CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 25, 1990

Appeal No. AP-89-140

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 June 17, 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

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-89-140

PILLAR CONSTRUCTION LTD. ***Appellant***

and

THE MINISTER OF NATIONAL REVENUE ***Respondent***

Excise Tax Act - Sales Tax - Repair and replacement parts for trenching and ditching equipment used for the construction of pipelines of any kind and tools and processing equipment used to repair or maintain such equipment - Exemption from sales tax under paragraphs 1(a), (j), (k), (l) and 2(a), Part XIII, Schedule III to the Excise Tax Act (the Act) - Goods manufactured or produced - Equipment engaged in the development of petroleum or natural gas - 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 federal sales tax paid on the purchase of certain repair or replacement parts for trenching and ditching equipment used for the construction of pipelines of any kind and on the purchase of certain tools and processing equipment used to repair or maintain such equipment. On May 12, 1988, Pillar submitted a refund application in the amount of $12,968.09 in respect of these purchases. The application was rejected for the reason that the Act does not provide any exemption from federal sales tax to the said repair or replacement parts, tools and processing equipment. Pillar filed a notice of objection to the determination on September 13, 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 said repair or replacement parts, tools and processing equipment qualify for exemption from sales tax under paragraphs 1(a), (j), (k), (l) and 2(a), Part XIII, Schedule III to the Act. In order for Pillar to benefit from these exemptions, it must be demonstrated that Pillar uses the excavation equipment in the manufacture or production of goods within the meaning of the Act, these goods being the backfill material excavated. Second, it must be determined that the excavation equipment is engaged in the development of petroleum or natural gas within the meaning of paragraph 1(j). A further question to determine is whether Pillar, 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 operation consisting of putting the excavated material back into the trench and compacting the material over the pipe did not result in this backfill material being produced or manufactured within the meaning of the Act. No goods having new forms, qualities or properties have been created for sale. The appellant simply followed the contract specifications in constructing the pipeline and took the necessary precautions to protect the pipe. The Tribunal further finds that the evidence does not show to its satisfaction that the excavation equipment employed in trenching for the laying of oil and gas gathering lines is machinery or apparatus for use in exploration for, or discovery or development of, petroleum, natural gas or minerals within the meaning of paragraph 1(j). Consequently, the Tribunal concludes that the appellant is not entitled to the exemptions provided in paragraphs 1(a), (j), (k), (l) and 2(a), Part XIII, Schedule III to the Act. 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.*

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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**:*	*G.H. Poulin Contractor Limited v. The Deputy Minister of National Revenue for Customs and Excise (1985) 10 T.B.R. 170; 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; The Queen v. York Marble, Tile and Terrazzo Ltd., [1968] S.C.R. 140; The King v. Vandeweghe Ltd. (1934), S.C.R. 244.*
***Statutes and Regulations Cited**:*	*Excise Tax Act, R.S.C., 1985, c. E-15, subss. 50(1) and 51(1), ss. 68, 68.2 and 81.22, par. 1(a), (j), (k), (l) and 2(a), Part XIII, Schedule III (as amended).*

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-89-140

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. ALB53274, dated June 17, 1988, denying Pillar's claim for refund of sales tax in the amount of $12,968.09 paid on the purchase of certain repair or replacement parts for trenching and ditching equipment used for the construction of pipelines of any kind and on the purchase of certain tools and processing equipment used to repair or maintain such equipment.

The appellant seeks the following declarations from the Tribunal:

-that the excavation and separation of suitable materials for backfilling over pipeline construction is a process of manufacture or production of goods within the meaning of paragraph 1(*a*), Part XIII, Schedule III to the Act;

-that parts installed on the excavation equipment employed in such manufacturing or production activities are exempt from excise tax pursuant to paragraph 1(*l*), Part XIII, Schedule III;

-that materials consumed or expended in the excavation of backfill material are exempt from excise tax pursuant to paragraph 2(*a*), Part XIII, Schedule III;

-that tools used to repair equipment employed in the manufacture or production of goods are repair and maintenance equipment for use in servicing goods described in paragraph 1(*a*), Part XIII, Schedule III, and qualify for exemption under paragraph 1(*k*), Part XIII;

-that excavation equipment employed in trenching for the laying of oil and gas gathering lines is machinery or apparatus for use in the development of petroleum or natural gas within the meaning of paragraph 1(*j*), Part XIII, Schedule III;

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-that parts installed on the excavation equipment employed in such petroleum or natural gas development activities are exempt from excise tax pursuant to paragraph 1(*l*), Part XIII, Schedule III;

-that tools used to repair construction equipment employed in exploration for, or discovery or development of, petroleum and natural gas are repair and maintenance equipment for use in servicing goods described in paragraph 1(*j*), Part XIII, Schedule III, and qualify for exemption under paragraph 1(*k*), Part XIII; and

-that the appellant is entitled to a refund of the excise tax under section 68 of the Act on the purchase of the said parts in the amount of $7,203.50, on the said materials consumed or expended in the amount of $3,655.71 and on the purchase of the said tools in the amount of $2,108.88.

FACTS

Pillar is a construction company providing construction equipment and services to oil and gas sector. The principal activities of Pillar include construction of well sites, oil and gas lease site access roads and pipelines. Pillar's pipeline construction activities involve the laying of gathering lines bringing oil or gas from some oil and gas wells to a central point. These construction activities include trenching for the placement of the pipe, and the provision of suitable material for padding the pipe and backfilling over the pipe once it is in place.

Pillar purchased repair or replacement parts that were installed on the equipment engaged in the excavation of backfill materials from the pipeline trench. Pillar purchased tools for use in the repair and maintenance of all its construction equipment, including, but not limited to, the repair and maintenance of its trenching equipment. Pillar paid taxes on such purchases.

Pillar filed Refund Claim No. 1262 with Revenue Canada, Customs and Excise, on May 12, 1988, in respect of these purchases. The refund claim was made for the period May 16, 1984, to March 31, 1988. On June 17, 1988, the Minister issued Notice of Determination No. ALB53274 denying the appellant's claim for a refund of the tax paid because the Act does not provide any exemption from federal sales tax to the said repair or replacement parts, tools and processing equipment.

Pillar filed a notice of objection with the Minister on September 13, 1988. Because the Minister had not yet sent a notice of decision, Pillar appealed the Minister's determination to the Canadian International Trade Tribunal (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 oil field business and derives most of its revenues from the construction of well sites, access roads and pipelines. He explained that Pillar's claim for refund covers exclusively the gathering system work that involve the laying of gathering lines bringing the product from the wellhead to a central point called the battery. Under a typical

contract to construct a gathering line, the appellant picks up the pipe and installs it. The appellant's activities for the installation of the pipeline include the hauling, stringing and welding of the pipe, the ditch lowering and the backfilling.

According to the witness, the appellant uses either backhoes or trenching machines to do the excavation for the pipeline to be laid underground. Certain particular ground conditions require that the ditch be excavated with a backhoe only. In other conditions, the contract specifies that a trenching machine be used. As opposed to the backhoe, the trenching machine cuts only the minimum amount of ditch required, places neatly the excavated material as close to the ditch line as possible for ease of backfilling and produces excavated material that is more granular.

The witness said that, in some contracts, there are conditions describing the characteristics of the backfill material to be placed over the pipe. For example, steel pipes are protected from corrosion by a coating on the outside of the pipe. The coating is subject to damage from rock, stones or large clods of frozen material. Therefore, the appellant is required to ensure that the backfill material does not contain matters that could damage the protective coating. In circumstances where the appellant is working on agricultural lands, government regulations require that the topsoil be removed and be separated from the other backfill material to return to the full productivity of the field before the construction of the pipeline. During winter construction, the appellant has to keep a very short period between the time that the material is excavated and the time that it is returned to the ditch because it is important that the material does not freeze. If it is frozen, the dirt or clay will become like rocks and will damage the coating.

To fill the requirements of the contracts, the appellant must return the right of way to its original condition. The appellant must get back into the trench and compact the material that has been ditched out and put on the ground. The material that cannot get back into the trench is neatly mounded over it. The appellant uses the material that has been excavated and does not bring in additional material. If the material excavated is unsuitable for laying over the pipe, the appellant is required to purchase suitable backfill material.

Mr. David Heaton testified that, as an engineer, he has prepared bids for pipeline construction jobs and has been retained, as a consulting engineer, by various oil companies having trouble with bad ground conditions on pipelines. He explained that pipelines are buried underground to protect them, to minimize their environmental impact on the ground, to use the ground to support the elbows and the fittings, to stop the pipe from coming apart and to minimize the thermal regime that the pipe has to go through.

The witness told the Tribunal that there is an engineering measurement, called the Standard Proctor Test, used to measure degrees of compaction or density of various materials. The Proctor Test inputs constant compactive energy into a unit of soil. Typically, in the pipeline construction industry, the specifications require 90 to 95 percent of proctor for compaction over the pipe. For pipeline construction, the excavated material is compacted for two reasons: firstly, to get the material back in the hole and, secondly, to increase its strength. If the material is compacted, it will be stable, it will not settle, there will not be big depressions falling in the ground, it will support the pipe and minimize later settlement of the ground over the pipe.

Mr. Jerry Ault, a sales tax consultant since 1988, testified that he was engaged by Pillar to prepare a refund claim to recover any sales tax paid. The witness went through the appellant's accounting records and reviewed the purchase invoices on which sales tax refund is being claimed. He said that most of the invoices would show tax included or extra tax charged on the invoice. He subsequently categorized the various purchases according to the machinery they were purchased for and installed on. These categories were illustrated on a working document called Pillar Construction Ltd. Breakdown of FST on Disputed Claims, entered as Exhibit A-6.

The first category is constituted by purchases of repair and replacement parts for the trenching equipment. The second category covers repair and maintenance equipment and tools used to repair and maintain the trenching equipment. The witness identified the pipeline construction jobs for which the tools were purchased by looking at the charging slip attached to each supplier's invoice and the unit number of the equipment or the job number to which that purchase was being charged. The third category covers various materials consumed or expended during the production of materials and supplies that could be parts bought and installed on the trenching equipment on the site. The parts include things like filters, nuts and bolts that are consumed during the operations. The fourth category includes repair and maintenance equipment and tools that repair all the pieces of construction equipment in the main shop. The fifth category covers the materials consumed and expended during the repair and maintenance of the construction equipment and other equipment in the shop. The sixth category is composed of repair and replacement parts for a drag line that was used in exploration. The seventh category covers consumable materials and supplies for a D-8 tractor used in exploration. The eight category includes materials consumed and expended by trenching equipment for the construction of one transmission line job for Nova. Finally, the ninth category covers repair and maintenance equipment and tools used on site to repair the trenching equipment during the same transmission line job for Nova.

The witness said that, before his employment as a sales tax consultant, he was employed for eight years as a Refund Auditor with the District Excise Office in Edmonton. Part of his duties consisted of advising the public on the operation of the Act. He explained his understanding of the departmental policy regarding end-user refund claims as follows: any unlicensed manufacturer, producer or contractor had to file end-use refund claims on pipes, valves, fittings, electric wire, cable and conduit, and any multi-use parts for equipment, unless they were exclusively engaged in an exempted activity. Multi-purpose parts are either interchangeable with similar pieces of equipment or interchangeable with pieces of equipment that were used on various taxable and exempt jobs. For example, in the present case, they are parts that can be used on the trenching machine or a backhoe. The witness believed that most of the parts and supplies included in the refund claim in issue are multi-use parts.

Questioned by the Tribunal, the witness said that part of the appellant's activities consists of exploration that qualifies for exemption. The appellant's equipment used for exploration is also used for other purposes, for instance, pipeline construction. Because the appellant is not exclusively engaged in exploration, the appellant has to buy on a tax included basis and file a refund for the purchases that qualify for exemption. This corresponds to the witness' understanding of the departmental policy regarding purchases by end users of multi-purpose parts.

Ms. Patricia Coyle, a Tax Interpretation Officer with the Excise Tax Branch, was called on behalf of the appellant. The witness was asked to comment on the reasons for the implementation of the departmental policy on refund claims, as expressed in Ruling No. 9110/287. The witness replied that the policy was implemented for ease of audit and control.

ISSUES

The issue in this appeal is whether certain repair or replacement parts for trenching and ditching equipment used by the appellant for the construction of pipelines and certain tools and processing equipment used to repair or maintain such equipment qualify for exemption from sales tax under paragraphs 1(*a*), (*j*), (*k*), (*l*) and 2(*a*), Part XIII, Schedule III to the Act. The first underlying question in issue is whether the appellant uses the excavation equipment in the manufacture or production of goods within the meaning of the Act, these goods being the backfill material. A second question is whether the excavation equipment is engaged in the development of petroleum or natural gas within the meaning of paragraph 1(*j*) of Part XIII. Finally, a further question to decide is whether the appellant, an end user, is entitled to claim a refund of sales tax on the purchase of the said repair or replacement parts, tools and processing equipment.

LEGISLATION

The statutory provisions relevant to this appeal are as follows:

Excise Tax Act[1]

> *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.*

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

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,

...

(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,

(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),

...

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 presented a two-pronged argument in this appeal. First, the appellant argued that section 51 of the Act essentially provides an exemption from sales tax imposed by section 50 for goods mentioned in Schedule III. Specifically, paragraph 1(*a*) of Part XIII states that machinery or apparatus sold to or imported by manufacturers for use by them primarily and directly in the manufacture or production of goods is tax exempt. The appellant contended that the trenching machine is used primarily and directly in the manufacture or production of goods, these goods being the backfill material produced by the appellant. Therefore, the parts for the machine and the consumable items used for it ought to be eligible for tax exempt purchase.

In support of its submission, the appellant said that it is required by contract to provide suitable backfill material with specific characteristics. The appellant in its operation must select the appropriate material from the excavated material to satisfy the contractual requirements. The appellant referred to the typical contracts entered in evidence and suggested that the contract requirements indicate that the excavated material undergoes some processing.

The appellant further submitted that the backfill material that it produced are "goods" within the meaning of subparagraph 1(*a*)(i) of Part XIII. Relying on the case *G.H. Poulin Contractor Limited v. The Deputy Minister of National Revenue for Customs and Excise*,[2] the appellant explained that to have the characterization as goods, the material must have some value and must be produced in a commercial sense. The appellant also referred to the dictionary definitions of the word "production" and argued that it essentially means to bring forward, to generate, to yield, to bring about or to create. In the appellant's view, the production of backfill material might be considered to be a by-product of the trenching operation. However, nothing in the Act precludes the valuable by-products of an operation from being considered as goods produced or manufactured within the meaning of paragraph 1(*a*).

The appellant further argued that paragraph 1(*a*), Part XIII, Schedule III, requires that the trenching machine be used "primarily and directly" in the production of goods. In the case *The Deputy Minister of National Revenue for Customs and Excise v. Amoco Canada Petroleum Company Limited*,[3] the Federal Court of Appeal established that "directly" means without any intervening medium. In the present case, the trenching machine is directly creating the backfill material. There is no intervening medium between the trenching machine and the material that results from its operation. The appellant also suggested that the word "primarily" used in paragraph 1(*a*) means "basic" or "fundamental" and concluded that, in this case, the trenching machine is fundamentally involved in producing the backfill material. The primary purpose of the trenching machine is to create the hole where the pipe goes; its second primary purpose is to create the backfill material.

The second prong of the appellant's argument was that the trenching machine, insofar as it is engaged in the laying of gathering lines, is engaged in the development of petroleum and natural gas. Gathering lines are essentially pipe valves and fittings used to bring the product from the well to the point of first storage. The construction and laying of oil and gas gathering lines is an essential element of the development of petroleum or natural gas and the gathering lines themselves are exempt from excise tax under Part XIII. Therefore, the appellant argued that the machinery or apparatus necessary to have the product to the point of first storage is to be considered a part of the development process and is exempt from tax under paragraph 1(*j*) of Part XIII.

On this point, 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 and includes matters that can be shown to be activities directly related to and indeed a necessary aspect of resource development. The appellant urged the Tribunal to adopt the criteria laid down by the Tariff Board in the *Ocelot* case and submitted that, if the gathering lines themselves are considered to be products for development of oil and natural gas, the activity of installing those pipes must also be included in that definition. It is a necessary aspect of development and it is

2. (1985) 10 T.B.R. 170, at 180.
3. (1985) 86 D.T.C. 6008 (F.C.A.).
4. (1983) 8 T.B.R. 763, at p. 770.

directly related to development. If the line is not constructed, there is not going to be any production and, in fact, the development process will not be completed.

On the last question in issue in this appeal, as to whether a refund is claimed by an end user, the appellant submitted that the Tribunal must interpret the meaning of section 68 in the context of the entire Act to determine if the appellant falls within the terms of that section. The appellant argued that it is entitled to an exemption on the purchase of the parts and consumable items in issue. As a result of that purchased 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 afford a means by which tax paid in error can be refunded to a deprived party such as the appellant, notwithstanding a statutory limitation on such refund being made. In support of that position, the appellant referred to the case *Consumers Glass Co. Ltd. v. Her Majesty The Queen in Right of Canada.*[5]

The respondent argued that the onus is on the appellant to prove that it is eligible for and entitled to a refund. He 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 equipment and the various items 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.

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5. [1988] 2 C.T.C. 141 (F.C.T.D.).
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 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 appellant is not a "manufacturer" or "producer" of "goods" within the meaning of paragraph 1(*a*), Part XIII, Schedule III. For that proposition, the respondent relied on the case *The Queen v. York Marble, Tile and Terrazzo Ltd.*[8] where the Supreme Court of Canada adopted the following definition of "manufacture":

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

The appellant is not, argued the respondent, manufacturing goods. The appellant does not give to the materials new forms, qualities and properties. The appellant is using equipment, such as trenching machines or backhoes, to dig up trenches. The appellant lays gathering lines and puts the dug up dirt back into the trench minus certain undesirable items such as snow, hard lumps or rocks. Then, the appellant compacts the backfill material. That is essentially what the appellant is doing. Even if there are changes in the consistency or in the compacting of the dirt, there is no evidence before the Tribunal to show that these activities amount to new forms, qualities or properties such as to produce articles that would fall within the aforementioned definition.

The respondent further submitted that the contracts entered in evidence that list certain requirements concerning the trenches that are dug and the kind of backfill material that has to be put in simply keep the contractor, in this case Pillar, in line by making it clear that it has to take reasonable care in filling up the hole again, not to damage the pipe, to use suitable material and not to put rocks back in. These requirements do not go as far as specifying a material that can be viewed as having a separate commercial value and goods that are produced by the appellant.

On the issue of whether, under paragraph 1(*j*), Part XIII, Schedule III, the machinery and apparatus in question are for use in exploration for, or discovery or development of, petroleum, natural gas or minerals, the respondent argued that since the appellant did not call any expert evidence about the meaning of the terms "exploration, discovery or development" he assumed that the pipes in question were, presumably, falling within the term "development." 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-Burtt Industries Ltd. et al. v. The Deputy Minister of National Revenue for Customs and Excise*[10] and *Pembina Resources Limited v. The*

8. [1968] S.C.R. 140, at p. 145.
9. (1979) 6 T.B.R. 907.
10. (1982) 8 T.B.R. 424.

Minister of National Revenue[11] where the meaning of "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. The Federal Court of Appeal[12] upheld that decision and essentially 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.

The respondent concluded that the appellant's claims to exemptions under paragraphs 1(*k*), (*l*) and 2(*a*), Part XIII, Schedule III, can only be supported if it succeeds in proving exemptions under paragraphs 1(*a*) and (*j*).

FINDING OF THE TRIBUNAL

The first group of exemptions claimed by the appellant under paragraphs 1(*a*), (*l*), (*k*) and 2(*a*), Part XIII, Schedule III to the Act, covers repair or replacement parts installed on the excavation equipment used in carrying out its obligations under contract, materials consumed or expended in the excavation of backfill material and tools used to repair such equipment.

In order for the appellant to benefit from these exemptions from sales tax, it must be demonstrated that the excavation activities carried out by Pillar resulted in goods being produced or manufactured within the meaning of the Act. A review of the testimonies and the contracts for pipeline construction entered into evidence revealed that the appellant is typically required to excavate the trench to a certain depth and to remove from the trench all brush, skids, metal of any kind, rocks, ice, frozen lumps and any other hard objects that might damage the pipe coating when the pipe is lowered into the trench. Then the appellant is required to pad the trench bottom with soil sand, polyurethane foam, select earth or any other material specified in the contract. After lowering the pipe into the ditch, the appellant is required to do all work necessary to backfill suitable excavated material into the ditch and restore the right of way to its original condition.

Some contracts specify the manner in which the backfilling is to be done. For example, the contract may require that the pipe has to be covered with a minimum quantity of soft dirt before harder fill is pushed into the ditch or wrapped with rock shield or that the backfill material has to be deposited in layers not exceeding 150 mm in depth, with each layer being compacted to 95 percent of standard Proctor density. The evidence also revealed that the excavated material is normally compacted for two reasons: to get the material in the hole and to increase its strength.

It is clear from the testimony of the witnesses and by reference to the contracts that all the work done by the appellant, including the placement and the compaction of the excavated material, is for the construction of a gathering line. In the opinion of the Tribunal, the operation consisting of putting the excavated material back into the trench and compacting the material over the pipe did not result in this backfill material being produced or manufactured.

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11. Appeal No. 2946 of the Tariff Board, November 10, 1988.
12. (1980) 2 C.E.R. 119 (F.C.A.).

As recognized by the courts,[13] the words "manufactured" and "produced" are not words of any precise meaning. The Tribunal is of the view that the definition of "manufacture" adopted by the Supreme Court of Canada in the case *The Queen v. York Marble, Tile and Terrazzo Ltd.*[14] is enlightening for the present purposes. Applying this definition to the operations in issue, it is apparent that the appellant did not give to the excavated material new forms, qualities or properties or combinations whether by hand or machinery. The form of the backfill material did not differ from what has been excavated from the trench. As to the qualities and the properties of the backfill material, there is no evidence to show that they have changed. There may have been changes in the consistency or in the compacting of the material, but that does not amount to new forms, qualities or properties.

The Tribunal believes that this case may be distinguished from the above-noted case *G.H. Poulin Contractor Limited v. The Deputy Minister of National Revenue for Customs and Excise*.[15] 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." That type of rock was used to fill the lower areas of the 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 merchandises, 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. Goods with new forms or properties have not been created for sale. The appellant simply followed the contract specifications in laying the gathering lines and took the necessary precautions to protect the pipe. No goods having a separate commercial value were produced by the appellant during the performance of its contracts.

Consequently, since no goods have been 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, for the repair or replacement parts installed on the excavation equipment, for the materials consumed or expended in the excavation of backfill material and for the tools used to repair such equipment.

The second question to decide in this appeal is whether the excavation equipment is engaged in the development of petroleum or natural gas within the meaning of paragraph 1(*j*) of Part XIII. The second group of exemptions claimed by the appellant covers parts installed on the excavation equipment employed in such petroleum or natural gas activities and the tools used to repair the construction equipment.

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13. See *The King v. Vandeweghe Limited*, (1934) S.C.R. 244 at 248.
14. Supra, footnote 8.
15. Supra, footnote 2.

On this issue the Tribunal is of the view that the appellant has not discharged its burden of proof. The appellant offered no evidence to show that the excavation equipment employed in trenching for the laying of oil and gas gathering lines is machinery or apparatus for use in exploration for, or discovery or development of, petroleum or natural gas. Indeed, the appellant assumed, as noted by the respondent, that the construction and laying of oil and gas gathering lines were an essential element of the development of petroleum or natural gas and that the gathering lines themselves were exempt from excise tax under Part XIII.

The Tribunal notes that all the appellant's activities in this appeal are for the laying of gathering lines. All those activities are related to the transportation of the product. In the above-noted decision *Leonard Pipeline Contractors Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,[16] which was upheld by the Federal Court of Appeal,[17] the Tariff Board stated 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 might be essential to construct gathering lines to bring the product from the well to the point of first storage, these transportation facilities do not necessarily refer to the drilling of wells.

Consequently, since it has not been proved to its satisfaction that the excavation equipment is engaged in the development of petroleum or natural gas, the Tribunal concludes that the appellant is not entitled to the exemptions provided in paragraphs 1(*l*) and (*k*), Part XIII, Schedule III, for the repair or replacement parts installed on the excavating equipment and for the tools used to repair the construction equipment.

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 parts, materials and tools.

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

16. Supra, footnote 9.
17. Supra, footnote 12.