



Ottawa, Thursday, June 7, 1990

DD-90-008
Appeal No. AP-89-027

IN THE MATTER OF an appeal heard on October 3, 1989,
pursuant to subsection 81.21(1) of the *Excise Tax Act*,
R.S.C., 1985, c. E-15;

AND IN THE MATTER OF two Notices of Determination,
nos. SWO 42277 and SWO 42276, and a Notice of
Assessment, no. SWO 7400, issued on December 9, 1988,
with respect to three Notices of Objection filed pursuant to
section 81.15 of the *Excise Tax Act*.

BETWEEN

HUSSMANN STORE EQUIPMENT LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal declares that the "Ultraline" shelving at issue sold by the appellant does not qualify for the reduced rate of federal sales tax of eight percent provided under section 21, Part I, Schedule IV of the *Excise Tax Act* for structural metal and fabricated metal for buildings and other structures.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-027

HUSSMANN STORE EQUIPMENT LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - Sales tax - Whether "Ultraline" shelving sold by the appellant is eligible for the reduced rate of sales tax of eight percent as goods falling under section 21, Part I, Schedule IV of the Excise Tax Act - Meaning of fabricated metal and other structures.

DECISION: *The appeal is dismissed. "Ultraline" shelving sold by the appellant does not fall within the scope of the enumerated goods "Structural metal and fabricated metal for buildings and other structures." "Ultraline" shelving does not constitute fabricated metal for "other structures" as claimed in the context of this appeal.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: October 3, 1989
Date of Decision: June 7, 1990*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
Robert J. Bertrand, Q.C., Member
Sidney A. Fraleigh, Member*

Clerk of the Tribunal: Lillian Pharand

*Appearances: Clark V. Craig, for the appellant
John B. Edmond, for the respondent
Michael Kaylor, assistance by way of argument pursuant to subsection 81.34(2) of the Excise Tax Act.*

Statute Cited: *Excise Tax Act, R.S.C., 1985, c. E-15, as amended.*

Cases Cited: *Chateau Manufacturing Ltd. v. The Deputy Minister of National Revenue for Customs and Excise, Federal Court of Appeal, December 9, 1983, 84 D.T.C. 6126; The Minister of National Revenue and The Attorney General of Canada v. Plastibeton Inc., 86 D.T.C. 6400; Her Majesty The Queen v. Nova Construction Company Ltd. (1986) 1 C.T.C. 68; Superior Pre-Kast Septic Tanks Ltd. and Lloydminster Pre-Kast Septic Tanks Ltd. v. Her Majesty The Queen, [1978] 2 S.C.R. 612.*

Dictionaries Cited: *The Shorter Oxford English Dictionary on Historical Principles, Oxford, Clarendon Press, 1977 (3rd ed. Rev.); Black's Law Dictionary, West Publishing Co., 1979 (5th ed.); The Living Webster Encyclopedic Dictionary of the English Language, Chicago: English-Language Institute of America, 1971.*

Appeal No. AP-89-027

HUSSMANN STORE EQUIPMENT LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

SUMMARY

The appellant, Hussmann Store Equipment Limited (Hussmann), claimed a refund for federal sales tax paid on its "Ultraline" shelving system on the grounds that it qualified for the reduced rate of tax of eight percent applicable to construction materials enumerated under Part I, Schedule IV of the *Excise Tax Act* (the Act), and more specifically under section 21, which provides for "Structural metal and fabricated metal for buildings and other structures."

The appellant argued that the shelving system in issue qualified for the reduced rate of sales tax, as it was fabricated metal for other structures, on the grounds that the shelving units, once installed in the store, could be considered "structures" or "other structures" based on the plain and ordinary meaning of those words.

The issue in this appeal is whether the appellant's "Ultraline" shelving system, sold in kit form, can be considered as " ... fabricated metal for ... other structures" which is provided for under section 21, Part I, Schedule IV of the Act.

In the Tribunal's view, the appeal fails because the subject shelving cannot be considered to constitute " ... fabricated metal for ... other structures" as contemplated by the Act. Shelving installed in supermarkets cannot be considered as constituting a structure nor can it be considered an integral part of the building.

Accordingly, the appeal is not allowed.

THE LEGISLATION

The relevant provisions of the Act are as follows:

50(1) There shall be imposed, levied and collected a consumption or

sales tax at the rate prescribed in subsection (1.1) on the sale price or on the volume sold of all goods

(a) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii) or (iii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,

...

(1.1) Tax imposed by subsection (1) is imposed

...

(b) in the case of goods enumerated in Schedule IV, at the rate of eight per cent;

...

(d) in any other case, at the rate of twelve per cent.

*Schedule IV
Part I
Construction Materials*

21. Structural metal and fabricated metal for buildings and other structures.

THE FACTS

This is an appeal made pursuant to subsection 81.21(1) of the Act from two Notices of Determination, nos. SWO 42277 and SWO 42276, and a Notice of Assessment, no. SWO 7400, issued by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) on December 9, 1988, who denied the appellant's request for refunds.

The appellant requested a refund of sales tax on the grounds that its "Ultraline" shelving system qualified for the reduced rate of sales tax of eight percent applicable to "Structural metal and fabricated metal for buildings and other structures" which is an enumerated category in section 21, Part I, Schedule IV of the Act.

The appellant, upon serving Notices of Objection under section 81.15 of the Act, waived reconsideration of the assessment and the two determinations by the Deputy Minister and appealed directly to the Tribunal.

Mr. Michael Kaylor, on behalf of Tax Save Consultants Limited, sought to render assistance to the Tribunal by way of argument pursuant to subsection 81.34(2) of the Act. The Tribunal, at the opening of the hearing, granted the request.

The evidence was adduced by two witnesses for the appellant. The respondent called a witness whose testimony related to the generally accepted classifications in the construction industry of items or materials under metal fabrication and equipment and fixtures.

The relevant facts in this appeal are as follows.

"Ultraline" shelving is designed and manufactured by the appellant, Hussmann, at its plant in Brantford, Ontario. It holds a manufacturer's sales tax licence under the Act and fabricates metal shelves, assembly components and supports to standard designs and dimensions. In addition to "Ultraline" shelving systems, Hussmann produces and sells different types of store equipment, such as refrigerated cases, checkout counters, commercial refrigeration packages, ice cubers and other self-contained units.

"Ultraline" shelving is manufactured from standard design and only produced to customer order. Upon receipt of an order, Hussmann fabricates the shelves and components from steel, which is purchased in various forms such as coils, sheets and flat stock, and puts the materials through a number of manufacturing operations such as cutting, forming, drilling, punching and painting. Only occasionally will Hussmann vary its design to accommodate special customer requirements. Once the shelving materials are produced, they are packaged in boxes and delivered to the customer's store for assembly and installation.

The installation of the shelving in supermarkets is performed by special crews according to Hussmann's instructions which cover installation, levelling and anchoring, if necessary. Normally, the supermarket uses its own installation crew to install the shelving units. The contractor, responsible for the construction of the building, or its renovation, as the case may be, would not normally be responsible for the installation or assembly of the shelving units. However, electrical outlets would have been provided for at pre-established positions in the floor, walls, columns or ceiling to provide power to the shelving units. This work would normally be performed by the general contractor or subcontractor.

It is the installation crew's responsibility to cut out shelves to fit around columns and to provide for electrical outlets or light fixtures. Electricians would be called upon to complete the electrical work.

The witness for Hussmann explained that the basic difference in the "construction" or installation of shelving and the other types of equipment supplied by Hussmann was that other units were preassembled at the factory, while in the case of "Ultraline" shelving, no unit was sold or sent out of the factory as such. Shelving is sold in an unassembled kit form. The shelves have to be "constructed" on site because of size considerations. This contrasts with other equipment where the bulk of the assembly is performed in the factory with only minimal work on site.

Shelving requirements are of central importance in the design of the layout of a supermarket. A plan of the shelving is central to the design of the building itself, or renovation, as the case may be. The layout of the shelving determines important elements such as the exact position of electrical lighting and the emplacement of the electrical fixtures. The general approach used for the construction of a supermarket was explained. The developer produces a general layout of the supermarket indicating elements such as the work site plan, fixture layout and basic requirements (lighting, heating, ventilating, cooling, etc.). Although such work is usually done by supermarket staff, once completed, the plan is provided to architects for detailed drawings and plans which are used for the construction of the store by the general contractor. It is the

supermarket's responsibility, not the contractor's, to purchase and install the necessary shelving. It is normally a separate contract from the one used for the construction or renovation of a building.

The shelving in question, once installed, can be disassembled, moved and reassembled. The shelves are usually free-standing units, except for wall shelving and shelving at refrigerated areas which can be anchored to the wall or to the floor. Materials required for attaching the shelving units to the wall or other units or for anchoring to the floor are provided by the installation crews.

THE ISSUE

The issue in this appeal is whether the appellant's "Ultraline" shelving system qualifies as fabricated metal for building and other structures in order to benefit from the reduced rate of tax of eight percent applicable to the enumerated construction materials under section 21, Part I, Schedule IV of the Act.

The main argument raised by counsel for the appellant was that, although such materials are sold in convenient kit form, they are fabricated metal for other structures. Furthermore, their final form as equipment or fixtures does not preclude their classification as construction materials.

The appellant argued that the goods in issue were fabricated metal for use in other structures. He relied on the plain and ordinary meaning of the words in the legislation as well as on the Federal Court of Canada - Trial Division decision in *Chateau Manufacturing Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.¹

Relying on this last decision, the appellant contended that the goods in issue were fabricated metal for use in other structures. In that case, the Federal Court held that certain structural and fabricated metal (prefabricated siding) sold in convenient kit form for the construction of garden storage sheds qualified as structural and fabricated metal for other structures. The Court was of the view that the use for which the goods in question were intended did not alter their appearance, form, function or essential character as structural and fabricated metal, that the language used in paragraph 21 was common language bearing a plain meaning and that there was no reason, in its view, for not giving to words of the statute the broadest meaning possible consistent with the context in which those words are found.

The Court further added that, insofar as the context of Schedule IV was concerned, it found nothing therein to require a departure from the plain meaning of the words used in interpreting the scope to be given to section 21, Schedule IV of the Act.

Counsel for the appellant also argued that there could be no doubt that the goods manufactured and sold were fabricated metal components for a shelving system and that the shelving system, when erected on site, formed a structure within the ordinary meaning of the word. Furthermore, the fact that the shelving could be dismantled and moved to another location in the store did not take away from its classification as a structure.

1. (1983), 84 D.T.C. 6126.

Counsel for the respondent argued that if the appellant was correct that its shelving system was a structure, which was denied by the respondent, and given that the kit sold by the appellant contained the complete system, though disassembled, the appellant was not selling components for a structure but rather an entire structure. Structures, as opposed to the specified materials for their construction as set out in Part I, are not eligible for tax exemption.

Furthermore, counsel's view was that a shelving system resulting from the assembly of fabricated metal was not a structure because, whether free-standing or attached to the building in which it is located, it lacked what has been called the "negative characteristic" that is one of the essential criteria for determining the existence of the structure. He relied on the case *The Minister of National Revenue and The Attorney General of Canada v. Plastibeton Inc.*²

Mr. Kaylor, who assisted the Tribunal by way of argument pursuant to subsection 81.34(2) of the Act, supported the appellant's position and its counsel's argument.

Mr. Kaylor argued that, in the interpretation of the word "structure," the Tribunal should take cognizance of the Nova Construction³ decision in which the Court held that a portable asphalt plant, although portable, could be considered a structure and, therefore, even though the shelving in issue can be disassembled and moved in the store, that would not take away from its intrinsic qualities as distinct structures. Other points were argued and cases cited by Mr. Kaylor.

DECISION

The key issue, as the Tribunal sees it, is that the shelving units, once installed, are not an inherent part of the building, nor can they be considered a structure based on the plain and ordinary meaning of that word in the context of section 21 and based on case law definitions.

The Tribunal accepts that the goods in issue are made of fabricated metal; however, it cannot accept that what the appellant is selling, albeit in kit form, is fabricated metal for structures as contemplated by section 21.

The Tribunal recognizes that the words in section 21 should be given their plain and ordinary meaning and that the title of Part 1, "Construction Materials," is of assistance in the interpretation of the words in section 21.

The Tribunal is, however, of the view that the dictionary definitions do not lead to the conclusion that the goods in issue are fabricated metal for a structure or that they constitute "other structures."

Dictionary definitions of structure are as follows:

The Shorter Oxford English Dictionary on Historical Principles:⁴

4. That which is built or constructed; a building or edifice of any kind, esp. one of considerable size and imposing appearance. 5. More widely, a fabric or framework of material parts put together.

2. 86 D.T.C. 6400, p. 6402.

3. Her Majesty The Queen v. Nova Construction Company Ltd. (1986) 1 C.T.C. 68.

4. Oxford, Clarendon Press, 1977 (3rd ed. Rev.).

Black's Law Dictionary:⁵

Any construction, or any production or piece of work artificially built up composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind.

The Living Webster Encyclopedic Dictionary of the English Language:⁶

Something built or construed; a building; an edifice; a bridge, dam or framework; any construction; anything composed of parts arranged together in some way.

All of these definitions refer to a building or edifice. The last definition gives the following examples for structure: a dam, a bridge or any construction.

From these definitions, it seems quite clear to the Tribunal that structures are to be distinguished from what would normally be considered as equipment or fixtures, as is the case for the items in issue here.

In the Plastibeton case, Mr. Justice MacGuigan, writing for the Federal Court of Appeal, relied on the following criteria taken from the Supreme Court of Canada decision in *Superior Pre-Kast Septic Tanks Ltd. and Lloydminster Pre-Kast Septic Tanks Ltd. v. Her Majesty the Queen*⁷ for the interpretation of what is a structure:

It seems to me that in this analysis Martland J. endorses three criteria for determining the existence of a structure: (1) it must be built or constructed; (2) it must rest on or in the ground; (3) it must not be "a part" of another structure.

The Judge then went on to say:

Nevertheless, what is to my mind more decisive is Martland J.'s third criterion. "Being not a part of another structure" implies that the substance in question has not only an internal unity and identity (its positive characteristic) but a certain separateness or apartness from the other structure (its negative characteristic).

The criteria to which Justice MacGuigan referred are helpful to the resolution of this case, more particularly the second and third criteria which the Tribunal feels the appellant has not satisfied in this case.

The appellant relied greatly on the Chateau Manufacturing Ltd. case in its argument. However, the Tribunal considers that this case is distinguishable from the present appeal. While there are similarities in the facts, and both cases involve the interpretation of goods enumerated in section 21 (the goods at issue here are claimed to be fabricated metal in convenient kit form with instructions for assembly), the Tribunal believes that these are the only similarities.

In the Chateau Manufacturing Ltd. case, the purchaser of the kit had to construct, or have constructed, the garden storage shed. A floor had to be built, other construction materials had to be purchased, such as two by fours and reinforcing materials. Once the construction was

5. West Publishing Co., 1979 (5th ed.).

6. Chicago: English-Language Institute of America, 1971.

7. [1978] 2 S.C.R. 612.

completed, a distinct structure or building, indeed a garden storage shed, was created and available for use. All of the criteria discussed above to obtain a structure were met. The unit was constructed from pieces, it was built on the ground or foundation, and it was separate from other buildings or structures.

In the case before the Tribunal, it is evident that the shelving is sold in kit form with instructions for installation on the floor of the supermarket according to a specific plan. But the shelving units are installed by an installation crew, not the construction crew responsible for the building construction. There is no construction per se in the installation of shelving units. Because of this, the Tribunal cannot accept the appellant's contention that this case must be decided in its favor on the basis of the Chateau Manufacturing Ltd. decision.

Indeed, the criteria set out by the Federal Court for determining what a structure is have not been met. The shelving units are assembled, installed from prefabricated components and all fitting in a predetermined way. The installation crew is responsible for cutting out shelves so that the unit will fit around columns and so that electrical outlets or light fixtures can be installed. The Tribunal does not consider those activities as construction, but assembly or installation.

The shelving is installed by an installation crew which follows specific instructions. Some units are anchored to the floor, others to walls and many are free-standing. All units are installed within the four walls of the store. The shelving units can be disassembled and moved. This, however, is not by itself determinative. What is important, however, is that the shelving is neither an integral part of the building nor a separate structure.

Also, both the appellant's witnesses admitted that the shelving units were viewed as items similar to the other fixtures or equipment such as the cash registers and the refrigerated units, the key distinguishing feature being their place of assembly, i.e., the factory or the supermarket.

In addition, it is clear from the evidence that the appellant is not in the business of selling construction materials, in the plain and ordinary sense of those words. Indeed, it is readily admitted that none of the units assembled in the factory would qualify as fabricated metal for other structures, as they are fixtures. In short, the goods in issue are more accurately described as shelving units sold in unassembled fashion. If the legislator had intended to provide a lower rate of duty for such items, special provisions could have been enacted for their exclusion from the basic rate of tax.

For all the foregoing reasons, the appeal is not allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

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

Sidney A. Fraleigh
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Member