

Ottawa, Wednesday, October 24, 1990

**Appeal No. AP-89-133**

IN THE MATTER OF an appeal heard on March 21, 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 determination of the  
Minister of National Revenue dated June 7, 1988,  
regarding a notice of objection filed under section 81.17 of  
the *Excise Tax Act*.

**BETWEEN**

**ARTHUR A. VOICE CONSTRUCTION CO. LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

W. Roy Hines  
W. Roy Hines  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Michèle Blouin  
Michèle Blouin  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-133

ARTHUR A. VOICE CONSTRUCTION CO. LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

*Excise Tax Act - Sales tax - Repair and replacement parts for construction and road-building equipment purchased and used in the excavation and processing of raw materials suitable for road-building projects - Exemption from sales tax under paragraphs 1(a), (k), (l) and 2(a), Part XIII, Schedule III - Goods manufactured or produced - Class of persons entitled to claim refund under section 68 of the Excise Tax Act (the Act).*

*This is an appeal under section 81.22 of the Act by Arthur A. Voice Construction Co. Ltd. (Voice Construction) to set aside a determination of the Minister of National Revenue (the Minister) denying Voice Construction's claim for refund of sales tax paid on the purchase of repair or replacement parts and materials for construction and road-building equipment used in the excavation and processing of raw materials suitable for road-building projects. Voice Construction submitted a refund application in respect of these purchases. The application was rejected because Voice Construction's equipment was not used primarily and directly in the production of goods, as required under paragraph 1(a), Part XIII, Schedule III to the Act. The Minister determined that this production activity occurs at quarries and borrow pits. Consequently, the exemption was limited to the equipment used primarily in borrow pits. Voice Construction filed a notice of objection to the determination on September 2, 1988. Because the Minister had not sent a notice of decision, Voice Construction appealed the determination to the Tribunal on March 20, 1989.*

*The issue in this appeal is whether the equipment parts and materials used by Voice Construction in its road-building projects qualify for exemption from sales tax under paragraphs 1(a), (k), (l) and 2(a), Part XIII, Schedule III to the Act. In order for Voice Construction to benefit from these exemptions, it must be shown that Voice Construction uses the equipment in the manufacture or production of goods within the meaning of the Act. A further question to determine is whether Voice Construction, an end user, is entitled to claim a refund of the sales tax paid on the said purchases under section 68 of the Act.*

**Held:** *The appeal is dismissed. The Tribunal finds that the appellant's construction activities in the described road-construction projects did not result in goods being produced or manufactured. No goods having new forms, qualities or properties resulted from the construction activities. The existing materials on site or the materials brought over were reworked and compacted in order to support the weight of the road. No new material was, in fact, "produced" within the ordinary meaning of the word. Consequently, the Tribunal concludes that the appellant is not entitled to the exemptions provided under paragraphs 1(a), (k), (l) and 2(a) for the repair or replacement parts and the materials used in the construction activities. In view of these conclusions, the Tribunal does not find it necessary to determine whether the appellant is entitled to claim a refund of sales tax, under section 68 of the Act, on the said purchases.*

*Place of Hearing:* Edmonton, Alberta  
*Date of Hearing:* March 21, 1990  
*Date of Decision:* October 24, 1990

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

*Clerk of the Tribunal:* Janet Rumball

*Appearances:* Douglas R. Densmore, for the appellant  
Linda Wall, for the respondent

*Cases Cited:* G.H. Poulin Contractor Limited v. The Deputy Minister of National Revenue for Customs and Excise (1985) 10 T.B.R. 170; The Queen v. York Marble, Tile and Terrazzo Ltd., [1968] S.C.R. 140.

*Statute Cited:* Excise Tax Act, R.S.C., 1985, c. E-15, par. 1(a), (k), (l) and 2(a), Part XIII, Schedule III.

**Appeal No. AP-89-133**

**ARTHUR A. VOICE CONSTRUCTION CO. LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

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

**REASONS FOR DECISION**

This is an appeal under section 81.22 of the *Excise Tax Act* (the Act) by Arthur A. Voice Construction Co. Ltd. (Voice Construction) to set aside the determination of the Minister of National Revenue (the Minister), dated June 7, 1988, wherein the Minister denied the appellant's claim for refund of sales tax in the amount of \$28,198.08 paid on the purchase of repair or replacement parts and materials for construction and road-building equipment used in the excavation and processing of raw materials suitable for road-building projects.

The appellant seeks the following declarations from the Tribunal:

- that sales tax exemption is applicable by virtue of paragraphs 1(a), (k), (l) and 2(a), Part XIII, Schedule III to the Act, as the equipment parts and materials purchased are used directly and primarily in the production of goods; and
- that there is no authority in the Act to treat repair parts for construction equipment listed in paragraphs 1(a) and (b), Part XVI, Schedule III to the Act, as unconditionally exempt from federal sales tax where the fair sale price by the Canadian manufacturer or the duty-paid value of the imported article is \$2,000 or less per unit.

**FACTS**

Voice Construction is a construction company involved in a variety of work activities, including industrial site preparation (e.g. pads for large storage tanks, tailing ponds, sewage lagoons, etc.), sewer construction and road construction.

The goods in issue are repair and replacement parts for construction and road-building equipment (e.g. motor scrapers, dozers, compactors, etc.) purchased and used in the excavation and processing of raw materials suitable for road-building projects.

Voice Construction filed Refund Claim No. 0629 in which it claimed an amount of \$78,118.01. The Minister issued Notice of Determination No. ALB 52348 on June 7, 1988, in which the claim was approved for the amount of \$49,919.93. The Minister denied the claim in the amount of \$28,198.08 for all parts for equipment not used primarily in borrow pits for the following reasons:

*... The exemption under Subsection 1(a) of Part XIII of Schedule III to the Excise Tax Act requires that the machinery and apparatus be used directly and primarily in the manufacture or production of goods. In the case of the production of fill materials suitable for road bed construction, the Department has determined that this production activity occurs at quarries and borrow pits. For this reason exemption has been limited to the equipment used primarily in borrow pits.*

*All purchases of parts installed by service dealers have been deleted where the total selling price of parts installed onto a single complex part (such as an engine or transmission) exceeds \$2,000.00. These repairs have been treated as unconditionally exempt from tax. Note that such deletions have not been made for transactions occurring on or after July 1, 1987.*

Voice Construction then filed with the Minister, on September 2, 1988, a notice of objection with respect to Notice of Determination No. ALB 52348. The appellant claimed an amount of \$28,198.08 on the basis that all parts for equipment used in the excavation of raw materials and the processing of these raw materials are entitled to exemption under paragraph 1(a), Part XIII, Schedule III to the Act, and on the basis that there is no authority in the Act to treat repair parts for construction equipment listed in paragraphs 1(a) and (b), Part XVI, Schedule III to the Act, as unconditionally exempt from federal sales tax where the fair sale price by the Canadian manufacturer or the duty-paid value of the imported article is \$2,000 or less per unit.

Because Voice Construction had not received a decision from the Minister with respect to the notice of objection, it appealed the Minister's determination to the Tribunal by letter dated March 20, 1989, under section 81.22 of the Act. The Secretary of the Tribunal acknowledged receipt of the letter on April 25, 1989, and opened File No. AP-89-133. Hence, the present appeal.

In the meantime, the Minister issued, on March 28, 1989, Notice of Decision No. 80713RE, which refers to the objection to Notice of Determination No. ALB 52348. The Minister disallowed the objection and confirmed the determination. The Minister explained his position as follows:

*The purview of the Excise Tax Act is confined to goods. The meaning of "goods" for purposes of the Act has been clarified as a result of the Tariff Board decision in Appeal No. 2154 (G.H. Poulin Contractors Limited).*

*... It is our position that the construction activities described in your representation are not considered processes whereby goods are being produced. Accordingly, there is no basis on which to allow an exemption from the sales tax on parts for construction equipment as the equipment does not classify under paragraph 1(a) of Part XIII of Schedule III to the Act.*

*Your second representation concerns repair parts purchased from R. Angus Limited who installed these parts on engines, transmissions, or track groups, of your construction equipment.*

*Under section 68.2 (formerly section 44.2) of the Excise Tax Act, a vendor may apply for a refund where goods on which he paid tax are subsequently sold to a purchaser who was entitled to an exemption or uses the goods under conditions warranting an exemption.*

*The evidence has shown that your supplier, R. Angus Limited (the vendor), received a refund of taxes for the sale of the repair parts installed on your engines, transmissions or track groups. The parts were used to repair an integral functioning assembly, with an aggregated assembly value in excess of \$2,000 per unit.*

*As the goods installed on your construction equipment are regarded as being exempt from tax, there are no grounds on which a refund of sales tax may be payable to you.*

At the beginning of the hearing, the appellant withdrew the second part of its appeal, as set out in its notice of appeal, as to whether there is authority in the Act to treat repair parts for construction equipment listed in paragraphs 1(a) and (b), Part XVI, Schedule III to the Act, as unconditionally exempt from federal sales tax where the fair sale price by the Canadian manufacturer or the duty-paid value of the imported article is \$2,000 or less per unit. The respondent agreed to that withdrawal.

The appellant called four witnesses. Mr. Donald Scafe, a geologist who is currently employed as a research officer for the Geological Survey Division of the Alberta Research Council and who is specialized in clays, clay minerals and industrial minerals, testified as an expert witness. He stated that the clays in Alberta are primarily clays that have been laid down by sedimentary processes or have been altered from volcanic ash as part of a sediment. They cover, in essence, most of the province. Therefore, they are major components of any sort of construction because they are so universal in the sediments that are going to be used.

The witness explained that, within the term "clay," there are some minerals called "clay minerals." These minerals have quite different properties from the usual materials that make them very useful in construction. One of the characteristics of the clay minerals is that they hold a lot of water. The optimum water is two layers of water. The electrical charges contained in the minerals and the water structure make a very solid bond between the clay minerals so that if these materials are compacted together, they stick together. In order to get the clay minerals to hold together, the clay must have certain moisture characteristics. If there is too much water, the water lubricates and the material can just flow. When water is driven out to the optimum moisture content, the result is structured water. To drive off the water, the material would have to be heated above 100°C, but that does not happen in road construction.

The witness stated that, generally, topsoil is not a good construction material because it has a lot of organic matter in it and cannot be compacted sufficiently. It does not have the properties of the clay material. The clay minerals act in the same capacity as cement and concrete, but they do not form a chemical or rigid structure, and they do not have the same strength as concrete.

The second expert witness who testified on behalf of the appellant was Mr. David R. Sereda. He is a professional engineer working mostly in the fields of construction materials, concrete, asphalt and soil, primarily in the Alberta area. He works for owners who are

involved in construction, and he determines the kind of construction materials or site conditions that are involved in a particular facility.

The witness explained each step that he takes when he does a site examination for a roadway. First, he analyses the soil conditions along a piece of right-of-way of 10 km. Then, he drills test holes every 300 m and classifies the types of soil. When this is done, the materials are taken into a laboratory and classified by engineering means. Then, he begins strength testing to determine the properties of these types of soil. The most important test is a density test, the Standard Proctor Test. Under this test, several samples of soil of very different moisture contents are air-dried, and a certain amount of water is added to them. The samples are then compacted with a hammer into three layers and dried in an oven at 100°C. Every soil sample results in different maximum density and moisture content and different compactive kinds of criteria.

The laboratory testing determines the physical characteristics that the soil could have under the right kind of conditions of changing, mixing, adding water, subtracting water or adding other cement, as a stabilizing material, to get the soil to the physical condition that will support a roadway structure. After the testing, the witness develops some sort of specifications for strengthening the soil and then, additionally, for the structure needed to put on top of it. The specifications include a criterion for a material and for the kind of compaction requirements needed in a field. The witness further explained that the Standard Proctor Test indicates that the finished product is now uniform and that its moisture content is adjusted. The test achieves a standard for each different kind of soil along the right of way.

On being questioned by the Tribunal as to whether the contractor normally uses the soil available on a site, the witness replied that ideally the contractor gets the soil near the right of way. However, in modern-day highway construction, it is usually not enough, and the contractor has to get the necessary material from a borrow pit. In the witness' opinion, the ditch could be classified as a borrow pit.

The third witness was Mr. Douglas Ells, President and General Manager of Voice Construction, who is also an engineer. He testified that Voice Construction is generally known as a highway and heavy construction contracting company working with soil of different types. The witness described the equipment used to perform the work activities on a highway.

To excavate the material, the witness uses an excavator and physically loads the material onto a truck or some other conveyance to carry it from the side ditch. To spread the material and to lay it down in layers of 150 mm, bulldozers and motor scrapers are used. The witness said that, when the soil is too wet and he is not able to compact it, he uses a drying machine. Large disks, 36 in. in diameter, are used to pulverize the soil, mix it, expose it to the air and dry it out. Sometimes, the witness uses a chemical, lime for example, to aid the drying and to mix it into the soil. To rework the soil in order to obtain the right moisture content, the witness uses a high-speed earth compactor and compacts the soil to the density required. If the soil is too dry, water trucks are used to wet the soil. While compacting, the witness uses a motor grader. The witness said that there are various types of compaction equipment, depending on the soil.

The witness described the work activities done on a job known as "Dow Pond Revamp" used in the notice of objection to illustrate the processing of the soil. On that job, the owner, Dow Chemical Plant in Fort Saskatchewan, had many waste ponds on the site. Over the years, the ponds got filled with chemicals, earth or crud. To revamp the pond, the appellant had to

remove all the materials from inside the pond, excavate new materials from somewhere on the site and rebuild the pond to its original configuration. The dikes and the lining were rebuilt and recompacted. The pond was taken out of service, drained and rebuilt. Because the soil was polluted, the appellant wasted it and hauled in new materials. Suitable materials were brought over and put in under the same conditions as for the road-building projects.

In the various specifications under which the appellant works, terms like "common excavation" and "borrow excavation" are used to describe the activities. The witness explained that "common excavation" means all the soil common to the site and left on the site. On the other hand, "borrow excavation" refers to a specific operation where the soil is taken from a point and moved to a second point. What is available as borrow depends on the customer. The customer will generally supply the borrow; if not, the contractor is required to buy it, bring it and process it.

The witness stated that tax is always shown as included on the invoices of parts bought for the equipment used by Voice Construction to perform its activities. A part may be used in more than one piece of equipment, if the equipment is similar. For example, a filter would fit a number of machines having the same engine.

In cross-examination, the witness admitted that the drying process is the same process as that used by a farmer, except that a different size disk is employed. As to the borrow that the witness would buy when the customer does not supply it, the witness said that he cannot buy already processed material and reiterated that the processing operations include the wetting, drying, mixing and compacting of the soil.

The last witness called on behalf of the appellant was Mr. Robert Zawalski, a consultant in federal sales tax. Until February 1989, the witness worked for the Department of National Revenue (the Department) where he audited refund claims. He explained the departmental policy concerning the construction equipment under appeal. If the parts were multi-use and could be used on various equipment, or if that equipment could be used for various taxable or exempt activities, the policy required the end user to purchase them tax-included and to file end-use refund claims. The witness testified that the policy was adopted to give some control to the Department.

## ISSUE

The issue in this appeal is whether the equipment parts and materials used by the appellant in its road-building projects qualify for exemption from federal sales tax under paragraphs 1(a), (k), (l) and 2(a), Part XIII, Schedule III to the Act. The underlying question is whether the appellant uses the construction equipment in the manufacture or production of goods within the Act. A further question to determine is whether the appellant, an end user, is entitled to claim a refund of sales tax under section 68 of the Act on the purchase of the said parts and materials.

## LEGISLATION

The statutory provisions relevant to this appeal are as follows :

### Excise Tax Act<sup>1</sup>

*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 that 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:*

*(a) machinery and apparatus sold to or imported by manufacturers or producers for use by them primarily and directly in*

*(i) the manufacture or production of goods,*

*(ii) the development of manufacturing or production processes for use by them, or*

*(iii) the development of goods for manufacture or production by them,*

*...*

*(k) repair and maintenance equipment sold to or imported by manufacturers or producers for use by them in servicing goods described in paragraphs (a) to (j) that are used by them,*

*(l) parts for goods described in paragraphs (a) to (k),*

*...*

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

2. *Materials, not including grease, lubricating oils or fuel for use in internal combustion engines, consumed or expended by manufacturers or producers directly in*

*(a) the process of manufacture or production of goods;*

...

## ARGUMENTS

The appellant submitted that the Act provides, under paragraph 1(a), Part XIII, Schedule III, that machinery and apparatus sold to or imported by manufacturers or producers for use by them primarily and directly in the manufacture or production of goods qualify for exemption of tax. The appellant's position is that there is a production process involved in a necessary improvement of soil that is required to meet contract specifications for most work activities involved in a road-construction project and that these improvements constitute manufacture or production of goods for the purposes of the Act.

The appellant referred to various cases where the terminology used in paragraph 1(a) was considered. In *The Queen v. York Marble, Tile and Terrazzo Ltd.*,<sup>2</sup> the Supreme Court of Canada adopted the following definition of "manufacture:"

*... manufacture is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.*

In *the Deputy Minister of National Revenue for Customs and Excise v. Amoco Canada Petroleum Company Ltd.*,<sup>3</sup> the Federal Court of Appeal had to determine whether pipelines that carry natural gas liquids over a distance of 33 km from a gas processing plant to a fractionating plant are used "directly" in the production of goods. The Court held that the conveyance of raw, liquid hydrocarbon mix is part of the process whereby the liquids are changed in form, quality and property and, as a result, the pipelines are used directly in the production process and not in the distribution process of the final product.

In *G.H. Poulin Contractor Limited v. the Deputy Minister of National Revenue for Customs and Excise*,<sup>4</sup> the Tariff Board clarified the meaning of the word "goods" and stated that "the essence of goods is that they must have a value and be moveable." The appellant submitted that in the *Poulin* case, the production process is evident in that the original goods (e.g. a large solid rock formation) have been changed into rock fragments or shot rock and have resulted in new characteristics and value added to the shot rock. The appellant argued that improved soil, as a result of processing, is similarly to be regarded as goods because it is a commodity of value that is moveable and is intended for commercial use. The characteristics of the soil are changed through the work activities described by the witnesses. The various processes that soil undergoes in improvement are and should be regarded as manufacturing of goods for the purposes of the Act.

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2. [1968] S.C.R. 140, at p. 145.

3. 13 C.E.R. 102, at p. 110 (F.C.A.).

4. (1985) 10 T.B.R. 170, at p. 180.

The appellant submitted that, while the Department is correct in considering that a production activity occurs at quarries or borrow pits, it is incorrect to limit the production activity to these areas. The same materials, as received from a borrow pit, are obtained by other excavating activities. All other forms of excavation to obtain materials, which are "goods" within the meaning of the Act, should be considered to be manufacture or production activities. The production activity should be extended to all processing and manufacturing activities that are required to produce suitable soil. Therefore, the appellant concluded that an exemption should be allowed for all parts bought for equipment used in the production outside borrow pits where the materials qualify as goods within the meaning of the Act.

With respect to the appellant's eligibility to claim a refund, the appellant argued that section 68 of the Act gives the Department the authority to deal with end-user refund claims. The appellant referred to the current and past policy of the Department concerning end-user refund claims and argued that the present refund claim should be allowed.

On the other hand, the respondent urged the Tribunal to look at the law and to leave any discretionary application of the law to the Department. The respondent argued that, to succeed in this appeal, the appellant would have to fall under either section 68 or 68.2 of the Act. Section 68.2 clearly applies to vendors, and since the appellant is not a vendor and buys its equipment from dealers, the appellant would have to fall under section 68. That section applies to taxpayers, as the word is defined in the traditional sense through the case law. For that proposition, the respondent relied on the decisions *The Queen v. M. Geller Inc.*,<sup>5</sup> *Geocrude Energy Inc. v. The Minister of National Revenue*<sup>6</sup> and *The Sauguen Indian Band v. The Queen*,<sup>7</sup> where it was decided that an end user is not eligible to claim a refund under section 68 and its predecessors. The respondent submitted that there is nothing in this case to differentiate it from what has been held in the earlier line of authorities.

The respondent further contended that the appellant is not a "manufacturer" or "producer" of "goods" within the meaning of paragraph 1(a), Part XIII, Schedule III. On this point, the respondent referred to the definition of "manufacture" established in the *York Marble* case, as quoted by the appellant, and argued that, in order to come within that definition, the appellant must show that it manufactures or produces something, that it uses its equipment in the process and that what it produces are goods.

In the respondent's view, the term "goods" has a connotation, both in the dictionary sense and in the common-sense meaning, of something that is of commercial value; goods are items that are either sold or for sale, or to which a value can be assigned. The respondent submitted that the appellant, in its road-building activities, is not producing goods of value in a commercial sense. The appellant excavates the materials and compacts them so that they support the weight of the road. No new material is being produced; it is simply a reworking of an existing material, an earth-moving operation.

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5. (1963) S.C.R. 629.

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.

The respondent pointed out that the various pieces of equipment move the earth from one spot to another, spread it out and compact it so that a road can be built. If the material is not available, the appellant can go to a borrow site and pay for it. The appellant cannot buy already processed material and cannot sell pieces of roadway that it has packed down and say that they are of commercial value to somebody else. Consequently, the respondent concluded that the appellant's work activities involve a fair degree of skill, but do not constitute production of goods within the ordinary meaning of the word.

#### FINDING OF THE TRIBUNAL

The exemptions claimed by the appellant under paragraphs 1(a), (k), (l) and 2(a), Part XIII, Schedule III to the Act, cover repair and replacement parts for construction equipment and materials used in the excavation of raw materials suitable for road-building projects and the processing of these raw materials. In order for the appellant to benefit from these exemptions from sales tax, the following conditions must, first, be satisfied under paragraph 1(a) of Part XIII:

- (a) the machinery or apparatus must be sold to or imported by a manufacturer or producer; and
- (b) the manufacturer or producer must use the machinery primarily and directly in the manufacture or production of goods.

Consequently, the fundamental question to address in this appeal is whether the construction activities, carried out by Voice Construction, resulted in processes whereby goods were being produced or manufactured. The appellant argued that the improvements of soil described by the witnesses are required to meet contract specifications and that these improvements constitute manufacture or production of goods for the purposes of the Act.

While the appellant produced qualified experts who, at the hearing, explained clearly the physical characteristics of the soil that will support a roadway structure and the kind of compaction requirements needed in a field, the Tribunal is of the view that the work activities performed by the appellant in the road-construction projects described did not result in goods being produced or manufactured.

As recognized by the courts,<sup>8</sup> the words "produced" and "manufactured" are not words of any precise meaning. In the *York Marble* case,<sup>9</sup> in which the Supreme Court of Canada adopted the definition of "manufacture" quoted by the appellant, the Court compared the finished product (an accurately sized piece of polished marble), which left the plant, with the raw product (raw marble slabs), which arrived at the plant, and found that they had resulted in new forms, new qualities and new properties or combinations. In applying the same analysis to the present case, it appears that the raw product is what the appellant excavated out of the ground, i.e., the material found on a construction site. The same material is then spread, laid down and compacted in conformity with contract specifications. If the appellant cannot use the soil available on a site, it must buy the necessary material from a borrow pit. The necessary material is brought over and the same operations are carried out on site.

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8. See *The King v. Vandeweghe Ltd.* (1934), S.C.R. 244, at p. 248.

9. *Supra*, footnote 2.

It is clear to the Tribunal that the finished product, i.e., the material left on the site after carrying out the operations described by the witnesses, did not result in a new form, quality and property. There may have been changes in the consistency or in the compacting of the material, but there was no variation in its form, qualities and properties. The existing materials on site or the materials brought over were reworked and compacted in order to support the weight of the road. No new material was, in fact, "produced" within the ordinary meaning of the word.

In the Tribunal's view, the present case may be distinguished from the *Poulin*<sup>10</sup> case. In that case, Poulin was engaged in road construction through some rocky areas. Poulin purchased blasting caps to be used with dynamite to blow up the rock that was in the way of the road. As a result, it provided pieces of rock aggregate of irregular shape and sizes, referred to as "shot rock." The shot rock was used to fill the lower areas of road. Poulin claimed an exemption for the purchase of the blasting caps on the basis that they were machinery or apparatus engaged primarily and directly in the production of goods, the goods being the shot rock. The Tariff Board reviewed the notion of "goods" and stated as follows:

*The essence of goods is that they must have a value and be moveable. This accords with the French translation of goods as marchandises, to wit, an object of commerce, whether actually sold in a given instance or not.*

In that case, the Tariff Board decided that the shot rock produced were goods within the meaning of the Act. The operations carried out by Poulin altered the character of the rock; by blasting the rock, Poulin made "shot rock" out of it. In the present case, the appellant did not produce a new material out of the excavated material. The appellant in its road-building activities did not produce goods of value in a commercial sense. The evidence clearly established that already processed material cannot be bought; if the material required is not available in place, the appellant is required to buy it from a borrow site and perform the necessary operations to build the road. As noted quite rightly by the respondent, the appellant cannot sell pieces of roadway that it has packed down.

Furthermore, the Tribunal is of the view that the present case can also be distinguished from the production activity occurring at quarries or borrow pits. Where a quarry or pit operator extracts goods from the quarry or pit deposits, such person produces goods that have a value and are moveable. In this case, where the appellant excavates materials on site, it does so in order to perform its necessary construction activities and not to produce and sell goods having a commercial value.

Consequently, since no goods were produced or manufactured within the meaning of the Act, the Tribunal concludes that the appellant is not entitled to the exemptions provided under paragraphs 1(a), (l), (k) and 2(a), Part XIII, Schedule III to the Act, for the repair or replacement parts and the materials used in its construction activities.

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10. Supra, footnote 4.

With regard to the appellant's request to withdraw the second part of this appeal as to whether there is authority in the Act to treat repair parts for construction equipment listed in paragraphs 1(a) and (b), Part XVI, Schedule III to the Act, as unconditionally exempt from federal sales tax where the fair price by the Canadian manufacturer or the duty-paid value of the imported article is \$2,000 or less per unit, the Tribunal, having considered the request, accepts the withdrawal and dismisses that part of the appeal.

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 on the said parts and materials.

CONCLUSION

The appeal should be dismissed.

W. Roy Hines  
W. Roy Hines  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Michèle Blouin  
Michèle Blouin  
Member