

Ottawa, Monday, August 19, 1991

Appeal No. AP-89-267

IN THE MATTER OF an appeal heard on April 11, 1991,
under section 81.19 of the *Excise Tax Act*, R.S.C., 1985,
c. E-15;

AND IN THE MATTER OF a decision of the Minister of
National Revenue dated September 29, 1989, regarding a
notice of objection served under section 81.15 of the *Excise
Tax Act*.

BETWEEN

PERMA TUBES LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-267

PERMA TUBES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act (the Act) by Perma Tubes Ltd. of a decision of the Minister of National Revenue. The appellant filed an application for refund claiming that taxes were paid in error in respect of concrete forming tubes called PermaTubes. By Determination dated October 21, 1988, the Department of National Revenue, Customs and Excise, rejected the claim on the basis that there is no provision in the Act that permits a reduction in the rate of federal sales tax applicable to PermaTubes. The appellant objected to the determination on the basis that the tubes were construction materials within the provisions of Part I, Schedule IV to the Act. By Notice of Decision dated September 29, 1989, the Minister of National Revenue disallowed the objection on the basis that there was no legislative authority to vary or vacate the determination.

HELD: *The appeal is dismissed.*

Place of Hearing: Vancouver, British Columbia

Date of Hearing: April 11, 1991

Date of Decision: August 19, 1991

Tribunal Members: Kathleen E. Macmillan, Presiding Member

Arthur B. Trudeau, Member

Sidney A. Fraleigh, Member

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Nicole Pelletier

Appearances: Werner H.G. Heinrich, for the appellant

Brian J. Saunders, for the respondent

Cases Cited:

Stubart Investments Limited v. Her Majesty The Queen, [1984] 1 S.C.R. 536, at 578; The Deputy Minister of National Revenue for Customs and Excise v. Amoco Canada Petroleum Company Ltd., 13 C.E.R. 102 (F.C.A.), at 107; ECG Canada Inc. v. Her Majesty The Queen, 13 C.E.R. 281 (F.C.T.D.), at 287.

Dictionary Cited:

The Concise Oxford Dictionary of Current English, University Press, Oxford, Seventh Edition, p. 1182.

Appeal No. AP-89-267

PERMA TUBES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
ARTHUR B. TRUDEAU, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

ISSUE AND LEGISLATION

The issue in this appeal is whether the PermaTubes constitute goods described in paragraph 16, Part I (Construction Materials), Schedule IV to the *Excise Tax Act*¹ (the Act) and, therefore, are taxed at the lower rate pursuant to paragraph 50(1.1)(b) of the Act.

In the period during which the appellant claims to be eligible for a refund of taxes paid in error, paragraph 50(1.1)(b) of the Act was amended several times. However, the actual drafting of the paragraph or the effective rate of tax was not at issue. The relevant provisions of the Act as they read on October 21, 1988, the date of the Notice of Determination are:

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

...

(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;

...

SCHEDULE IV

PART I

CONSTRUCTION MATERIALS

...

16. Pipe, conduit and tubing designed for use in buildings, sewers, irrigation or drainage systems, pipelines and other construction; valves and fittings therefor.

...

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

FACTS AND EVIDENCE

This is an appeal under section 81.19 of the Excise Tax Act (the Act) by Perma Tubes Ltd. from a decision of the Minister of National Revenue (the Minister). The appellant filed an application for refund claiming that taxes in the amount of \$102,309 were paid in error on paper cylinders or tubes, referred to as PermaTubes, for use as forms in making concrete columns, pillars, posts and footings as part of the construction of buildings and other structures.

By Notice of Determination dated October 21, 1988, the Department of National Revenue, Customs and Excise, rejected the claim on the basis that there is no provision in the Act that permits a reduction in the rate of federal sales tax on such tubes. By Notice of Objection dated December 20, 1988, the appellant objected to the determination on the basis that the tubes were construction materials within the provisions of Part I, Schedule IV to the Act.

By Notice of Decision dated September 29, 1989, the Minister disallowed the objection on the basis that there was no legislative authority to vary or vacate the determination.

By letter dated December 21, 1989, Perma Tubes Ltd. appealed to this Tribunal.

The appellant is a licenced manufacturer of construction forms known as Permaforms or PermaTubes. Mr. Alan Batcheller, President of Perma Tubes Ltd., acted as witness for the appellant. He stated that PermaTubes are made of layers of paperboard and adhesive wound together in a spiral fashion. The inside of the tubes are treated with a layer of plastic to prevent the concrete from sticking and to allow the tubes to be easily stripped. He stated that the tubes are sold in standard widths and lengths.

The specific PermaTubes in issue are: Permaforms, the standard cardboard tubes treated with plastic on the inside; Handiforms, a lighter version of the tubes designed to be used on small domestic jobs around the home or farm; and Poli-Permaforms that are the standard tubes with a heavy plastic liner added to prevent the spiralling line on the finished concrete created by the standard tubes.

The tubes are used in the construction of buildings and other structures. Specifically, the tubes are used as forms to hold liquid concrete that is poured into a tube and contained by its walls. As the concrete hardens, it forms a solid concrete column used for structural support of the building under construction. PermaTubes come in various diameters and can be cut to length depending on the particular structural requirements of the column to be formed. The wall thickness of PermaTubes increases as the inside diameter of the tubes increases.

With a plastic lining, the tubes are made to be stripped and discarded after the concrete has hardened. The manufacturer recommends that the tubes be stripped within 10 days after pouring the concrete. In some situations, however, the tubes are not stripped. This occurs generally when the tubes are used below the surface of the soil, rendering removal inconvenient or unnecessary or when the tubes will be closed in by the building.

The appellant also manufactures other tubes used in the construction industry, namely, PermaVoids that are used to replace "dead concrete" where strength is not needed and the added concrete would only add to the weight of the structure. An example of its application would be in the floor of a bridge. In this application, concrete is poured around the surface of the tubes, and the tubes interior remains hollow. The appellant also produces small diameter tubes used to form an empty void through a concrete structure, allowing for passage of plumbing pipe or electrical conduits. These products, however, are not in issue.

ARGUMENTS

Counsel for the appellant argued that PermaTubes constitute goods enumerated in paragraph 16, Part I, Schedule IV to the Act and thus are taxed at the lower rate as prescribed by paragraph 50(1.1)(b) of the Act.

Counsel for the appellant urged the Tribunal to apply the rules of statutory interpretation in determining whether PermaTubes fall within the terms of paragraph 16. In interpreting that paragraph, the Tribunal must give effect to the object and spirit of the Act and read the particular provision in the context of the whole Act. In this regard, counsel referred to *Stuart Investments Limited v. Her Majesty The Queen*.²

Counsel argued that when reference is made to the relevant provisions of the Act it becomes evident that the object is to tax at a lower rate those construction materials and equipment that are essentially consumed, incorporated or abandoned in the construction process. He elaborated on this by stating that reusable goods could not take advantage of the reduced rate of tax.

Counsel then argued that words used in a statute should be given their ordinary grammatical meaning and referred the Tribunal to *The Deputy Minister of National Revenue for Customs and Excise v. Amoco Canada Petroleum Company Ltd.* case.³ After referring the Tribunal to two dictionary definitions of the word "tubing," counsel argued that PermaTubes fall within the definitions and must be considered as tubes as that word is used in the Act. He noted that paragraph 16 places no restriction on the material from which the tubing is made.

Counsel then submitted that the tubes are "designed for use in buildings." He argued that the evidence is clear that the tubes remain part of the poured concrete for at least 10 days.

In response to the respondent's argument that paragraph 16 does not apply because the tubes are removed, counsel for the appellant noted that there is nothing in the Act that requires that the goods be present when the building is completed. He argued that from the time the foundation is started until the building is completed, it must be considered a building. As long as the tubing is used during this period, it must be viewed as being used in the building.

Counsel argued that paragraph 16 contains the "catch-all" provision "other construction" and that the tubing also qualifies under this term. It was submitted that "other construction" in this context would refer to the pilings, piers and columns that the PermaTubes are designed to form.

Counsel noted that the respondent has been taxing PermaVoids at the lower rate pursuant to paragraph 50(1.1)(b), presumably on the basis that they remain in the structure after it is completed. He argued that this practice is consistent with the general principle that goods consumed in the construction process are taxed at the lower rate. He reiterated his argument that the PermaTubes are also consumed, but are taxed at the higher rate. After referring the Tribunal to *ECG Canada Inc. v. Her Majesty The Queen*,⁴ counsel argued that if there is an ambiguity in the way the Minister has been taxing different goods, the more favorable rate should apply.

2. [1984] 1 S.C.R. 536, at 578.

3. 13 C.E.R. 102 (F.C.A.), at 107.

4. 13 C.E.R. 281 (F.C.T.D.), at 287.

Counsel for the respondent suggested that counsel for the appellant has attempted to give an expansive interpretation to the term "construction materials" that all such materials would be eligible for the lower rate of tax. In contrast, he argued that what is intended by the Act is that only those construction materials that are enumerated under Part I, Schedule IV will be eligible for the lower tax rate.

Counsel for the respondent argued that the primary definition of the words "pipe, conduit and tubing" includes the notion of a channelling device designed to convey such things as liquids. In support, he referred to paragraph 16 that includes the expression "valves and fittings therefor" that is separated by a semicolon from the balance of the paragraph. He argued that the legislature would not have added this if it envisioned all pipes, conduits and tubing. He argued that because the goods at issue do not accommodate valves and fittings, they do not fall within the provisions of paragraph 16.

Counsel also noted that to be properly described by paragraph 16, the goods must be designed for use in buildings or other construction. He argued that the goods at issue are not pipes, conduits or tubing with valves or fittings that are permanently installed to serve a purpose in a building or other construction. They were designed as a forming for concrete. It was noted that in most cases the forming is stripped after the concrete has hardened.

With regard to the alleged inconsistency in the Minister's practice of taxing PermaTubes and PermaVoids, counsel referred to a letter dated November 2, 1979, addressed to the appellant from a Mr. Crossley of the Excise Tax Interpretations Branch. The letter represented a ruling that all tubes whether strippable or non-strippable and whether used for forming or to create voids were subject to tax at the normal rate. Counsel noted that this interpretation is supported by an excerpt from an administrative bulletin issued by the Minister concerning paragraph 16 that is contained in the Appellant's Book of Authorities. He pointed out that "Laminated tubular forms to provide voids in pre-cast or cast-in-place concrete members" and "Tubular fibre forms for forming concrete columns, piers and footings, designed to be removed and disposed of after the concrete has set" have the same tax status.

REASONS

As a preliminary matter to the hearing, counsel for the appellant narrowed the scope of his arguments to the question of whether the goods in issue fall within the provisions of paragraph 16, Part I, Schedule IV to the Act.

The Tribunal accepts the argument submitted by both counsel that it should employ the literal approach to statutory interpretation and give the words of a statute their common ordinary meaning, unless the context suggests otherwise. It is also in agreement with the argument that it is open to the Tribunal to look to the object and purpose of a statute for purpose of understanding and determining the intention of Parliament.

The Tribunal must determine whether PermaTubes are "designed for use in buildings ... or other construction." Because the term "other construction" is preceded by "buildings, sewers, irrigation or drainage systems, pipelines" the Tribunal interprets "buildings ... and other construction" as the completed structure and not as the process of construction. Accordingly, the question is not whether the goods are used in constructing the buildings or other structures but whether they are used in the buildings or structures themselves.

The Oxford dictionary⁵ provides the following definition for the word "use":

use (n) 1. using, employment, application to a purpose; ... 3. availability, utility, purpose for which thing can be used ...

The Tribunal's plain reading of paragraph 16 is that Parliament intended to encompass tubing and similar goods that have a purpose or utility in a building or other structure. It did not intend to include all items used in construction and found at a construction site.

In the Tribunal's view, this interpretation accords with the spirit of Part I, Schedule IV as a whole. Had it been the intention of Parliament to tax all construction materials and equipment at the lower rate, Parliament would not have enumerated the various paragraphs describing the specific items entitled to the lower rate of tax. Rather, it would have simply provided a basic provision for materials used in construction.

A reading of the items contained in Part I, Schedule IV suggests to the Tribunal that the materials listed form component parts of a building or other construction project, such as, bricks, doors and windows. Many of the items are qualified with the phrase "designed for permanent installation" or "to be incorporated in." Paragraph 11, which refers to plywood lumber and other wood products, contains the qualifying phrase "and other such building components."

Based on the plain meaning of paragraph 16 and on its reading of Part I, Schedule IV in its entirety, the Tribunal believes that Parliament's intention was to include only those construction materials that form a component part of a building or structure.

There is no question that the goods in issue are used in the construction or building of various structures; however, they are not used in the sense of being incorporated into the structure. The Tribunal notes that the goods are designed to be removed from the hardened concrete that they were employed to form. In situations where the tubes are not removed, the Tribunal does not believe that the tubes form part of the structure, but are left on as a matter of convenience. Accordingly, the Tribunal finds that the tubes are not "designed for use in buildings ... and other construction."

The Tribunal also considered whether the goods qualify as "pipe, conduit, and tubing" within the meaning of paragraph 16. The Tribunal agrees with the appellant's contention that the goods fit the description of "tubes" in that they are elongated, hollow cylinders used as receptacles. However, in the Tribunal's view, "tubes" are not synonymous with "tubing." The latter, like pipe and conduit, implies goods that make up a network or system of cylinders used for the transmission of matter, such as liquids, gas or wire. The reference to valves and fittings in paragraph 16 further suggests that this is their usual application.

SEPARATE REASONS BY MEMBER TRUDEAU

I agree with my colleagues that this appeal should be dismissed, but for different reasons.

I agree that the goods in issue, which on the basis of undisputed evidence are forms designed for use in pouring concrete in the construction of buildings and other structures, do not fall within the category "pipe, conduit or tubing" as specified in paragraph 16. In my respectful view, this finding alone

5. The Concise Oxford Dictionary of Current English, University Press, Oxford, Seventh Edition, p. 1182.

would have been sufficient to dismiss this appeal.

Had I found that the goods in issue could be considered "pipe, conduit or tubing," I would have allowed the appeal as I do not place the same interpretation on the words "designed for use in buildings" as my colleagues. In my view, the words "designed for use in buildings" must include the notion that the goods are designed to be used in the construction of the buildings, etc., and in this sense the goods do not have to be used per se in buildings nor do they have to be permanently installed in buildings. Had that been the intention of Parliament, then the qualifying words "for permanent installation" as included in paragraphs 4, 9, 10 and 24 of Part I would have also been used in paragraph 16.

Accordingly, I would dismiss this appeal.

CONCLUSION

For the above-mentioned reasons, the appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member