CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, September 25, 1990

Appeal No. 3093

IN THE MATTER OF an appeal heard on July 10, 1990, under section 81.19 of the *Excise Tax Act*;

AND IN THE MATTER OF a decision of the Minister of National Revenue, dated August 30, 1988, with respect to a notice of objection filed under section 81.15 of the *Excise Tax Act*.

BETWEEN

PICK-A-MIX CONCRETE LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal finds that the appellant is entitled to deduct the transportation costs incurred between its premises and the customer's construction site where it delivers concrete.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. 3093

PICK-A-MIX CONCRETE LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Deduction of transportation costs - Raw materials - Manufactured goods - Ready-mix concrete.

Whether the appellant, in determining its liability for sales tax on the sale price of the concrete, is entitled to deduct the transportation costs of the contents of the mobile mixer truck, incurred between its premises and the construction site where concrete is delivered, even though the truck's contents consist of four concrete ingredients loaded into four different compartments.

Held: *The appeal is allowed. The Tribunal finds that the appellant has the right to deduct the transportation costs incurred between its premises and the construction site where it delivers concrete.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*July 10, 1990*
Date of Decision:	*September 25, 1990*
Tribunal Members:	*Michèle Blouin, Presiding Member* *W. Roy Hines, Member* *Charles A. Gracey, Member*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Paul E. Hawa, for the appellant* *Ian M. Donahoe, for the respondent*
***Cases Cited**:*	*Her Majesty The Queen v. York Marble, Tile and Terrazzo Limited, [1968] S.C.R. 140; Montreal Swiss Embroidery Works Limited v. The Deputy Minister of National Revenue for Customs and Excise (1965), 3 T.B.R. 203; Chevron Canada Limited v. The Minister of National Revenue, [1986] 2 C.T.C. 495 (F.C.A.); Stubart Investments Limited v. The Queen, [1984] 1 S.C.R. 536.*
***Statutes and Regulations Cited**:*	*Excise Tax Act, R.S.C., 1970 (as amended), c. E-13, cl. 26(6)(c)(ii)(B), subpar. 27(1)(a)(i) and s. 51.19; An Act to amend*

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the Excise Tax Act and the Excise Act and to provide for a revenue tax in respect of petroleum and gas, S.C. 1980-81-82-83, c. 68, subs. 8(5); 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, subs. 52 (1), item 33, and subs. 52(2); Sales Tax Transportation Allowance Regulations, SOR/83-95, January 21, 1983, s. 3.

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3093

PICK-A-MIX CONCRETE LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
W. ROY HINES, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 51.19 of the *Excise Tax Act*[1] (the Act), from a decision of the Minister of National Revenue (the Minister) confirming a former assessment made by the Department of National Revenue, Customs and Excise (the Department), disallowing the deduction of the transportation costs when assessing the appellant's tax liability on the sale price of ready-mix concrete.

The appellant is a manufacturer of concrete that contracts with its customers for the supply of concrete to the customer's construction site.

The appellant seeks the right to deduct the transportation costs incurred between its premises and the delivery site when delivering the concrete to the purchaser.

FACTS

The appellant, Pick-A-Mix Concrete Limited (Pick-A-Mix), is a licensed manufacturer of custom-ordered concrete. The appellant contracts with its customers for the supply of concrete to the customer's construction site on an all-inclusive price basis.

The concrete on which sales tax is being assessed is produced from the mixing of cement, sand, stone or gravel, and water. The mobile concrete mixing truck used in the mixing and delivery operation is divided into four different compartments containing cement, sand, stone or gravel, and water. These compartments are loaded at the appellant's premises. When loaded, the truck is driven to the customer's construction site where the truck's mixer, located beneath the compartments, mixes the four ingredients into concrete. When the mixing is completed, the concrete is poured out of the mobile mixer through a chute into the relevant forms or molds on site.

1. R.S.C., 1970 (as amended), c. E-13; now R.S.C., 1985, c. E-15, s. 81.19.

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In calculating the sale price of the concrete for the purpose of sales tax, the appellant deducted the transportation costs relating to the delivery of the contents of the mobile mixing truck from the appellant's premises to the construction site.

By Notice of Assessment No. TOR 4106, dated December 2, 1987, the Department assessed the appellant unpaid tax of $40,493.27 (on the deducted transportation costs), interest of $3,309.75 and a penalty of $2,480.11, for a total amount of $46,283.13. The period covered was from July 1, 1985, to August 31, 1987.

By a notice of objection, dated January 26, 1988, the appellant opposed the Department's notice of assessment. On August 30, 1988, Notice of Decision 71060AE was issued by the Minister confirming the assessment. On December 7, 1988, the appellant appealed the sales tax assessment under section 51.19 of the Act.

The appellant seeks a declaration that, in calculating the taxable sale price of the concrete, the costs incurred in transporting the ingredients from the appellant's premises and delivering the concrete to the construction site be deducted under clause 26(6)(*c*)(ii)(B) of the Act.[2]

At the hearing, two witnesses were heard for the appellant. The first witness was Mr. Patrick Aprile, president of Pick-A-Mix. In his testimony, Mr. Aprile explained what concrete is and how it is manufactured. With respect to the concrete produced by the appellant, he explained the production process of that concrete. Asked to distinguish between the "ready-mix" process and the one used by Pick-A-Mix, Mr. Aprile said that the only difference is that, in the latter process, the mixing of the raw materials occurs at the delivery site. (For greater comprehension, the Tribunal notes that the expression "ready-mix" as used here refers to the production process that, for the transportation of concrete, uses trucks equipped with a large revolving mixer.)

This witness also revealed that the producers of concrete using the "ready-mix" process were allowed a deduction for their transportation costs to the construction site. He explained that, while the "ready-mix" trucks often started mixing raw materials at the producer's premises, they would also mix all the way to the delivery site, and sometimes, raw materials, like water or cement, would be added. The witness added that the trucks used in the "ready-mix" process would sometimes mix or continue to mix at the delivery site in order to obtain the correct product.

In cross-examination, the witness explained where, and at what costs, the appellant bought cement, stone and sand. Finally, he revealed the existence of a "standard transportation deduction" allowed to "ready-mix" process producers following an understanding concluded with the Department.

The second witness, Mr. Ronald Weisfeld, is a chartered accountant and has been the appellant's independent auditor for over 20 years. This witness testified that the transportation costs allocated to concrete by the appellant, for the transportation of the raw materials from its

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2. R.S.C., 1970 (as amended), c. E-13; now R.S.C., 1985, c. E-15, cl. 46(*c*)(ii)(B).

premises to the delivery site, were allocated in accordance with generally accepted accounting principles. Mr. Weisfeld added that the transportation costs were outward freight costs allocable to the cost of sales of the concrete. In cross-examination, he confirmed that these costs were allocated to the sale of concrete.

ISSUE

The issue in this appeal is whether the appellant, in determining its liability for sales tax on the sale price of the concrete, is entitled to deduct the transportation costs of the contents of the mobile mixer truck, incurred between its premises and the construction site where concrete is delivered.

LEGISLATION

The statutory provisions of the Act[3] relevant to this appeal are as follows:

26(6) For the purpose of determining the consumption or sales tax payable under this Part,

...

(c) in calculating the sale price of goods manufactured or produced in Canada, there may be excluded

...

(ii) under such circumstances as the Governor in Council may, by regulation, prescribe, an amount representing

...

(B) the cost of transportation of the goods incurred by the manufacturer or producer in delivering the goods from his premises to the purchaser where the goods are sold at a price that includes delivery to the purchaser,

determined in such manner as the Governor in Council may, by regulation, prescribe.

27(1) There shall be imposed, levied and collected a consumption or sales tax at the rate specified in subsection (1.1) on the sale price of all goods

(a) produced or manufactured in Canada
(i) payable, in any case other than a case mentioned in subparagraph (ii) or (iii),

3. R.S.C., 1970 (as amended), c. E-13; now R.S.C., 1985, c. E-15, ss. 46 and 50.

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,

...

Sales Tax Transportation Allowance Regulations[4] *(the Regulations)*

...

3. Subject to section 4, for the purpose of determining the consumption or sales tax payable under Part V of the Act on the sale price of goods manufactured or produced in Canada, the amount representing the cost of transportation of the goods that may be excluded under subsection 26(6) of the Act in calculating the sale price of the goods shall be determined by reference to the invoices, statements, records or books of account of the manufacturer or producer of the goods and in accordance with generally accepted accounting principles.

ARGUMENTS

The appellant submits that section 3 of the Regulations provides that, for the purpose of clause 26(6)(*c*)(ii)(B) of the Act, the transportation or delivery costs incurred by the appellant be determined in accordance with generally accepted accounting principles. The appellant further submits that those transportation and delivery costs are properly allocated to the sale price of the concrete, according to generally accepted accounting principles.

The respondent asserts that to manufacture is to give "new forms, qualities and properties or combinations" and that the manufacturing of the concrete does not occur until after the appellant delivers the raw materials consisting of the cement, sand, stone or gravel, and water to its customer's construction site. In this regard, the respondent cites two cases: *Her Majesty The Queen v. York Marble, Tile and Terrazzo Limited*[5] and *Montreal Swiss Embroidery Works Limited v. The Deputy Minister of National Revenue for Customs and Excise*.[6]

The respondent adds that, since the appellant manufactures the concrete on its customer's site, the appellant does not incur any transportation costs for delivering the manufactured goods from its premises to the purchaser. The respondent submits that only these costs are deductible and cites the case of *Chevron Canada Limited v. The Minister of National Revenue*.[7]

Counsel for the appellant argues that subparagraph 26(6)(*c*)(ii), in which clause (B) is contained, refers to an "amount representing." Thus, counsel submits, when read with the end of paragraph (*c*) and the beginning of clause (B), it gives the following:

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4. SOR/83-95, January 21, 1983.
5. [1968] S.C.R. 140.
6. (1965), 3 T.B.R. 203.
7. [1986] 2 C.T.C. 495 (F.C.A.).

... there may be excluded ... an amount representing ... the cost of transportation ...

Therefore, it is counsel's contention that the measure does not require that only direct costs be deductible. Counsel submits that the only requirement is that costs be allocated to the concrete delivered at the construction site after the transportation of the raw materials from the appellant's premises. This will be done in accordance with generally accepted accounting principles as provided by the applicable regulation, which, counsel submits, the appellant does accordingly.

Counsel also argues that nothing in the applicable provision states that the taxable goods must be manufactured or produced at the time the appellant's truck leaves its premises. Finally, he submits that the provision establishes a distinction between transport and delivery. Thus, if the appellant does not transport concrete, at least it delivers concrete, not raw materials. Therefore, the appellant has the right to deduct the costs incurred for the delivery of concrete, which are the transportation costs incurred between the appellant's premises and the delivery site, allocated to the concrete in accordance with generally accepted accounting principles.

Counsel for the respondent argues that the costs incurred by the appellant are for transportation of raw materials (sand, cement, stone or gravel, and water), not concrete. Counsel adds that there is no concrete at the time the appellant's truck leaves its premises. He submits that, in view of the *York Marble*[8] case, which interprets the words "produced or manufactured in Canada," the appellant's concrete is not produced until the truck arrives at the delivery site and starts the mixing operation. Counsel submits that the fact that the transportation costs of the raw materials can be allocated to the supply of concrete for accounting purposes does not make it deductible and adds that the provision makes no distinction between transport and delivery.

Finally , counsel for the respondent relies on the *Chevron*[9] case to show that the statute must be applied as it is, even if, in doing so, an unfair situation seems to arise.

FINDING OF THE TRIBUNAL

The Tribunal considers that the central issue in this case is whether clause 26(6)(*c*)(ii)(B) requires that, in order to qualify for a deduction of transportation costs, the concrete be manufactured or produced before departure from the appellant's premises for delivery to the customer's construction site.

To answer that question, the Tribunal considers it necessary to study the meaning of paragraph (*c*) within the entire context of subsection 26(6). The Tribunal believes that the text of this measure, which was introduced in 1981, shows the legislator's intent.[10] The Tribunal is of

8. Supra, note 5.
9. Supra, note 7.
10. *An Act to amend the Excise Tax Act and the Excise Act and to provide for a revenue tax in respect of petroleum and gas*, S.C. 1980-81-82-83, c. 68, subs. 8(5).

the opinion that the clear purpose of this provision is to permit, under such conditions and circumstances as the regulations provide, the deduction of three categories of costs from the sale price of taxable goods. These include: (1) fees for inspection, marking, stamping or certification; (2) the cost of erection or installation; and (3) the cost of transportation. These provisions are set out in clauses 26(6)(*c*)(ii)(A) and (B).

In considering the entire context of subsection 26(6), the Tribunal concludes that the legislator's intent was not to tax that part of the sale price that relates to the above-mentioned costs or activities. Certainly, the legislator intended to apply conditions, and did provide for regulations, to establish how such costs may be deducted. However, in reading clause (B), the Tribunal can find neither an express nor an implied directive that transportation costs incurred by the appellant should not be deducted.

To interpret subsection 26(6), the Tribunal recalls the Supreme Court of Canada decision in *Stubart Investments Limited v. The Queen*.[11] This case dealt with income tax matters, and Mr. Justice Estey, in connection with rules for the interpretation of taxing statutes, gave the following comment:

> *While not directing his observations exclusively to taxing statutes, the learned author of Construction of Statutes (2nd ed. 1983), at p. 87, E.A. Dreidger, put the modern rule succinctly:*
>
> > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

The respondent argues for a denial on the grounds that the raw materials in transit are not the goods delivered or sold. The Tribunal takes the broader view that, in fact, the goods delivered by the appellant are identical to the goods delivered by the other method of conveyance. If the respondent wishes to rely upon the narrowest possible interpretation of the statute, the Tribunal points out that the subject goods are ready-mix concrete, not simply concrete. It follows that, by definition, all concrete is a mixture of the constituent ingredients; thus, the qualifier "ready-mix" must refer to a particular kind of concrete. The respondent understands this appellation to mean the type of concrete that is mixed prior to and during transit and for which a transportation deduction is presently allowed. The Tribunal takes the view that the appellant is either delivering ready-mix concrete, in which case the goods are taxable and a deduction for transportation costs is allowed, or the appellant is not delivering ready-mix concrete, in which case the goods would not be taxable. To be clear, the respondent based his argument on the fact that, since the unmixed ingredients were transported and not the mixed concrete, the deduction cannot be allowed. The Tribunal finds that the concrete cannot be produced without the ingredients that were transported, at a cost that can be allocated to the transportation of the ready-mix concrete in accordance with generally accepted accounting principles.

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11. [1984] 1 S.C.R. 536, at page 578.

The Tribunal notes also that the word "goods" is not defined. It agrees with the respondent that the word "goods" in clause (B) refers to the expression "goods ... produced or manufactured in Canada" mentioned at paragraph (*c*). However, it finds that: (1) the goods, which the appellant produced and delivered, are such produced or manufactured goods in Canada; (2) the text of clause (B) does not specify that the goods must be produced or manufactured prior to its transportation; and (3) nevertheless, the goods must be delivered, which implies that they are produced or manufactured at the time of the delivery.

The Tribunal takes into account that ready-mix concrete has been subject to sales tax only since 1985.[12] In this regard, it considers that one cannot expect that the legislator, whenever a product or a category of goods is newly subject to sales tax, will modify all measures of a general character, such as paragraph 26(6)(*c*), in order to contemplate in detail the very particular characteristics of each industry that may be involved. In the present case, the industry uses transportation methods appropriate to the manufacturing and delivering of concrete because the task presents unique technical problems. The Tribunal does not believe that, in deciding to tax ready-mix concrete in 1985, the legislator planned to disallow the deduction of transportation costs depending solely on the method of delivery of the concrete to the construction site. Rather, it believes that the legislator had in mind that clause 26(6)(*c*)(ii)(B) enacted in 1981 would apply generally to those goods because the paragraph is so generally constructed as to encompass such a situation.

In that sense, the Tribunal takes into account the evidence offered by the appellant with respect to the "ready-mix" production process and with respect to the deduction that these producers are allowed under the same statutory provision. It notes that the respondent did not contest this evidence and, moreover, that it cross-examined the appellant's witness about the exact amount of deduction agreed with the Department.[13]

The Tribunal does not see any critical difference between the two methods of production and delivery of concrete. The ready-mix process and the one used by Pick-A-Mix produce the same final taxable product that it delivers as ready-mix concrete.

The Tribunal has examined the cases submitted by the respondent and finds that they were not relevant to the case at hand.

In the *Chevron*[14] case, in particular, where the same provision had to be interpreted, the goods in issue were obviously produced or manufactured. Justice Pratte of the Federal Appeal Court had only to decide if the transportation between two premises of the same producer could lead to the deduction for transportation costs under the statute, even though there was no delivery to a buyer.

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12. *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, subs. 52(1), item 33, and subs. 52(2); now R.S.C., 1985, c. 7 (2nd Supp.).
13. Transcript of Appeal No. 3093, July 10, 1990, pp. 35 and 36.
14. Supra, note 7.

In the *York Marble*[15] case, the issue to determine was whether work done on marble slabs was sufficient to constitute the manufacturing or production of goods in Canada. The question at issue in that case has nothing to do with the present case. Firstly, the respondent recognizes that the appellant delivers goods, that is, ready-mix concrete. Secondly, the *York Marble* case had to interpret the phrase "goods ... produced or manufactured in Canada," which is not the issue in the present case.

In the *Montreal Swiss Embroidery*[16] case, the issue to determine was whether the appellant was manufacturing goods, which again is not the issue in this case.

For all these reasons, the Tribunal finds that clause (B) of subparagraph 26 (6)(*c*)(ii) does not require that ready-mix concrete be produced or manufactured before departure from the appellant's premises for delivery to the customer's construction site in order to qualify for a deduction of transportation costs.

CONCLUSION

The appeal should be allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
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Member

15. Supra, note 5.
16. Supra, note 6.