



Ottawa, Monday, July 20, 1992

Appeal No. AP-91-161

IN THE MATTER OF an appeal heard on March 26, 1992,
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 August 15, 1991, relating to a
notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

BULK-STORE STRUCTURES INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that the prefabricated modular wooden panels are not "directly" used in the manufacture or production of goods as required by subparagraph 1(a)(i), Part XIII, Schedule III to the *Excise Tax Act*.

Desmond Hallissey

Desmond Hallissey
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Charles A. Gracey

Charles A. Gracey
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-161

BULK-STORE STRUCTURES INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The goods in issue are prefabricated modular wooden panels. The goods were used in the on-site assembly of four dome-shaped structures with a finished diameter of 124 ft. The panels were bolted together, atop a poured concrete floor and wall foundation, the walls being 12 ft. in height. Fans and pipes were installed within that cement wall to accommodate the aeration and conditioning of the grain.

The issue in this appeal is whether the panels purchased by the appellant qualify for the reduced rate of sales tax pursuant to subsection 51(1) of the Excise Tax Act and within the meaning of subparagraph 1(a)(i), Part XIII, Schedule III to the Excise Tax Act.

HELD: *The appeal is dismissed. The Tribunal finds that the goods in issue are not "directly" used in the manufacture or production of goods as required by subparagraph 1(a)(i), Part XIII, Schedule III to the Excise Tax Act.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: March 26, 1992

Date of Decision: July 20, 1992

Tribunal Members: Desmond Hallissey, Presiding Member

Arthur B. Trudeau, Member

Charles A. Gracey, Member

Legal Services: France Deshaies

Clerk of the Tribunal: Dyna Côté

Appearances: C.J. Sorby, for the appellant

F.B. Woyiwada, for the respondent

Appeal No. AP-91-161

BULK-STORE STRUCTURES INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

The goods in issue are prefabricated modular wooden panels. The goods were used in the on-site assembly of four dome-shaped structures (the domes) with a finished diameter of 124 ft. The panels were bolted together, atop a poured concrete floor and wall foundation, the walls being 12 ft. in height. Fans and pipes were installed within that cement wall to accommodate the aeration and conditioning of the grain.

The issue in this appeal is whether the panels purchased by the appellant qualify for the reduced rate of sales tax pursuant to subsection 51(1) of the *Excise Tax Act*¹ (the Act) and within the meaning of subparagraph 1(a)(i), Part XIII, Schedule III to the Act.

Mr. James Knight, President of the appellant company, appeared as a witness. He testified as to the company's activities and product. The appellant is the manufacturer and distributor of the domes in question. It holds a Canadian patent for this type of structure. Its product is manufactured in various sizes. The product consists of a multi-sided unit where each side is made of a series of panels that run from the base to the peak. Mr. Knight compared its structures to an igloo, starting at the bottom with a series of panels to form one ring, adding one on top of another until, eventually, the structure is closed at its peak. Each individual panel is made of plywood or lumber. The size and shape of each individual panel is governed by the transportation constraints and the material used. Each panel is completely fabricated within the factory and is shipped to the site as a knock-down kit. Each panel needs to be lifted into position and bolted to its neighbouring panels to form the final dome cover. Larger domes need more panels than the smaller ones. The four domes in question may each store up to 225,000 bushels of grain.

Mr. Knight testified that competing products vary depending on the industry with which they are dealing. In the grain storage business, the main competitors are steel grain bins and concrete silos. In the road salt field, the appellant competes against pole barns and fabric structures. In response to questions from counsel for the respondent, Mr. Knight stated that the appellant was also selling its product to other markets in need of storage for various products such as table salt, pre-refined sugar, wood chips, sphagnum peat moss, fish meal, soya bean meal, agricultural products, any high-value sand, etc. Basically, he stated, the buildings can be used for practically the entire spectrum of commodities that might be stored in bulk or large quantities.

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

Counsel for the appellant called a second witness, Mr. Earl Wagner, General Manager of a farmer-owned co-operative. The co-operative is owned by approximately 3,500 farmers and engaged in the retail trade business in five areas: hardware and lumber, feed mills, petroleum and propane, fertilizer, and grain and white bean elevator. The co-operative is the end user of the four domes in issue in this appeal.

Mr. Wagner explained the dual purpose of the four domes. First, the domes are used for drying the beans and grain. The grain and beans come from the farmers' fields on trucks. They are unloaded into a hopper and moved up an elevator leg into a high-volume dryer using auxiliary heat. The grain is cleaned and dried before being either shipped directly to the buyer or transported to the domes. In the domes, the grain is further conditioned and dried by forcing outside air through the perforated duct system connected to fans installed in the foundations of the domes and finally aerated. It was entered into evidence that aeration is necessary to "condition" grain or beans following drying with auxiliary heat. Further, as much as 1 to 2 percent of the grain's moisture may be removed in this secondary drying process. Following aeration, the grain and beans are stored until sold and shipped.

Mr. Wagner also explained that the domes are also used in the fertilizing process. Three main commodities are needed in the fertilizer process: nitrogen, phosphate and potash. They arrive either by train or truck. Those three elements are unloaded on conveyors that feed into the top of three domes where they are stored separately until they are mixed. Aeration is not required during storage. The three components are later removed from the domes, blended together to the required proportions and shipped out in bulk.

Mr. Wagner stated that the dual purpose of the domes and the fact that the panels were capable of being disassembled were major factors in the co-operative's decision to purchase these domes instead of concrete silos. There was also some concern that the railway line servicing the area might be discontinued and, thus, it was deemed important to purchase structures that could be disassembled.

The appellant argued that the panels in issue should qualify for the exemption provided under subparagraph 1(a)(i), Part XIII, Schedule III to the Act. The relevant statutory provisions are as follows:

51. (1) The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III ...

SCHEDULE III

PART XIII

*PRODUCTION EQUIPMENT, PROCESSING
MATERIALS AND PLANS*

1. All the following:

(a) machinery and apparatus sold to or imported by manufacturers or producers for use by them primarily and directly in

(i) the manufacture or production of goods, ...

The first contention of counsel for the appellant was that the panels are used in the production or manufacturing process within the meaning of subparagraph 1(a)(i). He submitted that the panels were purchased with the intention of storing raw materials for use in the manufacture of solid and liquid fertilizer, and for the storage and processing of grain. His position was that the storage of fertilizer components and the storage, drying and aeration of grain were each part of a manufacturing process and that the structures, being used for those purposes, should therefore fall within the scope of that exemption.

On that point, counsel relied on various rulings² issued by the Department of National Revenue where it was willing to include within the meaning of paragraph 1(a), Part XIII, Schedule III, tanks and bins. He submitted that the panels, being similar to tanks and bins, should also qualify for the exemption.

Counsel's second contention was that the panels are apparatus within the meaning of paragraph 1(a), Part XIII, Schedule III to the Act. He argued that the key criterion in determining whether an item is an apparatus as compared to real property is the degree of fabrication prior to installation. Again, counsel relied on administrative rulings³ issued by the Department of National Revenue that exempted fertilizer bins, feed storage bins and tanks as being farm equipment for purposes of the Act. He submitted that the panels, being similar to the goods covered by these rulings, should also qualify for the exemption. The panels are similar in that they are both prefabricated and then shipped on site to be bolted into place using pre-drilled holes. They are both used for the storage of grain. The panels could not be considered real property because, as the patent indicates, they are designed to be demountable, a characteristic not enjoyed by real property.

The respondent classified the panels as structural building sections within the meaning of section 32, Part I, Schedule IV to the Act. The relevant statutory provisions 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;

...

2. See, for example, Ruling Cards 9100/119-2 and 9110/119-2.

3. See, for example, Ruling Cards 9110/119-2 and 8559/1.

SCHEDULE IV

(Section 50)

PART I

CONSTRUCTION MATERIALS

...

32. Structural building sections, for incorporation into buildings or other structures manufactured or produced by a person otherwise than at the site of construction or erection of the building or other structure in competition with persons who construct or erect buildings or other structures that incorporate similar sections not so manufactured or produced.

Counsel for the respondent argued that the onus was on the appellant to clearly establish that the panels fall within the exemption claimed. For the goods to be exempt from sales tax under subparagraph 1(a)(i), Part XIII, Schedule III to the Act, he argued that the appellant must clearly establish that, as of the date of sale, the goods in issue meet all of the following requirements:

- they are machinery or apparatus, or parts thereof;
- they are purchased by a manufacturer or producer; and
- they are for use primarily and directly in the manufacture or production of goods.

Counsel submitted that these requirements are not met. He first argued that the panels are not machinery or apparatus. Extending the definition of machinery or apparatus to include panels would stretch the common popular sense of the words far beyond any accepted dictionary definition. He further argued that the evidence showed that these structures are used for all kinds of different purposes, all of which are related to storage. With respect to the manufacturing of fertilizer, the panels protect the raw material from the elements. With respect to grain processing, in cases where the grain is not sold immediately or within a short period of time, the domes are simply used for storage purposes. Counsel agreed that under such circumstances the grain needs to be aerated. However, he submitted that the aeration was done by the fans and pipes installed in the concrete bases, rather than through the panels themselves. In the alternative, he submitted that even if the panels were found to be part of a process, it does not necessarily imply that they are machinery and apparatus used "directly" in the production or manufacture of goods. Counsel noted that, in the case at issue, the goods showed very little customization. The same domes could very easily be used for other storage purposes, such as road salt.

In order for the goods in issue to qualify for an exemption of sales tax, the goods must be apparatus or machinery for use primarily and directly in the manufacture or production of goods.

After careful consideration of the evidence and arguments of the parties, the Tribunal

finds that the goods in issue are not "directly" used in the manufacture or production of goods as required by subparagraph 1(a)(i), Part XIII, Schedule III to the Act. The Act does not define the word "directly" nor does the record disclose that any evidence was adduced as to a special meaning attributed to it. In *Esso Resources Canada Limited v. The Minister of National Revenue*,⁴ it was found that the word "directly," as drafted in paragraph 1(a), Part XIII, Schedule III to the Act, implies a close nexus or connection.

... [C]onstruing the word "directly" to mean "immediate or without delay" is not consonant with Parliament's intention in drafting the exemption clause ... the Tribunal considers that the dictionary definitions, taken as a whole, indicate that the word "directly" implies a close nexus or connection.

The concept of close nexus or connection is consistent with the statutory language of the exemption clause. In order to fall within the exemption clause, machinery or apparatus must be primarily and directly used in the production of goods. In other words, the machinery or apparatus must be primarily and directly used in the process that will result in a finished product.

Thus, Parliament, in defining the scope of the exemption clause, drafted the provision in a restrictive manner. Not only must the machinery or apparatus be used in the production process, their involvement in the process must be primary and direct. Indeed, Parliament's use of the word "directly" in the exemption clause implies that it does not consider every element of the production process to be directly used in the production of goods.

Because the word "directly" implies a close nexus or connection, and because Parliament has drafted the exemption clause in a restrictive manner, the Tribunal consider that in order for machinery or apparatus to fall within the exemption clause, there must be a close connection or link between the machinery or apparatus used in the production of goods and the process from which the goods are produced.

In the case at issue, the Tribunal finds that the panels do not have a direct role in transforming the raw material into a finished product. The panels are not really involved in the process that will bring the material one step closer to its finished state. Neither do the panels come into contact with the goods under production. While none of these factors, by themselves, would be conclusive, taken together, they convince the Tribunal that although the panels are used in the production of fertilizer or grain drying, their nexus or connection to the production process is more accurately and precisely defined as providing a structural protection, a roof and walls to protect the fertilizers or grain from the elements. Further evidence also showed that the goods in issue could be used for other uses and the storage of many different articles, materials or, indeed, vehicles. The fact that tractors or trucks can be driven into the structure and, indeed, stored there also distinguishes them from tanks or bins. Consequently, the Tribunal cannot find that the goods are machinery or apparatus for use primarily and directly in the manufacture or production of goods as required under subparagraph 1(a)(i), Part XIII, Schedule III to the Act.

4. Canadian International Trade Tribunal, Appeal No. 2984, December 4, 1989, at p. 9.

For the above reasons, the appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
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Member