal: Janet Rumball

Appearances: R. Trottier, for the Appellant
P. Engelmann, for the Respondent

Case Cited: *Les Presses d'aujourd'hui v. the Minister of National Revenue, (1988) 13 T.B.R. 318.*

Statutes Cited: *Excise Tax Act, R.S.C. 1985, c. E-15, subss. 50(1) and 51(1), s. 81.19, and par. 1(t), Part XIII, Schedule III; Canadian International Trade Tribunal Act, C.S., 1988, c. 56, s. 60; Sale of Goods Act, R.S.O. 1980, c. 462, s. 17.*

Author: *The Sale of Goods, P.S. Atiyah, 7th ed., Pitman.*

Appeal No. 3061

FEDERAL ELECTRIC (1976) LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: JOHN C. COLEMAN, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

SUMMARY

The appellant in this case had a contract to supply transformers and related materials to Defence Construction (1951) Limited. The contract was signed in October 1986 and listed the goods which would be delivered over several months. An amendment to Part XIII, Schedule III of the *Excise Tax Act* (the Act), which became effective on February 19, 1987, removed the sales tax exemption for transformers.

The appellant argued before the Tribunal that transformers, delivered to Defence Construction (1951) Limited between February 19, 1987, and June 1987, when the contract was completed, should be exempt from tax on the grounds that the goods required for the contract were ascertained at the time of its signature. The appellant argued that this met the requirements of paragraph 50(1)(a) of the Act which states that sales tax is assessed at the time goods are delivered or property in the goods passes.

The appeal is not allowed. The specific goods to be delivered were not known at the time of contract. The deliveries of the goods and the time at which property in them passed occurred after the legislative amendment.

THE LEGISLATION

For the purpose of this appeal, the relevant provisions from the Act¹ are as follows:

50. (1) There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sale 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,

...

1. 1985, c. E-15.

51. (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 XIII

*PRODUCTION EQUIPMENT, PROCESSING
MATERIALS AND PLANS*

1. All the following:

...

but not including:

...

(t) goods, including transformers, for use in the transmission or distribution of electricity, other than goods for use within the plant where the electricity is generated or within any other plant where goods, other than electricity, are manufactured or produced ...

THE FACTS

This is an appeal pursuant to section 81.19 of the Act, as amended, from a Notice of Decision of the respondent dated August 10, 1988, confirming Notice of Determination No. OTT 08134 dated October 8, 1987, rejecting in part a claim for refund of federal sales tax. The respondent states in its Notice of Decision:

It is your representation that certain goods, purchased by you for a project to replace electrical distribution system of hangar 1 to 5 of the CFB Ottawa (S) Ontario, qualified for sales tax exemption and you are entitled to receive a tax refund for those goods.

The subject goods are transformers and related items. The sales tax adjustment of \$3,094.39 is related mainly to those goods purchased between March 12, 1987 to May 22, 1987.

As a result of an amendment to the Excise Tax Act, goods, including transformers, for use in the transmission or distribution of electricity are specifically excluded from sales tax exempting provisions by virtue of paragraph 1(t) of Part XIII of Schedule III to the Excise Tax Act. This amendment came into force, effective February 19, 1987.

As the subject transformers and related items have been purchased after that date, there is no basis to allow your objection.

The appellant appealed the respondent's decision to the Tariff Board on September 12, 1988. It contends that the sales tax should be imposed at the time of signature of the fixed price contract at issue, October 24, 1986, and that the legislative amendment of Part XIII, Schedule III of the Act, effective February 19, 1987, has no bearing on the contract.

The appellant seeks a declaration that the subject goods, transformers and related items, qualify for exemption from sales tax pursuant to paragraph 1(t), Part XIII, Schedule III of the Act.

The appeal, being a continuation of proceedings commenced before the commencement of the *Canadian International Trade Tribunal Act*² is taken up by the Canadian International Trade Tribunal by virtue of section 60 of that Act.

At the hearing, parties submitted documentary evidence. From these documents, as well as from the parties' briefs, the events that led to this appeal can be summarized as follows.

The appellant entered into a contract with Defence Construction (1951) Limited on October 24, 1986. This contract was for the supply of transformers and related items for a new electrical distribution system for hangars one to five at C.F.B. (Canadian Forces Base) Ottawa South. In clause 22 of the "General Conditions" attached to the contract, there is a provision for adjustment of the amount set out in the agreement if any changes in the tax imposed under the Act occur after the date of tender.

The appellant purchased, tax included, and delivered some of the subject goods in accordance with the contract before February 19, 1987, the date at which paragraph 1(t), Part XIII, Schedule III of the Act, excluding the goods at issue from the exempting provision of subsection 51(1) of the Act, came into force.

The appellant's next purchases and deliveries of the subject goods took place in March, April and May 1987, until the contract was completed in June of the same year.

In September 1987, a refund claim was filed by the appellant with respect to all tax paid on the purchases of the goods in the execution of its contract.

2. C.S. 1988, c. 56.

By Notice of Determination No. OTT 08134, confirmed by the Respondent in its Notice of Decision No. 70643 RE, the appellant was denied the full refund of sales tax. A refund was approved only for the purchases made in February 1987, and delivered prior to the February 19, 1987, legislative amendment excluding the subject goods from the exempting provision of the Act.

Following this decision, the appellant filed a Notice of Appeal with the Tariff Board on September 12, 1988.

THE ISSUE

Both parties agree that only the transactions occurring after February 19, 1987, are at issue and that the relevant purchases and deliveries by the appellant of the subject goods took place after February 19, 1987. The question is thus narrowed down to the following: At what time did property in the goods pass?

In the appellant's view, the subject goods were ascertained at the time of signature of the contract in October 1986, because all required goods were identified by type, size, manufacturer and supplier.

The respondent argued that the date upon which the appellant and Defence Construction (1951) Limited entered into their contract is not relevant for the purpose of determining whether tax is payable in accordance with the Act. Subsection 50(1) of the Act specifies that tax is payable "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."

As the goods in question were all delivered after the effective date of the amendment to the Act, the only argument available to the appellant is that the property in the goods passed prior to February 19, 1987.

Counsel for the respondent, referring to the Tariff Board's decision in *Les Presses d'Aujourd'hui v. the Minister of National Revenue*³ (where a contract for the sale of printed matter was entered into before the manufacturer's licence came into force), and to P.S. Atiyah's book, The Sale of Goods,⁴ stated that the goods were unascertained and they only became ascertainable at the time of delivery; therefore, the property in the various transformer and related items was transferred at that time.

3. (1988) 13 T.B.R. 318.

4. (7th ed.).

DECISION

Under paragraph 50(1)(a) of the Act, sales tax is imposed, levied and collected on the sale price of all goods manufactured in Canada 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.

Both parties agreed that the subject goods were purchased and delivered according to a 1986 contract, after the amendment to the Act specifically excluding the transformers from the exemption provision came into force on February 19, 1987.

The crux of the matter is identifying the time when the property in the goods passed. Under the contract between Defence Construction (1951) Limited and the appellant, the latter was to purchase the subject goods from a sub-contractor and to deliver them to the Canadian Forces Base.

The subject goods were defined in the contract as to type, size, manufacturer and supplier, but were not to be specifically designed and manufactured for use by Defence Construction (1951) Limited. The supplier of the subject goods (the sub-contractor) supplied the goods "off the shelf" when the order to purchase was received from the appellant. Such purchases were made after February 19, 1987.

At the time of signature of the contract, the actual goods which were to be delivered were not specified. The meaning of "specific goods" can be found on page 46 of P.S. Atiyah's book, The Sale of Goods:⁵

Specific goods are goods "identified and agreed on at the time a contract of sale is made", for example, this particular car or this particular load of wheat.

As to the term "ascertained goods," counsel for the respondent offered the following definition taken from section 17 of the *Sale of Goods Act*:⁶

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained.

The subject goods became ascertained only at the time they were purchased and delivered, the date of transfer of ownership coinciding with the date of delivery.

5. Ibid.

6. R.S.O. 1980, c. 462.

CONCLUSION

In view of the fact that the appellant admitted having purchased and delivered the subject goods after paragraph 1(*t*), Part XIII, Schedule III of the Act, excluding transformers from the exemption provision of the Act, came into force February 19, 1987, the Tribunal concludes that the sales of the goods in issue are not exempt from federal sales tax as is imposed by section 50 of the Act, in accordance with subsection 51(1) of the same.

The appellant argued that the property in the goods passed prior to February 19, 1987. It relied on the contract which it considered a fixed price agreement. Even though the "General Conditions" attached to the agreement provided for an adjustment if the Act were amended and if it influenced the amount of the contract, the appellant's representative informed the Tribunal that no such request had been submitted to Defence Construction (1951) Limited.

The Tribunal notes that the appellant, in accordance with the "General Conditions" of the contract at issue, could have requested an adjustment of the amount of the agreement directly from Defence Construction (1951) Limited, but chose not to do so.

The appeal is dismissed.

John C. Coleman
John C. Coleman
Presiding Member

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member