



Ottawa, Thursday, October 25, 1990

Appeal No. AP-89-122

IN THE MATTER OF an appeal heard on March 19 and 20, 1990, under section 81.22 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF a notice of objection filed under section 81.17 of the *Excise Tax Act* with respect to a determination of the Minister of National Revenue dated May 31, 1988.

BETWEEN

PILLAR CONSTRUCTION LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau

Presiding Member

W. Roy Hines

W. Roy Hines

Member

Michèle Blouin

Michèle Blouin

Member

Robert J. Martin

Robert J. Martin

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-122

PILLAR CONSTRUCTION LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - Sales tax - Culverts incorporated into lease site access roads - Exemption from sales tax pursuant to paragraph 1(j), Part XIII, Schedule III to the Excise Tax Act (the Act) - Meaning of "apparatus" - Class of persons entitled to claim refund under section 68 of the Act.

This is an appeal under section 81.22 of the Act by Pillar Construction Ltd. (Pillar) to set aside a determination of the Minister of National Revenue (the Minister) denying Pillar's claim for refund of sales tax paid on culverts purchased for use in the construction of lease site access roads. On May 17, 1988, Pillar submitted a refund application in the amount of \$1,403.77 in respect of these purchases. The application was rejected because the culverts do not qualify as apparatus for use in the exploration for, or the discovery or development of, petroleum, natural gas or minerals, as set out in paragraph 1(j), Part XIII, Schedule III to the Act. Pillar filed a notice of objection to the determination on August 23, 1988. Because the Minister had not sent a notice of decision, Pillar appealed the determination to the Tribunal on March 16, 1989.

The issue in this appeal is whether the culverts purchased by Pillar and incorporated into lease site access roads are an apparatus and, if so, whether they are for use in the exploration for, or the discovery or development of, petroleum or natural gas within the meaning of paragraph 1(j). A further question to determine is whether the appellant, an end user, is entitled to claim, under section 68 of the Act, a refund of the sales tax paid on the said culverts.

Held: *The appeal is dismissed. The Tribunal finds that the culverts in issue do not constitute an apparatus within the ordinary meaning of the word. To be an apparatus, they would have to consist of a number of interrelated parts, each having a definite function. In this case, the culverts do not consist of parts; they are simply pieced together to obtain a longer culvert. The Tribunal further finds that the evidence does not show that the construction of an access road and, consequently, the incorporation of the culverts into the road, constitute a necessary aspect of the exploration for, or discovery or development of, petroleum or natural gas. In view of these conclusions, the Tribunal does not find it necessary to determine whether the appellant, an end user, is entitled to claim a refund of the sales tax paid on the said culverts.*

Place of Hearing: Edmonton, Alberta
Dates of Hearing: March 19 and 20, 1990
Date of Decision: October 25, 1990

Tribunal Members: Arthur B. Trudeau, Presiding Member
W. Roy Hines, Member
Michèle Blouin, Member

Clerk of the Tribunal: Janet Rumball

Appearances: Blair M. Geiger, for the appellant
Linda J. Wall, for the respondent

Cases Cited: Consolidated Denison Mines Limited and the Rio Tinto Mining Company of Canada Limited et al. v. The Deputy Minister of National Revenue for Customs and Excise (1963-66) 3 T.B.R. 34; Leonard Pipeline Contractors Ltd. v. The Deputy Minister of National Revenue for Customs and Excise (1979) 6 T.B.R. 907, affirmed by F.C.A. (1980) 2 C.E.R. 119.

Statutes and Regulations Cited: Excise Tax Act, R.S.C., 1985, c. E-15, subss. 50(1) and 51(1), ss. 68 and 81.22, par. 1(j), Part XIII, Schedule III (as amended).

Dictionaries Cited: Webster's Third New International Dictionary; Funk and Wagnalls New Standard Dictionary.

Appeal No. AP-89-122

PILLAR CONSTRUCTION LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

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

REASONS FOR DECISION

This is an appeal under section 81.22 of the *Excise Tax Act* (the Act) by Pillar Construction Ltd. (Pillar) to set aside the Determination of the Minister of National Revenue for Customs and Excise (the Minister), No. ALB52224, dated May 31, 1988, denying Pillar's claim for refund of federal sales tax in the amount of \$1,403.77 paid on the purchase of culverts.

Pillar seeks a declaration from the Tribunal that certain culverts, used by it in the construction of oil drilling lease site access roads, are exempt from sales tax pursuant to section 51 of the Act since the said culverts are "machinery and apparatus" within the meaning of paragraph 1(j), Part XIII, Schedule III to the Act.

FACTS

Pillar is a construction company that entered into a number of contracts to construct oil and gas lease site access roads and to prepare the lease sites. The goods in issue are corrugated steel pipe culverts manufactured from galvanized steel coils and cut to specific lengths, diameter and wall thickness. The culverts are incorporated into lease site access roads during the construction of the roads. They provide drainage and prevent backup of water on the roads, by that improving and maintaining access to the lease sites.

Pillar filed Refund Claim No. 1311 with Revenue Canada, Customs and Excise, on May 17, 1988. The refund claim was made for the period May 20, 1984, to March 31, 1988, and the amount of the claim was \$1,403.77.

The Minister issued Notice of Determination No. ALB52224 on May 31, 1988, denying the appellant's claim for a refund of the tax paid on the purchase of the said culverts. The Minister stated in the notice of determination that the culverts do not qualify as apparatus for use in the exploration for, or the discovery or development of, petroleum, natural gas or minerals, as set out in paragraph 1(j), Part XIII, Schedule III to the Act.

Pillar filed a notice of objection to the determination on August 23, 1988. Because the Minister had not yet sent a notice of decision, Pillar appealed the Minister's determination to the Tribunal, pursuant to section 81.22 of the Act, by letter dated March 16, 1989.

At the hearing, Mr. James Rinn, the President of Pillar, testified for the appellant. He told the Tribunal that Pillar is primarily engaged in the preparation of oil and gas lease sites, the construction of access roads to lease sites and the construction of pipelines. He explained that a lease site is a site for a drilling rig. To prepare the site, the appellant clears the brush from the site, prepares access to the site for the drilling rig and the support equipment necessary for it, prepares level site for the drilling rig to sit on and digs a sump for the disposal of drilling fluids.

The witness also explained that the construction of an access road to the lease site begins at the nearest existing access road and ends at the actual site for the drilling rig. He produced a series of documents entitled "Service Contract," entered as Exhibit B-1, to which were attached the general conditions that have come with the Mineral Surface Lease Approval, a copy of the survey plan showing access to the site, a copy of Pillar's invoice to the oil company for payment of the project, a backup sheet approved by the customer and third-party bills for the acquisition of the culverts, and a backup document to the oil company showing the amount paid by Pillar for the culverts and a request for reimbursement.

The witness described the culverts employed in a typical job: the culvert is a corrugated galvanized metal pipe, commercially sold and varying in lengths from three to seven meters. The culverts are bought in smaller pieces and coupled with a metal sleeve for the length required. The diameter of culverts varies from 12 to 60 in. The witness said that, in his experience, at least one culvert is installed in most access roads, depending on the site conditions and the drainage areas involved.

Mr. Jerry Ault, a sales tax consultant since 1988, testified that he was engaged by Pillar to prepare the refund claim in issue. To prepare the refund claim, he reviewed the invoices related to it and spoke to Pillar's accounting personnel to obtain details of the purchases. He stated that each culvert purchase indicated on the refund claim related to an access road for exploration and that in each purchase listed in the claim federal sales tax was included on the invoice.

ISSUES

The issue in this appeal is whether certain culverts purchased by the appellant and incorporated into lease site access roads are "machinery" or "apparatus" and, if so, whether they are " ... for use in exploration for or discovery or development of petroleum, natural gas or minerals" within the meaning of paragraph 1(j), Part XIII, Schedule III to the Act. A further question to determine is whether the appellant, an end user, is entitled to claim, under section 68 of the Act, a refund of sales tax paid on the said culverts.

LEGISLATION

The statutory provisions relevant to this appeal are as follows:

Excise Tax Act¹

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,

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 the Schedule that are sold to or imported by persons exempt from consumption or sales tax under subsection 54(2).

68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.

SCHEDULE III PART XIII

PRODUCTION EQUIPMENT, PROCESSING MATERIALS AND PLANS

1. All the following:

...

(j) machinery and apparatus, including wire rope, drilling bits and seismic shot-hole casing, for use in exploration for or discovery or development of petroleum, natural gas or minerals,

ARGUMENTS

The appellant argued, first, that the culverts in issue qualify as "machinery and apparatus" within the meaning of paragraph 1(j), Part XIII, Schedule III. On this point, the appellant relied on the case *Access Corrosion Services Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*² where the Tariff Board considered the interpretation of the word "apparatus" and concluded that "apparatus" is a word of broad application that is widely used in both a collective and singular sense.

1. R.S.C., 1985, c. E-15, as amended.

2. (1984) 9 T.B.R. 184.

The appellant also referred to dictionary definitions of the word "apparatus" and to the case *Consolidated Denison Mines Limited and the Rio Tinto Mining Company of Canada Limited et al. v. The Deputy Minister of National Revenue for Customs and Excise*.³ In that case, the Exchequer Court stated that the word "complex" contained in the Funk and Wagnalls' definition of the word "apparatus" "does not necessarily mean that a thing is complicated, but that it consists of parts...." Based on that decision, the appellant submitted that the culverts in issue consist of parts, and put emphasis on Mr. Rinn's testimony where he described how the culverts are pieced together.

Second, the appellant submitted that the essential question is whether the construction of the access road is to be considered part of the development. The construction of the access road is, in the appellant's submission, absolutely essential to the development or the discovery of oil and natural gas. Clearly, to develop a lease site, an access road is necessary to get the equipment and the workers to the site. Without culverts there could not be an access road constructed, or if there was an access road constructed, it would be prone to being washed away by the water that would otherwise be flowing through the culvert. Therefore, culverts purchased for installation under access road leading to oil and gas well drilling sites are to be considered goods for use in exploration for, or discovery or development of, petroleum or natural gas within the meaning of paragraph 1(j), Part XIII, Schedule III.

In support of that position, the appellant relied on the case *Ocelot Industries Ltd. v. The Deputy Minister of National Revenue for Customs and excise*⁴ where the Tariff Board recognized that the expression "the development of natural resources" by its very nature is a broad term that includes activities that are directly related to, and a necessary aspect of, resource development.

With regards to the second issue in this appeal as to whether a refund is claimable by an end user, the appellant submitted that the Tribunal must interpret the meaning of section 68 of the Act in the context of the entire Act to determine if Pillar falls within the terms of that section. The appellant argued that it is entitled to an exemption on the purchase of the culverts in issue. As a result of that purchase being on a tax-included basis, the appellant paid additional monies that were monies taken into account as taxes within the meaning of section 68 of the Act. They were taken into account as taxes between the purchaser and the vendor. Section 68 is not restricted to the person who remits tax and is broad enough to include end users. It is not essential for the claimant to be characterized as a "taxpayer" to be entitled to claim a refund under the Act.

Finally, the appellant submitted that the departmental policy, under which an end user who purchases multi-use parts must buy them tax included and must file a refund, places the onus on the end user to establish his tax-exempt use of the goods to the Department. Through the implementation of that policy, the Department has received monies as taxes under the Act that were not properly payable. The appellant has been deprived of those monies. The principle of unjust enrichment affords a means by which tax paid in error can be refunded to a deprived party.

For that proposition, the appellant referred to the case *Consumers Glass Co. Ltd. v. Her Majesty The Queen in Right of Canada*.⁵

3. (1963-66) 3 T.B.R. 34.

4. (1983) 8 T.B.R. 763, at p. 770.

5. [1988] 2 C.T.C. 141 (F.C.T.D.).

The respondent argued that the onus is on the appellant to prove that it is eligible for and entitled to a refund. The respondent submitted that section 68 is directed toward the relationship existing between the taxpayer, who is a manufacturer or producer of goods under the Act, and the federal government. That taxpayer has a relationship with the government. When he produces or manufactures goods, he pays a tax to the government. In the course of that relationship, there could be errors made by either side and that is, in the respondent's submission, what that section 68 is directed to. The entire Act is directed toward taxpayers who are manufacturers and producers. The appellant is not an eligible claimant under section 68 of the Act because it is an end user. The appellant is not, in law, a taxpayer. Section 68 uses the words "Where a person ... has paid any moneys in error ... " The only monies that have been paid by Pillar in this case are to the supplier for the culverts that it purchased and used in the activities under consideration.

It was the respondent's submission that there is nothing in this case to distinguish it from the cases in which this issue has already been decided. In particular, the respondent drew the Tribunal's attention to the case *Geocrude Energy Inc. v. The Minister of National Revenue*⁶ and to the case *The Saugeen Indian Band et al. v. Her Majesty The Queen*,⁷ where it was decided that an end user is not eligible to claim a refund under section 68.

The respondent further submitted that estoppel does not lie against the Crown and, therefore, the Crown is not bound by the representations made by the Department and followed by the appellant. The representations of the Department are simply the views of the Department, at a particular time, on the law. Consequently, the respondent concluded that the appellant is not eligible to claim a refund under section 68.

In the alternative, if the Tribunal finds that the appellant is eligible to claim a refund, the respondent contended that the culverts in question are not machinery or apparatus within the meaning of paragraph 1(j), Part XIII, Schedule III. They are not machinery because they have no moving parts. They are not apparatus because they are not complex. Apparatus refers to something that is more complex, which is a set of functioning parts designed to carry out a certain function. A culvert being essentially just a piece of pipe that may or may not be attached to another piece of pipe to make a longer piece cannot amount to apparatus because it is simply not sufficiently complex to be an apparatus. On that point, the respondent referred to the above-noted *Consolidated Denison* case.⁸

Alternatively, if the culverts are machinery or apparatus, the respondent argued that they do not meet the conditions of paragraph 1(j) because they are not for use in exploration for, or discovery or development of, petroleum, natural gas or minerals. The respondent pointed out that the appellant did not call any expert evidence on the meaning of the terms "exploration, discovery or development." The appellant's witnesses seemed to assume that the access roads into which the culverts were incorporated were, presumably, falling within the term "development." In the respondent's submission, the appellant has the onus to show that it fits within the terms of the exemption provision. Therefore, the Tribunal must look at the case law for such assistance as it can give. In particular, the respondent referred the Tribunal to three cases, *Leonard Pipeline Contractors Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,⁹ *Conrad-*

6. Appeal No. 2937 of the Tribunal, August 21, 1989.

7. 2 T.C.T., 4033, affirmed, F.C.A. No. A-1227-88, December 7, 1989.

8. *Supra*, footnote 3.

9. (1979) 6 T.B.R. 907.

*Burt Industries Ltd. et al. v. The Deputy Minister of National Revenue for Customs and Excise*¹⁰ and *Pembina Resources Limited v. The Minister of National Revenue*¹¹ where the meaning of the terms "development, exploration and discovery" have been considered.

In the *Leonard* case, the Tariff Board held that, within the industry, development is commonly understood to refer to the drilling of wells in a field or proven area of production. This decision was upheld by the Federal Court of Appeal.¹² Essentially, the Court approved the definition that the Tariff Board had accepted of the term "development." That definition restricts development to the drilling of wells in a proven field.

FINDING OF THE TRIBUNAL

Paragraph 1(j), Part XIII, Schedule III to the Act, exempts "machinery and apparatus ... for use in exploration for or discovery or development of petroleum, natural gas or minerals." To benefit from this exemption, the appellant must first show that the culverts in issue are either a machinery or apparatus within the meaning of that paragraph. The Tribunal does not believe that the appellant is trying to argue that they are machinery. It is the Tribunal's view that the issue is whether they are apparatus or not. The Act provides no definition of the term "apparatus." Consequently, it is useful to refer to dictionary definitions to derive its ordinary meaning.

The Webster's Third New International Dictionary¹³ defines "apparatus" as follows:

- 2 a: *a collection or set of materials, instruments, appliances, or machinery designed for a particular use ...*
- b: *any compound instrument or appliance designed for a specific mechanical or chemical action or operation: MACHINERY, MECHANISM.*

The Funk and Wagnalls New Standard Dictionary¹⁴ defines "apparatus" as:

- 1. *Any complex device or machine designed or prepared for the accomplishment of a special purpose;*

Both parties relied on the above-noted *Consolidated Denison* case¹⁵ to support their views. In that case, the Exchequer Court referred to the Funk and Wagnalls' dictionary definition of the word "apparatus" and stated that the word "complex" does not necessarily mean that a thing is complicated, but that it consists of parts. In the *Consolidated Denison* case, the rock bolts in issue had three different parts and the Court held that they were apparatus as well as machinery.

10. (1982) 8 T.B.R. 424.

11. Appeal No. 2946 of the Tariff Board, November 10, 1988.

12. (1980) 2 C.E.R. 119 (F.C.A.).

13. G. & C. Merriam Company, Springfield, 1968.

14. Funk & Wagnalls, New York, 1963.

15. *Supra*, footnote 3.

The evidence shows in the present case that the culverts are pieces of corrugated galvanized metal pipe, varying in lengths from three to seven meters, that are coupled together with a metal sleeve to obtain the length required. The culverts do not, in the Tribunal's view, consist of parts; they are simply put together to obtain a longer culvert. To be an apparatus, they would have to consist of a number of interrelated parts, each having a definite function. In this case, all the culverts have the same function when pieced together; they provide drainage and prevent backup of water on the roads.

Furthermore, the function of the culverts is not to perform a mechanical or other operation as such. They simply allow the passage of water under a road. They perform the function of bridges. No one would argue that bridges are instruments or appliances. Therefore, the Tribunal concludes that the culverts in issue do not fall within the ordinary meaning of the word "apparatus."

With regards to the second constituent element necessary to the exemption in paragraph 1(j), the Tribunal is of the view that the appellant has not discharged its burden of proof. The appellant offered no evidence to the effect that the construction of an access road and, consequently, the incorporation of the culverts into the road, is a necessary aspect of the exploration for, or discovery or development of, petroleum or natural gas. Indeed, the appellant assumed, as noted by the respondent, that the access roads in question were falling within the meaning of the term "development."

On that point, the Tribunal notes that all of the appellant's activities in the present case are to construct oil and gas lease site access roads and to prepare the lease sites. The appellant built, under contract, a number of access roads and incorporated the culverts into the roads. None of these activities are part of the development or exploration of petroleum, natural gas or minerals. The appellant is in the business of road building. In the above-noted *Leonard*¹⁶ case that was upheld by the Federal Court of Appeal,¹⁷ the Tariff Board stated quite clearly that, within the industry, the term "development" is commonly understood to refer to the drilling of wells in a field or proven area of production. Although it may well be essential to construct an access road to a lease site in order to get personnel and equipment to the lease site, these transportation facilities do not necessarily refer to the drilling of wells.

In view of these conclusions, it is not, in the Tribunal's view, necessary to determine whether the appellant, an end user, is entitled to claim a refund of the sales tax paid on the said culverts.

16. Supra, footnote 9.

17. Supra, footnote 12.

CONCLUSION

Accordingly, the appeal should be dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Michèle Blouin
Michèle Blouin
Member