



Ottawa, Tuesday, February 11, 1992

**Appeal No. AP-90-026**

IN THE MATTER OF an appeal heard on October 29, 1991, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated March 14, 1990, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**HILLSBOROUGH RESOURCES LIMITED**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Michèle Blouin  
Michèle Blouin  
Presiding Member

W. Roy Hines  
W. Roy Hines  
Member

Charles A. Gracey  
Charles A. Gracey  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

*UNOFFICIAL SUMMARY*

**Appeal No. AP-90-026**

**HILLSBOROUGH RESOURCES LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**HELD:** *The appeal is dismissed. The appellant has failed to discharge the onus of proof to demonstrate that it was a "manufacturer or producer" within the meaning of sections 1 and 2, Part XIII, Schedule III and of section 68 of the Excise Tax Act. It also failed to establish that it sold explosives to the mine-site owner.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: October 29, 1991*  
*Date of Decision: February 11, 1992*

*Tribunal Members: Michèle Blouin, Presiding Member*  
*W. Roy Hines, Member*  
*Charles A. Gracey, Member*

*Counsel for the Tribunal: Robert Desjardins*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: Kent N. Richardson, for the appellant*  
*Linda J. Wall, for the respondent*

**Appeal No. AP-90-026**

**HILLSBOROUGH RESOURCES LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member  
W. ROY HINES, Member  
CHARLES A. GRACEY, Member

**REASONS FOR DECISION**

This is an appeal pursuant to subsection 81(19) of the *Excise Tax Act* (the Act).<sup>1</sup>

The appellant seeks tax relief for the explosives it used on the Swayze Mine Property pursuant to paragraph 1(a) and section 2, Part XIII, Schedule III to the Act, and also pursuant to section 68.2 of that Act, i.e., that it sold the explosives to the mine-site owner, Orofino Resources Limited (Orofino).

In August and September 1987, a division of the appellant company, Canadian Mine Development (CMD) agreed to carry out underground work at the Swayze Mine Property in order to obtain a bulk sample for metallurgical testing and to obtain, as well, information on ground conditions. Work was carried out on the Swayze Mine Property by CMD from September 1987 to June 1988. In June 1988, geology and sampling were completed and the entrance to the underground ramp (i.e., in technical terms, the portal of the incline) was then closed with a muck pile. Some 18,000 tons of newly extracted ore was stockpiled during this period.

Hillsborough Resources Limited (Hillsborough) claimed a refund of sales tax in respect of explosives used by the company in carrying out the work on the Swayze Mine Property between October 5, 1987, and June 17, 1988. By Notice of Determination dated June 1, 1989, the respondent disallowed the refund application on the ground that the explosives were not considered to be used in a manufacturing operation and that no sale was considered to be made to Orofino. In the subsequent notice of objection, Hillsborough's division essentially referred to its verbal contract with Orofino, stating that it sold the explosives to Orofino, and claimed that it qualified as a producer. This notice was rejected by a Notice of Decision dated March 14, 1990, in which the Minister of National Revenue (the Minister) noted that no evidence had been presented to him to indicate that the production phase of the mine had commenced or even that a decision had been made to commence production, and that obtaining a bulk ore sample was seen as exploration rather than production. Furthermore, as no evidence had been presented to indicate that Orofino had contracted to buy the explosives used, the Minister concluded that there was no sale of goods as such, but that the explosives were purchased and utilized by the appellant to fulfil its contract.

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

The relevant statutory provisions in the present instance are paragraphs 50(1)(a), 51(1)(a), section 68.2 and sections 1 and 2, Part XIII, Schedule III to the Act.

At this juncture, the Tribunal faces two questions. Firstly, has the evidence adduced before the Tribunal by the appellant demonstrated to the Tribunal that, while carrying out the work for Orofino on the Swayze Mine Property, it was a "manufacturer or producer" of "goods"? Secondly, has the appellant proven to the Tribunal's satisfaction that it did sell the explosives to Orofino? In the Tribunal's view, the appellant fails on both accounts.

The appellant's witness, Mr. Patrick D. Hayes, a business associate of the appellant's counsel, told the Tribunal on two separate occasions during the hearing that he had no direct contact with this case and that he never went on the Swayze Mine Property where CMD carried out the work for Orofino. He stated that he had no knowledge other than that obtained in the data assembled by the appellant's counsel.

Documents before the Tribunal contain nothing that support the appellant's key argument that it was a "manufacturer or producer" of goods. The Tribunal has found that, on the contrary, these documents indicate that the project was solely exploratory in nature. Pursuant to Annex 9 of the appellant's brief, Orofino's project was to initiate an underground exploration program, which included driving a decline ramp and underground diamond drilling to confirm ore reserves and grades, and to sample and delineate the zones. The letter dated August 18, 1987, from CMD to Orofino setting out the proposal is clearly in line with Orofino's explicit and immediate plans for the Swayze Mine Property. CMD's president, Mr. Voro, even assured Orofino of the support and co-operation of its staff "to successfully execute the exploration work." The other letter from CMD to Orofino, dated September 17, 1987, underlines again the kind of work to be done. Similarly, the various progress reports prepared by Orofino's officials and attached to the appellant's submission leave little doubt that the work carried out by the appellant was exploration, not manufacturing or production of goods. The Tribunal has found nothing to indicate that the appellant had received instructions to conduct mining or manufacturing activities, as the latter have been defined in the oft-cited decision *Her Majesty The Queen v. York Marble, Tile and Terrazzo Ltd.*<sup>2</sup> Given the foregoing, the Tribunal is of the opinion that the appellant failed to discharge the onus of proof to demonstrate to the Tribunal that it was a "manufacturer or producer" within the meaning of sections 1 and 2, Part XIII, Schedule III and of section 68.

As to the question of the sale of the explosives to the mine owner and the possible application of section 68.2 of the Act, it is alleged that CMD and Orofino agreed verbally to apply to the Swayze Mining Project the general conditions included in CMD's standard contract, one of which stipulates that the mine owner obtain good title to the materials provided by the contractor upon the delivery of such materials to the work site. On this point, the appellant has annexed to its submission a letter dated May 10, 1989, addressed by its accountant to counsel. As argued by counsel, it was the appellant's intention that the ownership of the said explosives would transfer to Orofino upon their delivery to the Swayze Mine Property. The appellant also annexed to its submission a letter dated February 25, 1988, invoicing Orofino for a lump sum of \$199,615.90 for the purchase of a variety of items, such as pipe and fittings, steel and bits, explosives and fuel. Counsel for the appellant chose not to call any witness to support the allegation that CMD's standard conditions were incorporated in the verbal contract with Orofino, nor did he present any witness to establish that a contract of sale relating specifically to the explosives did effectively

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2. [1968] S.C.R. 140.

take place. Thus, the appellant's contentions could not be tested before this Tribunal. The Tribunal is of the view that the appellant has failed to establish that CMD did effectively sell the explosives to Orofino.

The Tribunal notes that counsel was offered the possibility of an adjournment by the respondent's counsel in order to get more time to call further witnesses who might have been necessary or useful to prove the alleged facts of the case. Counsel for the appellant declined this offer. The available information, in the Tribunal's view, has not permitted the appellant to discharge its burden of proof in the present instance.

The appeal is dismissed.

Michèle Blouin  
Michèle Blouin  
Presiding Member

W. Roy Hines  
W. Roy Hines  
Member

Charles A. Gracey  
Charles A. Gracey  
Member