CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, September 29, 1993

Appeal No. AP-91-077

IN THE MATTER OF an appeal heard on December 9, 1992, 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 March 15, 1991, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

MACMILLAN BLOEDEL LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

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

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-91-077

MACMILLAN BLOEDEL LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is a licensed manufacturer and wholesaler involved in all facets of the forestry industry in British Columbia. One of the activities carried on by the appellant is logging. This activity includes the bundling of logs into booms so that the logs can be transported to customers by water. The goods in issue are boom chains which are used to connect the logs that form the boom (i.e. a series of connected floating timbers which are used to form a corral to hold logs) which is then filled with logs. The issues in this appeal are whether the appellant's logging operations can be considered "manufacture or production" for purposes of the Excise Tax Act and, if so, whether boom chains used in those operations are exempt from federal sales tax because they are apparatus sold to a manufacturer or producer for use directly in the manufacture or production of goods and, thus, are goods named in subparagraph 1(a)(i) of Part XIII of Schedule III to the Excise Tax Act.

***HELD**: The appeal is allowed. The Tribunal finds that the evidence shows that the appellant's logging operations can be considered production and that the boom chains, which are apparatus sold to a producer, are used directly in that production process. Further, the Tribunal is of the opinion that there is a sufficiently close nexus or connection between the boom chains and the appellant's logging activities and that there is no intervening medium or agency which interrupts the "directness" of the relationship between the boom chains and the production of logs which the appellant sells by the boom.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*December 9, 1992*
Date of Decision:	*September 29, 1993*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Arthur B. Trudeau, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Douglas C. Morley and P.J. Landry, for the appellant* *Linda J. Wall, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-077

MACMILLAN BLOEDEL LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
ARTHUR B. TRUDEAU, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from a determination of the Minister of National Revenue.

The appellant is a licensed manufacturer and wholesaler involved in all facets of the forestry industry in British Columbia. One of the activities carried on by the appellant is logging. This activity includes the bundling of logs into booms so that the logs can be transported to customers by water. The goods in issue are boom chains which are used to connect the logs that form the boom (i.e. a series of connected floating timbers which are used to form a corral to hold logs) which is then filled with logs. These chains, made of steel, have a ring on one end and a hook on the other. The chain is passed through holes drilled through the ends of two adjoining logs. The hook is then connected to the ring securing the two logs together. The chains vary in length from 1.5 m to 3 m.

On or about December 10, 1987, the appellant applied for a refund of federal sales tax (FST), interest and penalty paid by it in respect of boom chains purchased by the appellant during the period from January 1, 1981, to February 24, 1984. The amount claimed was $108,558.58. By notice of determination dated February 19, 1988, the application was disallowed on the basis that log boom operations are not "manufacture or production," but rather part of logging operations. By notice of objection served May 25, 1988, the appellant objected to the determination on the basis that a boom is analogous to other forms of packaging of manufactured goods and is, thus, entitled to an FST exemption. By notice of decision dated March 15, 1991, the respondent confirmed the determination.

The issues in this appeal are whether the appellant's logging operations can be considered "manufacture or production" for purposes of the Act and, if so, whether boom chains used in those operations are exempt from FST because they are apparatus sold to a manufacturer or producer for use directly in the manufacture or production of goods and, thus, are goods named in subparagraph 1(*a*)(i) of Part XIII of Schedule III to the Act.

The appellant called two witnesses. The first witness was Mr. John C.R. Allan, Senior Log Trader with the appellant. Mr. Allan has been employed by the appellant for over 20 years in various positions, including the supervision of different phases of logging operations and engineering. He indicated that, for the last 10 years, he has been working in log marketing operations, most recently in his present position. Mr. Allan first explained how the appellant's

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

operations were organized into divisions and then proceeded to illustrate how the logging division operated, focusing on those aspects of its operations connected with the completion of a log boom and its transport to end users that purchase the logs in the boom. He described how the harvesting of logs and making of a boom involve cutting down trees, bucking (cutting) such trees into lengths (this can occur both in the forest and in a sorting area at a booming ground), delimbing the trees (again, in the forest or in a sorting area), grading, assembling the boom at the booming ground in a permanent structure of floating logs called a pocket, the placing of logs in the boom and then the placing of booms in a storage area until they are transported to the customer. The witness emphasized that bucking, delimbing and grading represented stages in the process where significant added value occurs with respect to the logs that have been cut.

Mr. Allan indicated that a boom consists of a number of long logs (called boom sticks) with holes drilled at each end. These logs are connected to each other by way of the chains in issue, which allow the boom to retain its form when transporting logs. Mr. Allan continued by stating that, after a boom was formed and "completed," i.e. filled with logs, it was generally moved by tug boat to a storage area, usually close to the booming ground, where it is kept until it is transported to the customer. Mr. Allan confirmed that logs (the product of the logging operations) are customarily sold by the boom. He stated that boom chains are not normally sold to customers, but usually returned after a boom is delivered.

In response to questions from the Tribunal, Mr. Allan stated that the logs are sorted by grades and species with certain end markets in mind. He also agreed that what the appellant does when completing a boom was similar to packaging a finished product in a crate. Mr. Allan added that he knew of no other way to "package" logs.

The appellant's second witness was Mr. Albert Rossander, Manager of Commodity Taxes for the appellant. Mr. Rossander stated that he has been working in the appellant's tax department since the early part of the 1980s. He indicated that the appellant and its competitors have bought boom chains from the same two manufacturers for many years. He also discussed various amendments to the Act during the 1980s and the effect of these amendments on how the appellant treated the goods in issue for tax purposes.

Counsel for the appellant first reminded the Tribunal that the period at issue in this appeal was prior to amendments to the Act in 1985,[2] which introduced the words "primarily and," into paragraph 1(*a*) of Part XIII of Schedule III to the Act. Counsel then set out the three elements in paragraph 1(*a*), as it was then, which, they stated, had to be proven by the appellant. These elements are: (i) that the goods are machinery or apparatus, (ii) that they are sold to a manufacturer or producer and (iii) that the manufacturer or producer uses the goods directly in the manufacture or production of goods.

With respect to the first element, counsel for the appellant referred to various dictionary definitions of the word "apparatus" which indicated that it means equipment, material and machinery or a collection or set of such items, designed for a particular use. They suggested that the boom chain, which consists of three separate parts and is used to connect two boomsticks, would plainly meet these definitions.

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2. *An Act to amend the Excise Tax Act and the Excise Act*, R.S.C. 1985, c. 15 (1st Supp.), assented to February 26, 1985.

Turning to the question of whether the boom chains had been sold to a manufacturer or producer, counsel for the appellant submitted that the evidence of Mr. Rossander established that the goods in issue had been "sold." In regard to the issue of whether the appellant was a manufacturer or producer, counsel submitted that the process of logging represents the manufacture or production of a product, namely, a log. In support of this proposition, counsel stated that the felling and bucking of trees, which are not goods, and the subsequent delimbing in the sorting area, give the trees new forms, properties and qualities, within the concept of manufacturing described by the Supreme Court of Canada in *The Queen v. York Marble, Tile and Terrazzo Limited*.[3] Counsel added that the utilization of natural resources is commonly referred to as the production of a natural resource and comes within the definition of "production" given in *Gruen Watch Company of Canada Ltd. et al. v. The Attorney General of Canada*,[4] which found that a product may be produced even if it is not manufactured, i.e. that production is a broader concept.

Finally, counsel for the appellant turned to the issue of whether the boom chains were used directly in the manufacture or production of goods. Counsel relied on two cases to support their submission that the boom chains were used directly in the manufacture or production of booms of logs. The first case was the decision of the Federal Court of Appeal in *The Deputy Minister of National Revenue for Customs and Excise v. Amoco Canada Petroleum Company Ltd.*[5] Counsel submitted that *Amoco Canada* sets out two requirements for direct use: (i) that the product in issue be essential to the production/manufacturing process and (ii) that, if the product in issue does not itself perform a production/manufacturing activity, there is no "intermediate intervention" in the production process. In discussing the facts of this case in the context of these requirements, counsel relied primarily on their second case, *Coca-Cola Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*.[6] Counsel described *Coca-Cola* as being identical to this case except that, here, one just has "a bigger Coke bottle."

In reference to the first requirement, counsel for the appellant argued that production involves all the activities between the receipt of components, i.e. the timber, and the storage of the finished product, the boom of logs. Counsel stated that production should be seen as an activity that is wider than the specific actions that give an item new forms, properties or qualities, that it is the entire process and that, in this case, the removal of the boom from the booming area is the last stage in the logging operation. Counsel submitted that this view is consistent with *Coca-Cola*, where the moulded containers, in which Coke bottles are placed in the processing line and then used to take the bottles to storage areas prior to transportation to sales outlets, were found to be exempt from sales tax. In support of this point, counsel referred to the following passage from that decision:

> *In an operation of this kind means for removal of the product from the production equipment is as essential as any other part of the machinery or apparatus used in the manufacture or production of the product and is used as directly in the manufacture or production of the product as any of the other parts. The cases and carriers here in question fall easily within the meaning of "apparatus" and are used in the production process at a time when the distribution and warehousing operations have not yet begun.*

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3. [1968] S.C.R. 140.
4. (1950) 4 D.L.R. 156.
5. 85 D.T.C. 5169, unreported, Federal Court of Appeal, Appeal No. A-1845-83, December 13, 1983.
6. [1984] 1 F.C. 447.

> *The fact that the cases and carriers are subsequently used in the warehousing and distribution processes is not relevant to the question under discussion.*[7]

Counsel for the appellant stated that, just as people buy Coke by the bottle, the appellant sells logs by the boom, and the boom chains form part of the boom that is used to remove the logs from the production area, thus providing the identical service as the Coke containers. They also submitted that this interpretation would be in accord with *Amoco Canada*, in which it was concluded that one should not consider that the production process stops at artificial or arbitrary points.

Counsel for the appellant indicated that, even if the removal of logs from the booming area was not considered to be part of production, *Coca-Cola* stands for the proposition that the exemption of sales tax may apply to apparatus which do not themselves perform a production activity if they are used in the production process prior to the time at which the distribution and warehousing function begins. In this regard, they referenced the last sentence in the quote set out above.

Turning to the second requirement set out in *Amoco Canada*, counsel for the appellant submitted that an intermediate intervention would occur if, for example, the boom carried a product essential to the production process. They contended, however, that as the boom is being used to carry the logs themselves, there is no intermediate intervention. Counsel distinguished *Amoco Canada* from the Tribunal's decision in *Esso Resources Canada Limited v. The Minister of National Revenue*[8] by noting that the pipeline in *Esso Resources* was used to carry fuel for the manufacture of steam, which was then used to aid in petroleum extraction, whereas the pipeline in *Amoco Canada* was used to carry raw natural gas to a fractionation plant where that gas was processed into its component parts.

Counsel for the respondent first noted that, in *Esso Resources*, the Tribunal approved of the test as set out in *Amoco Canada* and then interpreted the test in the context of the particular facts of that case. She submitted that the law had clearly changed since *Coca-Cola*, and, thus, the case should be read with some caution. Counsel also indicated that, in *Coca-Cola*, the cases and carriers played varying roles in the production process and were apparently an active part on the assembly line itself. This, she submitted, is readily distinguishable from the passive storage or containment role played by the booms.

With respect to the 1985 amendments to the Act, counsel argued that the inclusion of boom chains in paragraph 1(*h*) of Part XIII of Schedule III to the Act indicates, first, that as the boom chains were not included before the amendments, taxpayers did not have the benefit of the FST exemption before this time and, second, that the amendments are evidence that Parliament did not view logging as a form of manufacture or production of goods, because if it had, there would be no need to create a specific paragraph for logging in section 1.

Even if the Tribunal finds that the appellant does manufacture or produce logs, counsel for the respondent submitted that the evidence shows that the boom chains are not used in that process. In support of this position, counsel suggested that Mr. Allan's testimony be interpreted as showing that the production is finished in the dryland sorting area before the logs enter the water and that a marketable commodity has been produced before that time. Further, counsel stated that the role of the booms should be seen as one of transporting the logs to another site after the production process has been completed. In regard to the issue of packaging, counsel

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7. *Ibid.* at 457.
8. Appeal No. 2984, December 4, 1989.

submitted that, if any packaging had occurred, it involved the packaging of logs at a point after production had been completed.

In reply, counsel for the appellant suggested that any amendments to the Act occurred after the time period at issue and, thus, are of no concern to the Tribunal. They also stated that *Coca-Cola* was still good law with respect to the period before the amendments in question, as it had not been undermined in any subsequent decisions of the Federal Court of Appeal. With regard to the issue of what exactly the appellant sells, counsel stated that what the appellant's customers want are logs which are delivered by container, i.e. a boom. With respect to counsel for the respondent's submissions as to the implications of paragraph 1(*h*) of Part XIII of Schedule III to the Act, counsel for the appellant suggested that, if logging had not been included in manufacture and production, there would have been previous jurisprudence on the point and that, if one looks at the example of mining as production, which they stated should not be disputable, then the fact that certain equipment used in mining is specifically set out in paragraph 1(*e*) of Part XIII of Schedule III to the Act does not mean that an exemption for mining is limited to the goods set out in that paragraph. Counsel suggested that the real intent behind the drafting of paragraph 1(*h*) is that Parliament wanted to maintain the exemption for boom chains after the inclusion of the words "primarily and" in paragraph 1(*a*), which would have taken boom chains out of that paragraph. Finally, with respect to the argument that the production of logs ends at the edge of the water, counsel submitted, based on *Coca-Cola*, that it does not end at that point, but rather when the sorting of the logs by the boom is completed.

The Tribunal finds that the boom chains qualify for FST exemption as apparatus sold to a producer (the appellant) for use by that producer directly in the manufacture or production of goods within the meaning of subparagraph 1(*a*)(i) of Part XIII of Schedule III to the Act.

In coming to this conclusion, the Tribunal had to answer two questions: first, whether the appellant's logging operations can be characterized as "manufacture or production" for purposes of the Act; and second, if so, whether boom chains are apparatus that are used directly in that "manufacture or production."

With respect to the first question, the Tribunal finds that these operations clearly come within the broad meaning of the term "production" set out in *Gruen Watch*. By cutting, bucking and delimbing trees and grading the resulting logs, and then placing them in a boom for subsequent transport to customers, the appellant is certainly engaging in a process that can be said, at a minimum, to give new forms to goods which then enter into commerce.

The Tribunal finds that the goods in issue which the appellant purchases fall within the plain meaning of the definitions of the word "apparatus" offered by the appellant. The Tribunal thus turns to the issue of whether boom chains are used "directly" in the appellant's logging operations. In giving meaning to the word "directly" in the context of the facts of this case, the Tribunal relies on *Amoco Canada* and *Coca-Cola*. The Tribunal notes that, in its recent decision in *BHP-Utah Mines Ltd. v. The Minister of National Revenue*,[9] it cited *Amoco Canada* for the proposition that the word "directly" should not be interpreted restrictively and that it must be given meaning in light of the facts of each particular case.

The Federal Court of Appeal in *Amoco Canada* found the word "directly" to mean "without any intervening medium" or agency. In this case, the Tribunal is persuaded that boom chains play a direct role in the production of logs sold by the boom. The Tribunal is also persuaded,

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9. Appeal No. AP-91-047, March 19, 1993.

based on the Federal Court of Appeal's understanding of "production" in *Coca-Cola*, that, in this case, production does not end when the sorting of logs is completed, but rather when the logs, having been "packaged" in the boom, are taken to the storage area. Furthermore, the Tribunal finds that boom chains are essential to the construction of a boom since they are in effect the "glue" that keeps it together. Therefore, boom chains meet the test set out in *Amoco Canada*.

The Tribunal is also of the opinion that the role that the goods in issue play in the appellant's production of logs sold by the boom satisfies the test used by the Tribunal in *Esso Resources*. In that case, the Tribunal found that the test enunciated in *Amoco Canada* was not helpful in addressing the fact situation in that case (which concerned pipelines transporting natural gas used in producing steam, which, in turn, was used to facilitate the recovery of heavy oil). The Tribunal proceeded to state that, in the circumstances of that case, the word "directly" meant that there had to be a "close nexus or connection" between the goods for which the FST exemption was sought and the production process. The Tribunal found, in that case, that the pipelines and associated equipment in issue did not transport a raw material from which bitumen (heavy oil) was produced or which brought the bitumen closer to its finished state and that, therefore, the pipeline did not have a close enough nexus or connection with the production process to qualify for the exemption. In the instant case, the evidence showed that boom chains were used in making the boom which moves the logs from the production area to the storage area and, as Mr. Allan testified, there appears to be no other way to package the logs to achieve this purpose and to eventually transport the logs to the customer. Therefore, the Tribunal is of the view that there is a close nexus or connection between boom chains and the production of logs sold by the boom.

With respect to the amendments to the Act in 1985, by which the words "primarily and" were added to paragraph 1(*a*) of Part XIII of Schedule III,[10] the Tribunal notes that this addition was deemed to have come into force on February 16, 1984.[11] The period of time for which the appellant is claiming a refund ends February 24, 1984. Therefore, the appellant is not entitled to a refund for any tax paid between February 16, and February 24, 1984. Whether tax was paid during this period will need to be determined by the Minister.

Accordingly, the appeal is allowed, and the matter is referred back to the Minister so that the amount of the refund to which the appellant is entitled may be calculated in accordance with the above.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

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

10. *Supra*, note 2, ss 45(1) and 57.
11. *Ibid.*, s. 57.