

Ottawa, Tuesday, March 2, 1993

Appeal No. AP-92-059

IN THE MATTER OF an appeal heard on October 20, 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 June 12, 1992, with respect to a
notice of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

MUSTANG ENGINEERING AND CONSTRUCTION LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Desmond Hallissey

Desmond Hallissey
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Michel P. Granger

Michel P. Granger
Secretary

Appeal No. AP-92-059

MUSTANG ENGINEERING AND CONSTRUCTION LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
 ARTHUR B. TRUDEAU, Member
 SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of four determinations of the Minister of National Revenue (the Minister). The substance of this appeal involves parts used to repair construction equipment involved in the Slocan Highway and the Oldman River Dam construction projects. The appellant made four applications for refund of federal sales tax paid on parts of various equipment, claiming that they qualify for exemption from that tax under paragraph 1(l) of Part XIII of Schedule III to the Act. The Minister rejected the applications in part.

The equipment on which the parts were used includes rock trucks, graders, loaders, dozers and backhoes. The parts required to repair the equipment cover a wide range of repair and replacement parts including, but not limited to, valves, sleeves, gaskets, cylinders, a solenoid, compressor, injector, engine and transmission. The appellant's witness was Mr. Hal Beauclair who is presently the Executive Vice-President of Matthews Contracting Inc. (MCI) which, he explained, is "the umbrella" for the appellant and other companies. Mr. Beauclair testified that it was MCI that owned the construction equipment. However, the appellant purchased the parts for the equipment and, thus, applied for the refund of taxes paid on them.

The relevant provisions of the Act read 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

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

(i) the manufacture or production of goods,

...

(e) self-propelled trucks mounted on rubber-tired wheels for off-highway use exclusively at mines and quarries,

...

(j) machinery and apparatus, including wire rope, drilling bits and seismic shot-hole casing, for use in exploration for or discovery or development of petroleum, natural gas or minerals,

...

(l) parts for goods described in paragraphs (a) to (k),

...

but not including:

...

(q) motor vehicles except those described in paragraphs (e) and (h).

The issue in this appeal, therefore, is whether the construction equipment falls under either paragraph 1(a), (e) or (j) of Part XIII of Schedule III to the Act, such that the parts for this equipment qualify for tax-exempt status under paragraph 1(l) of Part XIII of Schedule III to the Act and subsection 51(1) of that Act.

At the construction sites, the appellant used Terex Model 3309 Dump Trucks and Caterpillar Model 769 Off-Highway Trucks, both referred to as rock trucks. The trucks are designed for off-highway use and cannot be licensed for public highways. At the Oldman River Dam project, the trucks were used to move various sizes and classes of rock, sand and granular fill. Excavation occurred at various pits located up to 7 km from the dam site and from the spillway, approach channel and chute portions of the dam where solid rock was drilled, ripped or blasted, and hauled to the dam. The Slocan Highway project involved the reconstruction of 5.9 km of highway through mountainous terrain. The contract involved clearing and grubbing, drilling and blasting, excavation, grade preparation and paving. The rock trucks were used to carry the excavated rock to its site of use along the highway. The trucks are self-propelled trucks mounted on rubber tires. The appellant claimed that they fall under paragraph 1(e) of Part XIII of Schedule III to the Act, the issue being whether they were used "exclusively at mines and quarries."

It was the appellant's contention that both the Slocan Highway and Oldman River Dam construction sites, inclusive of their haul roads, qualify as "quarries." The excavation took place at various locations throughout the job site, the trucks being used to move the goods produced from point of production to point of use.²

In contrast, counsel for the respondent argued that there is no evidence that the rock trucks are used exclusively at mines and quarries. She asserted that because they are used to transport materials from a borrow pit or excavation site to a place of use, the Tribunal must find that the entire construction site, be it the dam or highway project, was a mine or quarry. She contended that the evidence did not support this proposition.

2. In support of this contention, the appellant's representative referred to two decisions: *Arthur A. Voice Construction Co. Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-123, October 24, 1990; and *G.H. Poulin Contractor Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* (1985), 9 C.E.R. 165, 10 T.B.R. 170.

With regard to graders, Mr. Beauclair testified that they were used in the initial shaping of a temporary road on the construction site and in its ongoing maintenance. Without them, he noted, the time to haul materials would probably double and the equipment maintenance costs would probably quadruple. The appellant's representative noted that such equipment would fall under paragraph 1(a) or (j) of Part XIII of Schedule III to the Act. With regard to paragraph 1(a), he contended that production of the earth fill or blast rock requires that the haul roads be well maintained, enabling the rock trucks and motor scrapers to carry materials from the excavation site to place of use. With regard to paragraph 1(j), it was argued that clay, sand, gravel or blast rock are minerals and that the development of these minerals requires the opening of access roads to the mine or quarry from which they are obtained.

With regard to paragraph 1(a) of Part XIII of Schedule III to the Act, counsel for the respondent submitted that the graders are not machinery for use by the appellant primarily and directly in the manufacture or production of goods. The equipment was used in the construction of the road and dam. She submitted that the earth fill and rock are not "goods" that were "manufactured or produced," within the meaning of the Act. Rather, in performing its construction activities, the appellant was merely excavating the land and reincorporating the excavated rock and fill into the roadways or dam, thereby changing the nature of the reality. Nor was the construction equipment used "primarily and directly" in the manufacture or production of goods. Moreover, under the terms of paragraph 1(a), the machinery and apparatus must be sold to the one that uses them to manufacture or produce goods. Counsel reminded the Tribunal that MCI owned the construction equipment, not the appellant. Therefore, they were not sold to the one that used them.

With regard to paragraph 1(j) of Part XIII of Schedule III to the Act, counsel submitted that, although the construction and maintenance of haul roads may be necessary to transport personnel and equipment to a quarry or mine site, this activity is not part of the discovery, development or exploration of minerals.

The third group of construction equipment consisted of loaders, dozers and backhoes used on the Slocan Highway project. The appellant's witness explained that, as part of the project, many of the ledges cut into the side of the mountain over which the highway passed had to be widened. This involved taking rock cuts into the mountain by drilling and blasting. The resulting shot rock was placed into the new road alignment. He testified that the equipment typically used to clear and load the shot rock after blasting were backhoes, dozers and loaders. Rock trucks were used exclusively to move the rock to the fill areas.

The appellant's representative argued that loaders, dozers and backhoes fall under either paragraph 1(a) or (j) of Part XIII of Schedule III to the Act. He argued that the *Poulin* decision established that the making of shot rock is a production process and that the location where it takes place can be considered a quarry. He noted that subsection 51(1) of the Act refers to "the goods mentioned in Schedule III," the implication being that everything mentioned in Schedule III comes within the meaning of "goods" as that word is used in the Act. In this regard, he referred to Part X of Schedule III to the Act, entitled "Mines and Quarries," which lists such things as crushed stone and gravel, sand, rubble and field stone, the implication being that shot rock can be considered "goods" for purposes of the Act. It was argued that the production of shot rock requires loaders, dozers and backhoes, as the loose rock must be removed before new shot rock can be created.

With regard to paragraph 1(j) of Part XIII of Schedule III to the Act, it was argued that dozers and backhoes were used to remove materials in order to access a certain type of rock. This machinery and loaders were also used to remove overburden, thus exposing quarries and gravel pits. Such machinery was therefore involved in the development of minerals.

For purposes of this class of construction equipment, counsel for the appellant adopted the arguments presented against classifying graders under either paragraph 1(a) or (j) of Part XIII of Schedule III to the Act.

To reiterate the issue, the Tribunal must find that the construction equipment in issue falls within the terms of paragraph 1(a), (e) or (j) of Part XIII of Schedule III to the Act for the repair parts to that equipment to qualify for the exemption of tax pursuant to paragraph 1(l) of Part XIII of Schedule III to the Act and subsection 51(1) of that Act. After considering the evidence and arguments of the parties, the Tribunal dismisses the appeal.

With regard to paragraph 1(a) of Part XIII of Schedule III to the Act, in order to benefit from the exemption, the following conditions must be satisfied:

- (a) machinery or apparatus must be sold to, or imported by, a manufacturer or producer; and
- (b) that manufacturer or producer must use the machinery or apparatus primarily and directly in the manufacture or production of goods.

It was the evidence of the appellant's witness, Mr. Beauclair, that MCI was the owner of the construction equipment. It was the appellant that did the construction work and purchased the repair parts for the equipment. On the Tribunal's reading of paragraph 1(a) of Part XIII of Schedule III to the Act, the one that purchases or imports the machinery or apparatus must be the one that does the work that results in the manufacture or production of goods. As this is not the case, the appellant does not meet the conditions of paragraph 1(a).

Nor does the Tribunal view the activities of the appellant as the manufacture or production of goods. The Tribunal did not have the benefit of reviewing a copy of the contract governing the work activities of the appellant. However, from the oral evidence received from the appellant's witness, it would appear that the appellant was being paid, for the most part, to remove materials from one point on the job site and to move and deposit those materials at a second point, be it the dam or a site of use along the highway. The material was, at all times, the property of the contracting body, and the appellant was paid on the basis of the volume of material excavated and moved to the job site. Regardless of whether it was rock that was drilled, ripped or blasted, or sand, clay or other granular fill excavated, and hauled to a site of use, the Tribunal does not view this activity as the production of goods.

With regard to paragraph 1(e) of Part XIII of Schedule III to the Act, the Tribunal does not believe that the rock trucks were used "exclusively" at mines or quarries. It interprets this condition to require that the trucks be restricted or limited to use, or solely for use, at a mine or quarry. The evidence of the appellant's witness was that the trucks were used to haul materials up to 7 km from source to dam and some distance from source to point of use along the Slocan Highway. As argued by counsel for the respondent, the Tribunal would have to find that the entire construction site was a mine or quarry for the rock trucks to qualify under this paragraph, a finding that it could not make.

With regard to paragraph 1(j) of Part XIII of Schedule III to the Act, the Tribunal did not receive evidence on the meaning of the terms "exploration," "discovery" or "development" within the construction industry. Similarly, the appellant's representative only provided a few definitions in support of his view that clay, sand and rock are minerals. However, the Tribunal does not accept that these materials are contemplated within the meaning of the term "minerals" as used in paragraph 1(j).

For these reasons, the appeal is dismissed.

Desmond Hallissey

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Presiding Member

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