CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, July 30, 1990

Appeal No. 3016

IN THE MATTER OF an appeal heard on March 22, 1990, pursuant to section 81.19 of the *Excise Tax Act*;

AND IN THE MATTER OF a notice of decision by the Minister of National Revenue dated March 30, 1988, with respect to a notice of objection filed pursuant to section 81.17 of the *Excise Tax Act*.

BETWEEN

LAHRMANN CONSTRUCTION LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION

The appeal is not allowed. The Tribunal maintains the decision of the Deputy Minister of National Revenue to tax Lahrmann Construction Ltd., the appellant, as a producer or manufacturer of asphalt paving mixtures and to include in the sale price of the asphalt paving mixtures the cost of the asphalt cement that the appellant purchased and incorporated in the fabrication of the paving mixtures sold to Public Works Canada.

Michèle Blouin
Michèle Blouin
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

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LAHRMANN CONSTRUCTION LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

***DECISION**: The appeal is not allowed. The Tribunal maintains the decision of the Deputy Minister of National Revenue to tax Lahrmann Construction Ltd., the appellant, as a producer or manufacturer of asphalt paving mixtures and to include in the sale price of the asphalt paving mixtures the cost of the asphalt cement that the appellant purchased and incorporated in the fabrication of the paving mixtures sold to Public Works Canada.*

Place of Hearing:	*Edmonton, Alberta*
Date of Hearing:	*March 22, 1990*
Date of Decision:	*July 30, 1990*
Tribunal Members:	*Michèle Blouin, Presiding Member* *Arthur B. Trudeau, Member* *W. Roy Hines, Member*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*G. Flynn, for the appellant* *M. Ciavaglia, for the Respondent*

Statutes and Regulations Cited:	*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), Part I, Schedule V, Item 34, s. 24, now R.S.C., 1985, c. 7 (2nd Supp.), subs. 56(1).*
Memorandum Cited:	*Excise Communiqué 110/T1 dated May 23, 1985.*

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Appeal No. 3016

LAHRMANN CONSTRUCTION LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
ARTHUR B. TRUDEAU, Member
W. ROY HINES, Member

REASONS FOR DECISION

SUMMARY

The appellant, Lahrmann Construction Ltd., entered into a contract with Public Works Canada (Public Works) to supply, mix and install asphalt on certain portions of the Trans Canada Highway in Banff National Park. In order to fabricate the asphalt paving mixtures required to pave the road, the appellant used gravel supplied at no cost by Public Works and purchased and paid for asphalt cement from Imperial Oil Limited. The contract provided that the appellant would be responsible for the purchase and delivery to the plant site of the asphalt cement, prime coat and tack coat materials. The Deputy Minister of National Revenue (the Deputy Minister) found that, for the purposes of sales tax, the appellant was the manufacturer or producer of the asphalt paving mixtures and was required pursuant to the *Excise Tax Act* to pay tax based on the "sale price" of the asphalt paving mixtures sold to Public Works. In assessing the appellant, the Deputy Minister determined that the sale price of the asphalt paving mixtures included the cost of the asphalt cement used in the fabrication of the asphalt paving mixtures. The appellant brought an appeal of this decision to the Tribunal, alleging that its contract with Public Works was merely a contract for services that included labor and equipment and did not include the selling of goods. Insofar as the purchase of asphalt cement was concerned, the contract was in the nature of an agency contract. The appellant also argued that Public Works was the end user of the asphalt and should be the one to pay the sales tax. The Tribunal rejects the appeal and maintains the decision of the Deputy Minister.

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THE LEGISLATION

The statutory provisions, as they read at the relevant time, are as follows:

Excise Tax Act[1]

2 (1) ...
"manufacturer or producer" includes

...
(f) any person who, by himself or through another person acting for him, assembles, blends, mixes, cuts to size, dilutes, bottles, packages, repackages or otherwise prepares goods for sale, other than a person who so prepares goods in a retail store for sale in that store exclusively and directly to consumers; (emphasis added)

...

42 ...
"sale price", for the purpose of determining the consumption or sale tax, means

(a) except in the case of wines, the aggregate of
(i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,

(ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and

(iii) the amount of the excise duties payable under the Excise Act whether the goods are sold in bond or not, ...

50 (1) There shall be imposed, levied and collected a consumption or sales tax of nine per cent on the sale price of all goods

(a) produced or manufactured in Canada
(i) 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 (emphasis added)

...

PART I - SCHEDULE V

34. Asphalt paving mixtures.[2]

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1. R.S.C., 1985, c. E-15.
2. *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof,*

THE FACTS

This is an appeal, pursuant to section 81.19 of the *Excise Tax Act* (the Act), of Notice of Decision No. 60265 AE dated March 30, 1988. In this decision, the Deputy Minister of National Revenue (the Deputy Minister) found that, for the purposes of sales tax, the appellant was the manufacturer or producer of the asphalt paving mixtures and was required, pursuant to the Act, to pay tax based on the "sale price" of the asphalt paving mixtures sold to Public Works Canada (Public Works). In assessing the appellant, the Deputy Minister determined that the sale price of the asphalt paving mixtures fabricated by the appellant included the cost of the asphalt cement used in the fabrication of the asphalt paving mixtures.

The appellant, Lahrmann Construction Ltd. (Lahrmann), objected to the inclusion of the asphalt cement in the value upon which federal sales tax is calculated. It requested that the appeal be allowed and the matter referred back to the Deputy Minister for reassessment on the basis that federal sales tax should not be imposed on the value of asphalt cement supplied by Lahrmann.

The respondent asked that the appeal be dismissed.

The appeal was originally filed with the Tariff Board. However, pursuant to section 60 of the *Canadian International Trade Tribunal Act*,[3] the appeal is taken up and continued by the Canadian International Trade Tribunal.

Lahrmann is a corporation that entered into a contract with Public Works to supply, mix and install asphalt on 14,8 km of the Trans Canada Highway in Banff National Park. The contract was dated July 9, 1985.

Evidence for the appellant was presented by Mr. Wenzel, the Chief Executive Officer of the company. He has been associated with the company since 1978.

The witness described the asphalt fabrication process as follows. The contractor takes two raw materials, crushed aggregate, which is rock that is crushed to specific size, and asphalt cement. They are mixed in specific proportions in a drum mix plant that first dries the material and then coats it with the asphalt cement. This mixture is then placed into a storage silo until its removal to the construction site where it is placed into highway paving machines that deposit the material in a certain thickness, usually two to four inches, onto the road. It is then rolled and compacted.

As a matter of terminology, the witness explained that the terms "asphalt cement" and "oil" are synonymous terms. The terms "asphalt cement" will be referred throughout this decision to describe the material involved.

S.C. 1986, c. 9, subs. 52(1), amending s. 24 of Part I, Schedule V of the said Act, Item 34, in force on July 1, 1985, now R.S.C., 1985, c. 7 (2nd Supp.), subs. 56(1).

3. S.C. 1988, c. 56.

The tender's call document related to the contract between Public Works and Lahrmann provided that:

> ...
>
> *2. The Contractor will be responsible for the purchase and delivery of the asphalt cement, prime coat and tack coat materials to the plant site. The Contractor shall obtain competitive bids for the supply and delivery of the asphaltic cement, prime coat and tack coat materials and shall forward to the Engineer copies of the bids and substantiating data that the price is competitive, fair and reasonable, and shall recommend a supplier. The Contractor shall receive written approval of the supplier and asphalt price from the Engineer prior to issuing a purchase order for the supply and delivery of the asphalt cement and tack coat materials.*
>
> *3. The Contractor shall receive payment for the supply and delivery of the asphalt cement, prime coat and tack coat materials to the plant site <u>at costs invoiced by the supplier</u>....*

The appellant, in order to fulfill its contract, used gravel supplied at no cost by Public Works and purchased and paid for asphalt cement from Imperial Oil Limited (Imperial Oil). The witness explained that the amount for the purchase of asphalt cement was entered into the contract by Public Works and the appellant had no control over the amount. Asphalt was to be purchased on a sales tax exempt basis. The witness also explained that there was no profit to the appellant on the resale of the asphalt cement to Public Works and no opportunity, under the contract, to recover the monies expended for taxes. The appellant merely submitted the invoices received from the supplier, Imperial Oil, to Public Works that, in turn, reimbursed Lahrmann in the same amount. The monies were then paid to the supplier. The witness added that the price of the asphalt cement could not be determined prior to the award of the tender because the appellant did not bid a price for the asphalt cement. The amount for the purchase of the asphalt cement was set and entered into the contract with the appellant by Public Works.

The witness attested that on most similar contracts for paving highways entered into with the Province of Alberta, the province was responsible for the supply of asphalt cement and gravel. This was not the case here, because of the requirements of Public Works, although the nature of the work performed was the same, that is paving highways. The witness explained that the reason that Public Works did not buy the asphalt cement itself was one of convenience. During the construction process, it is very critical to order the exact amount of alphalt cement daily from the supplier. Had it purchased the asphalt cement itself, Public Works would have had to hire another person just to monitor the progress of the work and take daily stock of the amount of asphalt cement needed by the contractor. Thus, as it was not very convenient for Public Works to do the purchasing, the contract provided that Lahrmann would purchase the asphalt cement directly and be reimbursed later for the price.

Clause 22.2 of the General Conditions to the contract documents between Public Works and Lahrmann dated July 9, 1985, provide that:

22.2Notwithstanding GC22.1 and GC35, an amount set out in the Articles of Agreement shall be adjusted in the manner provided in GC22.3, if any change in a tax imposed under the Excise Tax, the Excise Tax Act, the Old Age Security Act, the Customs Act or the Customs Tariff

22.2.1 occurs after the date of the submission by the Contractor of his tender for the contract,

22.2.2 applies to material, and

22.2.3 affects the cost to the Contractor of that material.

22.3If a change referred to in GC22.2 occurs, the appropriate amount set out in the Articles of Agreement shall be increased or decreased by an amount equal to the amount that is established by an examination of the relevant records of the Contractor referred to in GC51 to be the increase or decrease in the cost incurred that is directly attributable to that change.

22.4For the purpose of GC22.2, where a tax is changed after the date of submission of the tender but public notice of the change has been given by the Minister of Finance before that date, the change shall be deemed to have occurred before the date of submission of the tender.

On July 1, 1985, asphalt paving mixtures became subject to sales tax,[4] at a six percent rate, calculated on the sale price, when sold or used by manufacturers or producers, or when imported. These legislative amendments were set out in Notice of Motions, No. 1, Paragraph 34 of the Budget Papers tabled in the House of Commons on May 23, 1985.

On May 23, 1985, Revenue Canada issued Excise Communiqué 110/TI that gave advance notice of the proposed new tax and set out methods by which manufacturers of asphalt paving mixtures could account for sales tax payable under the Act. This was brought to the attention of the bidders to the asphalt paving contract at a pre-tender meeting held on June 25, 1985, which Lahrmann attended.

Of the two methods set out in Excise Communiqué 110/T1 by which sales tax could be calculated, the appellant chose to take the detailed assessment method, which is a more detailed calculation and includes the costs of materials and of services to be calculated.

The Deputy Minister, in assessing the appellant for the year 1985, included the value of the asphalt cement as materials incorporated into the finished product and subject to federal sales tax, and therefore taxed the appellant accordingly. The appellant objected to this decision and appealed to the Tribunal for relief.

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4. *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), amending s. 24 of Part I, Schedule V of the said Act, Item 34, now R.S.C., 1985, c. 7 (2nd Supp.), subs. 56(1). The same legislative amendment provided, at subs. 52(2), that the modifications to the statute were deemed to have come into force on July 1, 1985.

The respondent presented one witness, Mr. Iverson, an employee of Public Works. The witness was the Deputy Project Manager, who acted as the assistant to the engineer of record on the project.

According to this witness, there were three components to the contract. One was to supply the asphalt cement, another concerned the mixing, loading, hauling, placing and compacting the asphalt cement while the last one was for miscellaneous extra work. Under the first obligation, the contractor, Lahrmann, was required to purchase the asphalt cement and would be reimbursed by Public Works through monthly progress claims.

The witness also explained that a pre-tender meeting was held on June 25, 1985, prior to the award of the contract. At that meeting, all the contractors were present including Lahrmann as evidenced in the minutes of the pre-tender briefing for the Banff National Park introduced in the record as Exhibit B-1. The minutes had been prepared by two resident supervisors, Mr. Don McRitchie and Mr. Julian Malinsky. Mr. Malinsky was the resident supervisor on the project.

The witness testified that, at this pre-tender meeting, Public Works raised the question of the new tax on asphalt paving mixtures and advised potential bidders that there had been certain tax changes. The witness for the respondent explained that, as early as the pre-tender stage of the contract, the appellant was aware that there was a sales tax payable on asphalt paving mixtures. At the same meeting, the contractors were told by Public Works representatives that the six percent excise tax would be in effect during the life of this contract. Public Works also explained that the contractor was expected to pay the sales tax on the asphalt cement and to build the price of the tax into its submissions.

The Deputy Minister found that for the purposes of the Act, the appellant was the manufacturer or producer of the goods and was required to pay tax based on the sale price of the asphalt paving mixtures sold to Public Works - the sale price of which included the value of the asphalt cement purchased by Lahrmann and sold to Public Works. Although gravel was also initially taxed by Revenue Canada, it was later excluded from tax on appeal by the appellant to the Deputy Minister. The reason for that change has to do with the fact that the gravel was not purchased, but rather, provided to the appellant at no cost.

It is the decision of the Deputy Minister to include the cost of the asphalt cement in the sale price of asphalt paving mixtures that is appealed by Lahrmann.

THE ISSUE

The issue in this appeal is whether the appellant is required to pay sales tax on the price of asphalt cement purchased from Imperial Oil, which asphalt cement was incorporated in the course of the fabrication of the paving mixtures sold to Public Works.

ARGUMENTS

It is the position of the appellant that its contract with Public Works was merely a contract for services that included labor and equipment. Counsel for the appellant argues that the contract did not include the selling of goods. Insofar as the purchase of asphalt cement is concerned, the contract was in the nature of an agency contract. Because of this agency relationship, he contends that Public Works is the end user of the asphalt and should be the one to pay the sales tax.

According to counsel, the terms of the contract provide, explicitly or impliedly, that Lahrmann was merely the agent of Public Works in acquiring the asphalt cement. This is evidenced by the fact that the tender did not require the appellant to bid on the asphalt cement. Rather, the asphalt cement was purchased only upon the written approval of Public Works that reimbursed the appellant for cost only with no provision for overhead or profit. Since Lahrmann did not incur any costs in respect of the asphalt cement, the price of this last material should not form part of the base upon which federal sales tax is calculated.

In addition, counsel argues, the terms of the Act require tax to be paid based on "sale price" that is generally defined as the amount charged as price. The concept of price, he argues, would not encompass that price received as reimbursement payment from Public Works for the asphalt cement.

Counsel adds that the terms of the Excise Communiqué 110/T1 dated May 23, 1985, are not precise as to the method of determining value as a basis for tax. Such value should not include a mere reimbursement of expenses incurred by the appellant as agent for Public Works. He further contends that if it is appropriate to use a determined value pursuant to Memorandum ET207, then the term "cost," as used in the phrases "cost of all materials used" and "laid-down cost," must envisage the cost to the appellant. It is unreasonable, he argues, to levy tax on the appellant based on the costs incurred by another party, i.e., Public Works.

Alternatively, argues counsel, paragraphs 5 and 6 of Memorandum ET207 deem Public Works to be the manufacturer for federal sales tax purposes. These provisions, he contends, encompass an end user (i.e., Public Works) supplying materials (i.e., gravels and asphalt cement) to another person (i.e., Lahrmann) to be physically manufactured into taxable products for the end user (i.e., Public Works as part of the Government of Canada). In the result, the manufacturer subject to tax in respect of the gravel and asphalt cement components should be Public Works, rather than Lahrmann.

Counsel also adds that the provisions of Memorandum ET311, Custom Work, limits the federal sales tax liability to the value of the contract to the appellant. In effect, the Contract is one for labor with the result that the appellant is deemed to have sold goods at a sale price equal to the charge made under the contract. The contract is an arrangement wherein gravel and asphalt cement is supplied by Public Works (either directly or through Lahrmann as agent of Public Works) and the appellant manufactures the materials and returns them to Public Works in the form of a road.

Counsel finally contends that it is unreasonable to interpret the contract that was awarded in early July 1985 on the basis of a communiqué issued very shortly before that time, but after the bidding process had commenced. He argues that the provisions of the Act and related guidelines should be interpreted so as to provide an equitable result. It is entirely unreasonable, he adds, to expect the appellant to pay federal sales tax on substantial amounts of asphalt cement that it acquired as agent for Public Works, as Lahrmann was reimbursed for direct costs only with no provision for overhead, profit or federal sales tax payable and now imposed by the respondent.

Counsel for the respondent argues that the appellant is the manufacturer or producer of asphalt paving mixtures and must pay sales tax on the price of asphalt cement purchased by the appellant and sold to Public Works in execution of the contract between the appellant and Public Works.

Counsel further submits that the fact that the mixtures are used to fulfill a contract does not absolve the appellant from payment of the tax on the total "sale price" thereof.

In calculating the "sale price" upon which tax is payable, the respondent submits that it was corrrect to include therein the cost of the asphalt cement. Pursuant to the terms of the contract, the appellant's construction tender and its arrangements with Imperial Oil, the supplier, the appellant ordered and paid for asphalt cement and then supplied and resold it to Public Works. In such circumstances, counsel argues that such asphalt cement was part of the goods sold and supplied to Public Works, and that tax is payable thereon.

As to the argument presented by counsel for the appellant that Lahrmann was merely acting as agent for Public Works in buying and selling the asphalt cement, counsel for the respondent contends that the argument is irrelevant as it has been decided a long time ago that the taxing provisions are applied on the basis of objective facts and not on the way people decide to arrange their contractual relationships.

Counsel for the respondent finally argues that any other result would lead to the conclusion that the asphalt cement is not subject to tax, a result clearly contrary to the expressed wording and intent of the Act.

DECISION

The appellant, Larhmann, is the producer of asphalt paving mixtures. This is not in dispute and was admitted by the appellant at the hearing. Given this admission, it is not open to the appellant to argue that the manufacturer is Public Works.

The contract entered into by Lahrmann and Public Works to supply, mix and install asphalt in Banff National Park sets out clearly that the appellant has the obligation, under the contract, to procure the asphalt cement necessary for the production of asphalt paving mixtures. Pursuant to the same contract, the gravel is provided free of charge by Public Works. It is the tax liability flowing from that transaction that must be reviewed by this Tribunal.

The legislative modifications that imposed a sales tax on asphalt paving mixtures were announced in the Budget of May 1985, and came into effect on July 1, 1985, before the contract was finalized between the parties on July 9, 1985. The proposed legislative changes were brought to the attention of the parties shortly after the May 23, 1985, budget announcement, long before the changes to the sales tax came into effect. Indeed, these legislative amendments were discussed at the pre-tender meeting held on June 25, 1985, which Lahrmann's representative attended. There is therefore no argument that the appellant was cognizant of the applicability of the law to its situation from the time of the bidding stage of the contract.

During the course of the hearing, the appellant admitted that it was the producer of asphalt paving mixtures in this case. Lahrmann has also sold asphalt paving mixtures to Public Works as demonstrated by the evidence adduced at the hearing. The contract provided for the paving by the appellant of certain portions of the Trans Canada Highway in Banff National Park. It is also clear from the contract that the appellant is responsible for the purchase of asphalt cement and the

sale to Public Works of the asphalt paving mixtures in which the asphalt cement is ultimately incorporated as part of the asphalt making process. The *Excise Tax Act* amendment was in effect at the time the contract was entered into and executed. Because of this, it is the view of the Tribunal that the appellant is a manufacturer or producer of asphalt paving mixtures and that it clearly comes under the purview of the Act as such. It is also clear to the Tribunal that the sale price of the asphalt paving mixtures subject to the tax included the cost of the asphalt cement purchased by Lahrmann for the purposes of incorporation in the fabrication of asphalt paving mixtures, pursuant to the above-discussed contract.

The Tribunal finds that the Deputy Minister was correct in finding that the appellant was, for the purposes of the Act, the manufacturer or producer of asphalt paving mixtures and was required, pursuant to the Act, to pay tax on the sale price of the asphalt cement used in the fabrication of the asphalt paving mixtures sold to Public Works.

The Tribunal rejects as irrelevant the argument presented by the appellant that it was merely acting as agent for Public Works in the purchase of asphalt cement. The Tribunal cannot agree that the provisions of the Act would become inapplicable on the mere assertion that the appellant was acting for another in the transaction at issue. Whether an agency relationship existed between Lahrmann and Public Works in this case is a matter of private law that should be settled between the parties or, failing settlement, could be determined in a more appropriate forum. In this case, the appellant is clearly covered by the provisions of the Act and the Tribunal has found accordingly.

CONCLUSION

The appeal is not allowed. The Tribunal maintains the decision of the Deputy Minister to tax the appellant as a producer and manufacturer of asphalt paving mixtures and to include in the sale price the cost of the asphalt cement that the appellant purchased and incorporated in the fabrication of the paving mixtures sold to Public Works.

Michèle Blouin
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