



Ottawa, Friday, March 19, 1993

Appeal No. AP-91-047

IN THE MATTER OF an appeal heard on November 4, 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 27, 1991, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BHP-UTAH MINES LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

John C. Coleman
John C. Coleman
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michèle Blouin
Michèle Blouin
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-047

BHP-UTAH MINES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act from a determination of the Minister of National Revenue. The issue is whether concrete and bentonite used to form a cement barrier around a mine site qualify for exemption from the payment of federal sales tax under paragraph 2(a) of Part XIII of Schedule III to the Excise Tax Act as materials consumed or expended by a manufacturer or producer directly in the process of manufacture and production of goods.

HELD: *The appeal is allowed. The production process for the extraction of copper ore is not limited to the removal of the copper ore and may require other steps, namely, the construction of the concrete and bentonite barrier. The Tribunal finds that there is a close nexus or connection between the concrete and bentonite comprising the barrier and the extraction of copper ore from the mine since such barrier: (1) surrounds the ground containing the copper ore; (2) is a necessary preparatory measure for the actual removal of the copper ore; (3) is necessary until the completion of the extraction; and (4) prevents the seepage of water. For the foregoing reasons, the Tribunal concludes that the concrete and bentonite comprising the barrier were used directly in the production of the copper ore and therefore qualify for the exemption.*

Place of Hearing: Vancouver, British Columbia

Date of Hearing: November 4, 1992

Date of Decision: March 19, 1993

Tribunal Members: John C. Coleman, Presiding Member

Sidney A. Fraleigh, Member

Michèle Blouin, Member

Counsel for the Tribunal: Brenda C. Swick-Martin

Shelley Rowe

Clerk of the Tribunal: Nicole Pelletier

Appearances: Douglas C. Morley, for the appellant

Wayne D. Garnons-Williams, for the respondent

Appeal No. AP-91-047

BHP-UTAH MINES LTD.

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and

THE MINISTER OF NATIONAL REVENUE

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TRIBUNAL: JOHN C. COLEMAN, Presiding Membe
SIDNEY A. FRALEIGH, Member
MICHÈLE BLOUIN, 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 issue is whether concrete and bentonite used to form a cement barrier around a mine site qualify for exemption from the payment of federal sales tax (FST) under paragraph 2(a) of Part XIII of Schedule III to the Act as "[m]aterials ... consumed or expended by manufacturers or producers directly in ... the process of manufacture or production of goods."

The appellant carries on business as the Island Copper Mine and operates an open pit copper mine on Vancouver Island adjacent to Rupert Inlet. In 1989, the appellant decided to extract copper ore from the mine at locations below sea level and, to prepare for such extraction, had to construct a barrier to prevent the seepage of sea water from the Rupert Inlet into the mine site. From June to October 1989, ICOS Corporation of America/Nicholson Joint Venture (ICOS), on behalf of the appellant, dug a channel between the mine site and Rupert Inlet and then filled the channel with concrete and bentonite which, when combined, formed a cement barrier. ICOS had purchased the concrete and bentonite on an FST-paid basis.

On January 24, 1990, ICOS applied for a refund of FST paid in respect of the concrete and bentonite. By notice of decision dated March 27, 1991, the respondent rejected the application for a refund by the appellant that subsequently appealed to this Tribunal.

During the hearing, counsel for the appellant argued that the concrete and bentonite qualified for the named exemption. He contended that the bentonite and concrete were "materials" and that they were "consumed or expended" in the course of production in that, when poured into the channel, they formed a permanent cement barrier and could not be reused, that a person operating a mine was a "producer" and that the extraction of copper ore from a mine represented the "production of goods."²

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

2. *Arthur A. Voice Construction Co. Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-133, October 24, 1990.

Counsel cited the decision in *Pacific Petroleum Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*³ where the Tariff Board held that oil well cement used to shore up a well was a material consumed and expended directly in the production of goods. The Tariff Board held that: (1) a producing well constituted the production of goods within the meaning of the exemption; (2) the oil well cement was in direct contact with the oil; (3) the oil well cement once poured and cured was dedicated to the production of oil from that particular well and could not subsequently be used; and (4) therefore, the oil well cement qualified as a material consumed or expended directly in the production of goods within the meaning of the exemption.

Counsel for the appellant further argued that the concrete and bentonite were used directly in the production process of extracting copper ore from the mine. He relied on *The Deputy Minister of National Revenue for Customs and Excise v. Amoco Canada Petroleum Company Ltd.*,⁴ in which the Federal Court of Appeal found that a pipeline supplying raw material to a manufacturing facility 30 km away was being used "directly" in the manufacturing process on the grounds that the pipeline was necessary and essential to the manufacturing process and there was no "intermediate intervention," that is, production process carried out between the two plants connected by the pipeline.

Counsel for the appellant relied on the *Amoco* decision to support his submission that the concrete and bentonite barrier need not be physically adjacent to the ore face to be "essential" and, thus, directly related to the mine's production process. He contended that there was no "intermediate intervention" between the barrier and the actual mining process such as would have occurred if the barrier had been used, for example, to protect pumping equipment used to keep the mine dry. Counsel further argued that the *Amoco* decision was consistent with *Esso Resources Canada Limited v. The Minister of National Revenue*,⁵ where the Tribunal found that there was no close connection or link between the oil pipeline equipment and the production of crude oil from bitumen because the equipment carried natural gas which was used to generate steam to melt the bitumen. The additional step of generating steam was the "intermediate intervention" which prevented the pipeline equipment from being directly related to the production of crude oil from bitumen.

As further support for his position, counsel for the appellant also cited the Tribunal's decision in *Hydro-Québec v. The Minister of National Revenue*⁶ in which various circuit breakers and capacitors used in the transmission of electricity were held to fall within the exemption under paragraphs 1(a), (l), (o) and 2(a) of Part XIII of Schedule III to the Act because they served, just as does the barrier in this appeal, "to ensure that the production process [was] not interrupted."⁷

Counsel for the respondent submitted that the concrete and bentonite used to construct the barrier were not materials consumed or expended directly in the process of manufacture or production of goods, regardless of the fact that the materials could not be reused. He agreed that the extraction of copper ore from a mine constitutes the production of goods, but disagreed that concrete and bentonite are materials consumed or expended directly in the production of goods, i.e. copper ore. He observed that the word "directly" has been interpreted in relevant case

3. Tariff Board, Appeal No. 1342, November 14, 1978.

4. (1985), 86 D.T.C. 6008 (F.C.A.).

5. Canadian International Trade Tribunal, Appeal No. 2984, December 4, 1989.

6. Canadian International Trade Tribunal, Appeal No. 2374, December 20, 1991.

7. *Ibid.* at 24.

law to mean "without any intervening medium" and "a close nexus or connection." The word "directly," therefore, requires that there be a close connection or link between the concrete and bentonite barrier and the extraction of copper ore, which is not present in this case.

Counsel for the respondent distinguished the *Pacific* decision on the basis of fact and on the basis that the oil well cement in that case was used directly in the well at the point of production. In counsel's view, the *Esso* and *Amoco* decisions indicate that the word "directly" means a close nexus or physical connection, which is not the same as "integral and essential." Counsel submitted that the concrete and bentonite barrier was part of the mine's infrastructure as opposed to being used directly in, or having a close nexus to, the extraction of copper ore from the mine. If the mine had been above sea level, the extraction of copper ore would have been carried out without any need of the barrier.

The Tribunal finds that the concrete and bentonite qualify for exemption from FST as materials consumed or expended by producers directly in the process of production of goods within the meaning of paragraph 2(a) of Part XIII of Schedule III to the Act.

Consistent with the principles enunciated in the *Pacific* decision, the Tribunal is satisfied that the concrete and bentonite are materials and that they were consumed or expended when they were poured into the channel forming a cement barrier which then hardened and could not be reused. The remaining issue is whether the concrete and bentonite were used directly in the extraction of the copper ore.

In reaching its conclusion, the Tribunal relies on the *Amoco* decision, where the Federal Court of Appeal held that the word "directly" should not be interpreted restrictively and that "[t]here [was] no rational reason for the imposition of any arbitrary point of commencement [of the production process] ... in the absence of a specific statutory direction." Further, the Tribunal shares the view of the Federal Court of Appeal that the word "directly" must be given meaning in light of the facts of each particular case.

In the Tribunal's view, the extraction of copper ore from a mine is a production process which involves many steps and is not limited solely to the act of removing the copper ore from the mine site. The parties agreed that the construction of the barrier was necessary for the extraction of the copper ore since it prevented the seepage of sea water from Rupert Inlet into the mine.

In *Esso*, the Tribunal found that the term "directly" meant that there had to be a "close nexus or connection" between the goods for which the exemption is sought and the production process. In that appeal, the Tribunal decided that pipelines and associated equipment were not entitled to the exemption under subparagraph 1(a)(i) of Part XIII of Schedule III to the Act, which refers to machinery and apparatus used primarily and directly in production. The Tribunal found that the pipeline did not transport raw material from which bitumen was produced or which would bring the bitumen closer to its finished state and, since neither the pipeline nor the raw material came into contact with the goods under production, the pipeline was an infrastructure.

Applying the "concept of close nexus or connection" enunciated in *Esso* to this case, the Tribunal finds that there is a close nexus or connection between the bentonite and concrete comprising the barrier and the removal of the copper ore from the mine. First, the barrier comprised of concrete and bentonite surrounds the ground containing the copper ore. Second, the concrete and bentonite barrier is a necessary preparatory measure for the actual

removal of copper ore, without which the actual mining cannot occur. Third, the concrete and bentonite barrier continued to be necessary until the completion of the extraction to continually prevent the seepage of water.

Having found that there is a close connection between the concrete and bentonite barrier and the removal of copper ore, the Tribunal concludes that the concrete and bentonite comprising the barrier are used directly by the appellant in the production of copper ore and, therefore, qualify for the exemption. The appeal is allowed.

John C. Coleman

John C. Coleman
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Michèle Blouin

Michèle Blouin
Member