

Ottawa, Friday, September 25, 1998

Appeal Nos. AP-90-156, AP-90-157, AP-91-037 to AP-91-040

IN THE MATTER OF appeals heard on March 16, 1998, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated September 28, 1990, and April 12 and 15, 1991, with respect to notices of objection served under sections 81.15 and 81.17 of the *Excise Tax Act*.

BETWEEN

NORTH AMERICAN STEEL EQUIPMENT COMPANY LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-90-156, AP-90-157, AP-91-037 to AP-91-040

NORTH AMERICAN STEEL EQUIPMENT COMPANY LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

These are appeals under section 81.19 of the *Excise Tax Act* of decisions of the Minister of National Revenue rejecting the appellant's claims for refunds of federal sales tax paid on fabricated metal locker components and pre-assembled banks of metal lockers manufactured by the appellant.

HELD: The appeals are dismissed. The Tribunal is not persuaded that the goods in issue are "construction materials" within the meaning of the *Excise Tax Act*. Therefore, they do not qualify for a reduced rate of federal sales tax.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 16, 1998
Date of Decision: September 25, 1998

Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Raynald Guay, Member
Charles A. Gracey, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Anne Jamieson

Appearances: Cameron D. McNaughton, for the appellant
Jan E. Brongers, for the respondent

Appeal Nos. AP-90-156, AP-90-157, AP-91-037 to AP-91-040

NORTH AMERICAN STEEL EQUIPMENT COMPANY LTD. Appellant

and

THE MINISTER OF NATIONAL REVENUE Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

These are appeals under section 81.19 of the *Excise Tax Act*¹ (the Act) of decisions of the Minister of National Revenue rejecting the appellant's claims for refunds of federal sales tax (FST) paid on fabricated metal locker components and pre-assembled banks of metal lockers manufactured by the appellant.

During all periods of time relevant to the appeals, the appellant manufactured and sold metal locker components, metal lockers and pre-assembled banks of metal lockers. These goods were sold on a supply-and-install basis to dealers and directly to contractors and end users. They were installed in a variety of institutional settings, including health clubs, schools and workplaces.

Mr. Rolf Fabricius, Design Engineer employed by North American Steel Equipment Company Ltd., testified on the appellant's behalf. The appellant's representative led Mr. Fabricius through a series of photographs which illustrated the installation of metal lockers. The lockers are typically installed in rows and are often placed on a raised metal or concrete platform so as to ensure that any water or dirt on the surrounding floor area does not enter the lockers. The lockers are fastened together with pop rivets and are secured in place through attachment to anchors fixed into the platform on which they sit or in an adjoining wall. In some installations, the lockers are installed in alcoves in walls, and their doors are, thus, flush with the wall into which they have been placed. Through Mr. Fabricius, the representative also put into evidence a "Locker Installation Instruction Sheet" which further illustrated the installation process.

In cross-examination, Mr. Fabricius indicated that the vast majority of the appellant's lockers are produced to specific customer specifications. In other words, the appellant does not produce and warehouse lockers for future sale. He also indicated that the lockers are fitted together in a predetermined way and that the only thing cut or shaped at the job site is the trim used to fill any gaps which may exist. He acknowledged that lockers are not structural elements in a building in the sense of supporting or holding up anything. Finally, he characterized the installation of lockers as being a combination of assembly and attachment.

The appellant's representative began his argument by stressing that, in deciding the appeals, the Tribunal must consider the lockers at the time of sale. He then submitted that the evidence clearly showed that, when the lockers leave the appellant's plant, they are "bulk materials that go to a construction site."²

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

2. *Transcript of Public Argument*, March 16, 1998, at 2.

The representative then referred the Tribunal to section 21, Part I, Schedule IV to the Act. He submitted that, in order to qualify for an FST reduction under section 21, the lockers need not be structural in the sense that they support the building. In the representative's submission, the lockers are fabricated metal which, while not having a load-bearing function, nevertheless form part of the structure of the building. In support of that submission, the representative referred the Tribunal to the fact that the lockers are built right into the facility in which they are installed, are installed on a more or less permanent basis by being attached to anchors and are held together securely by numerous pop rivets. He characterized the installation of the lockers as construction activity. In the course of his argument, the representative referred the Tribunal to a number of authorities and certain memoranda and guidelines produced by the respondent.

Relying on the testimony of Mr. Fabricius, counsel for the respondent submitted that the installation of the lockers is not construction activity, but merely assembly. While noting that the appellant's representative had referred the Tribunal to numerous authorities, counsel submitted that the decision of the Federal Court of Canada - Trial Division in *Hussman Store Equipment Limited v. Minister of National Revenue*³ was the only authority that the Tribunal need consider. He submitted that the facts in *Hussman*, which was decided after all of the authorities cited by the representative, were virtually indistinguishable from the facts in the present appeals. In counsel's submission, *Hussman* settled definitively that interior metal fixtures, such as shelving or metal lockers, do not qualify for a reduction in FST under section 21, Part I, Schedule IV to the Act.

The statutory provisions of the Act relevant to these appeals 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 (Construction Materials and Equipment for Buildings), at the rate of nine per cent;

(d) in any other case, at the rate of thirteen and one-half per cent.

SCHEDULE IV – PART I – CONSTRUCTION MATERIALS

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

To succeed in these appeals, the appellant had to demonstrate that the lockers are covered by section 21, Part I, Schedule IV to the Act, which refers to “[s]tructural metal and fabricated metal for buildings and other structures.” The appellant's representative submitted that, in order to fall within section 21, the lockers need not be a structural component of a building in the sense that they serve some load-bearing function. The Tribunal agrees. Section 21 refers to structural metal and fabricated metal for buildings and other structures. It must be assumed that the words “fabricated metal” contemplate something other than simply structural metal, otherwise they would be redundant.

3. Unreported, Court File No. T-2382-90, June 26, 1997, aff'g *Hussmann Store Equipment Limited v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-027, June 7, 1990.

These appeals rest on the meaning to be given to the words “fabricated metal for buildings and other structures.” There was no dispute that the lockers are made of fabricated metal. The question is whether they are fabricated metal for buildings or other structures.

In submitting that the lockers are “for buildings,” the appellant’s representative relied on the following points:

- they are attached to anchors in the floor or walls of the buildings in which they are installed, as well as attached to one another with numerous pop rivets. They are, thus, installed on a more or less permanent basis and cannot be removed without damaging the lockers and/or the building;
- the buildings into which they are installed are often laid out in such a way as to facilitate the installation of lockers; and
- given the degree to which they are integrated into the building and the number of fasteners necessary to install and hold the lockers together, the installation of the lockers is a construction activity.

In *Hussman*, the Federal Court of Canada - Trial Division considered an appeal of a Tribunal decision in which the Tribunal held that metal shelves for supermarkets did not qualify for an FST reduction under section 21, Part I, Schedule IV to the Act. In his decision, Rothstein J. described the metal shelves as follows:

The product is metal shelves for supermarkets. The plaintiff fabricates “raw” steel into fabricated steel components which, when assembled, will form the shelves which are commonplace in supermarkets. Components are only manufactured to order. They are shipped in boxes for assembly at site. Some shelving is in the form of islands and other is attached to walls or other equipment such as refrigerators. Anchors and bolts, which attach the shelving to walls and equipment, or in some cases to the floor or support beams, are not supplied by the plaintiff.⁴

After setting out that description, Rothstein J. stated that the case raised the following two issues:

- (1) Are what is being sold, fabricated metal for other structures as opposed to shelves in unassembled form?
- (2) Are shelves “other structures”?⁵

With respect to the first question, Rothstein J. found, on the basis of the decision in *Chateau Manufacturing Limited v. The Deputy Minister of National Revenue for Customs and Excise*,⁶ that the metal shelves were fabricated metal structures, notwithstanding they were shipped to the site in an unassembled form. With respect to the second question, Rothstein J. held that it was not appropriate to invoke the *ejusdem generis* rule of construction in construing the words “other structures” and, on that basis, held that “other structures” in section 21, Part I, Schedule IV to the Act need not be in the nature of “a building.” Rothstein J. then undertook a “contextual analysis” of Part I. He stated, in part, as follows:

Supermarket shelving might be considered to be analogous to interior fixtures. Item 10 [of Part I], providing for kitchen and bathroom cabinets, would seem to be, or at least come close to being, interior fixtures. However, it is significant that item 10 is limited to cabinets for kitchens and bathrooms. Clearly, cabinets in other rooms in a building are not contemplated. The indication is that interior fixtures within buildings are not generally contemplated except where expressly listed.

4. *Ibid.* at 4.

5. *Ibid.*

6. [1984] C.T.C. 43, Federal Court of Appeal, Court File No. A-797-80, December 9, 1983.

Item 20 [of Part I] refers to showers, baths, basins and sinks. These are also in the nature of interior fixtures. However, again, the specific enumeration of such items suggests that those not mentioned are not intended for inclusion under the rubric of “other structures”. In other words, a basin or tub constructed of fabricated steel might be considered an “other structure” in the broadest sense of that term but it is obvious that when Parliament intended that such interior items be entitled to the lower rate of tax, they were specifically listed, suggesting that reliance was not to be placed on the general term “other structures” for that purpose.

If “other structures” in item 21 were to be construed as including supermarket shelves, any fabricated metal shelving in houses and other buildings would also be included. However, this would be inconsistent with the restrictive way in which the Schedule is worded with respect to items in the interior of a building.⁷

In the Tribunal’s view, Rothstein J.’s contextual analysis with respect to whether supermarket shelving falls within section 21, Part I, Schedule IV to the Act is equally applicable to the lockers manufactured by the appellant. On that basis of that analysis, the Tribunal is of the view that the lockers are not fabricated metal for other structures.

The appellant’s representative argued that the decision of the Federal Court of Canada - Trial Division in *Hussman* did not address the question of whether supermarket shelving was fabricated metal “for buildings” and that it was open for the Tribunal to find that the appellant’s lockers were fabricated metal for buildings. The representative stressed the fact that the lockers are permanently affixed to the buildings in which they are installed.

The Tribunal’s decision in *Hussmann* states that the appellant in that case argued that the shelving system qualified for a reduced rate of duty on the basis that the shelving at issue was fabricated metal for other structures. From that starting point, the primary focus of the Tribunal’s decision and, indeed, the decision of the Federal Court of Canada - Trial Division, is on whether the shelving could be considered “other structures.” Counsel for the respondent suggested that the reason that the appellant in *Hussmann* did not press the argument that the shelves were fabricated metal for buildings may have been that that argument was less compelling than the “other structures” argument. That may be correct. However, it is not for the Tribunal to determine in this case why counsel in another case did or did not pursue a particular line of argument.

The Tribunal is of the view that the appellant’s lockers are not fabricated metal for buildings. In the Tribunal view, it is important to recall that Part I, Schedule IV to the Act is entitled “Construction Materials.” In the Tribunal view, in broad terms, there are two types of materials set out in Part I. The first type are things which, in normal parlance, would be considered basic construction materials, used in the construction of a building. These include bricks, building blocks, doors, windows, electrical wire, floor tile, glass, lumber, pipes, plaster, tar and concrete. The second type of materials is more in the nature of equipment or fixtures. Included here are chimneys, fire-fighting and fire-detection equipment, hot water tanks, kitchen and bathroom cabinets and countertops, septic tanks and sump pumps, ventilators and louvres, heat pumps, solar panels, as well as wood-burning stoves and wood-burning space heaters.

The Tribunal is of the view that the lockers in issue are not fabricated metal for buildings of the type contemplated by the first category set out above. Fabricated metal for buildings of this type might include aluminum siding or other fabricated metal incorporated directly into an exterior or interior surface within a

7. *Ibid.* at 10-12.

building. While it is true that the lockers are affixed to the buildings into which they are installed, having regard to the other types of basic construction materials enumerated in Part I, Schedule IV to the Act, the Tribunal simply is not persuaded that lockers are construction materials in the same nature as bricks and mortar.

If anything, the lockers are more in the nature of the second type of materials set out earlier (i.e. equipment or fixtures, including hot water tanks, kitchen and bathroom cabinets and countertops, sump pumps, etc.). However, adopting the contextual approach employed by the Federal Court of Canada - Trial Division in *Hussman*, the Tribunal is of the view that, in light of the fact that Part I specifically lists certain equipment, certain of which would, in the legal sense, be fixtures within a building, Parliament could not have intended lockers made from fabricated metal to fall within section 21 as fabricated metal for buildings. As noted in *Hussman*, “[t]he indication is that interior fixtures within buildings are not generally contemplated except where expressly listed.”⁸ Moreover, though it was not argued by either counsel for the respondent or the appellant’s representative, the Tribunal notes that Part II, Schedule IV to the Act lists “Equipment for Buildings” which qualifies for a reduction in FST. In the Tribunal’s view, had Parliament intended lockers to qualify for an FST reduction, it presumably would have listed lockers in a separate section within Part I or Part II to Schedule IV.

For the foregoing reasons, the appeals are dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Raynald Guay

Raynald Guay
Member

Charles A. Gracey

Charles A. Gracey
Member

8. *Ibid.* at 10-11.