

Ottawa, Friday, February 26, 1993

Appeal No. AP-92-070

IN THE MATTER OF an appeal heard on October 22, 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 April 16, 1992, with respect to a
notice of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

THOMPSON BROS. (CONSTR.) LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Sidney A. Fraleigh

Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Desmond Hallissey

Desmond Hallissey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-070

THOMPSON BROS. (CONSTR.) LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant was engaged in the construction of four highways under contract with the Department of Transportation and Utilities of the Province of Alberta. The goods in issue are repair and replacement parts installed on construction equipment, including motor scrapers and dozers. The issue in this appeal is whether the construction equipment falls under either paragraph 1(a) or (j) of Part XIII of Schedule III to the Excise Tax Act such that the parts for this equipment would qualify for tax-exempt status under paragraph 1(l) of Part XIII of Schedule III and subsection 51(1) of the Excise Tax Act.

HELD: *The appeal is dismissed. With regard to paragraph 1(a) of Part XIII of Schedule III to the Excise Tax Act, the Tribunal does not believe that the activities of the appellant constitute the manufacture or production of goods. Nor does the Tribunal believe that clay or other compactible materials, including sand, gravel or rock, qualify as "minerals" as that term is used in paragraph 1(j) of Part XIII of Schedule III to the Excise Tax Act. As the construction equipment does not fall under paragraph 1(a) or (j), the repair parts for such equipment do not fall under paragraph 1(l).*

Place of Hearing: Edmonton, Alberta

Date of Hearing: October 22, 1992

Date of Decision: February 26, 1993

*Tribunal Members: Sidney A. Fraleigh, Presiding Member
Arthur B. Trudeau, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Dyna Côté

*Appearances: Doug Densmore, for the appellant
Linda Wall, for the respondent*

Appeal No. AP-92-070

THOMPSON BROS. (CONSTR.) LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

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

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of a determination of the Minister of National Revenue (the Minister). The appellant applied for a refund of tax paid on parts to repair construction equipment used on various highway construction projects within the province of Alberta. The application was rejected and, on objection by the appellant, was varied by a decision of the Minister. The appellant's objection was allowed in part, granting a rebate of \$4,706.26 and leaving an outstanding amount of \$10,457.44, for which the appellant appealed to the Tribunal.

The appellant was engaged in the construction of four highways under contract with the Department of Transportation and Utilities of the Province of Alberta. The goods in issue are repair and replacement parts installed on construction equipment, including motor scrapers and dozers. Such repair parts include, but are not limited to, a hose, collar, connector, clamp, retainer, alternator, ring, bearings, manifolds and regulators.

The appellant's witness, Mr. John Thompson, described the use of motor scrapers and dozers in the construction of a highway. He noted that the first step is to clear the trees and topsoil from the highway right of way and from the borrow pit areas. Borrow pits, he explained, are used to obtain materials, including clay and other compactible materials, for the purpose of building the road. Motor scrapers are used to remove excavated materials from the borrow pits and to transport them to the road site. Within the pit area, large crawler dozer tractors are used to push the scrapers, forcing the excavated materials into the scrapers.

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.

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

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,

...

(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).

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

The appellant's representative asserted that where the majority of excavated materials used to fulfil the contractual obligations come from borrow pits, motor scrapers are being used in the production of goods and, therefore, fall under paragraph 1(a) of Part XIII of Schedule III to the Act. Motor scrapers are used primarily and directly in the production or "borrow excavation" from earth-fill "borrow pits." Such excavation refers to the specific operation where earth fill is taken from one point and moved to a second point. Motor scrapers are commonly used in the borrow excavation of earth fill where the borrow pits are located near the deposit point. The representative asserted that it is illogical to consider motor scrapers primarily as transport vehicles and that they should be viewed as excavating machines.

With respect to paragraph 1(j) of Part XIII of Schedule III to the Act, the representative asserted that the development of minerals includes the development of good quality clay, sand, gravel or combinations thereof. Several definitions of "minerals" were provided which include clay, sand or gravel. Reference was also made to the evidence of Mr. Don Scafe, a geologist with the Alberta Research Council, who described the compaction properties of clay minerals and the mineral content of various aggregates. As the excavated materials are "minerals," the removal of overburden from these deposits should fall under the meaning of "development." The equipment used in the removal of overburden should be entitled to the provisions of paragraph 1(j) and the parts thereof to those of paragraph 1(l).

Counsel for the respondent submitted that the motor scrapers are not machinery for use by the appellant in the "manufacture or production of goods." The equipment is used in the construction of highways. Moreover, the construction equipment is not used "primarily and directly" in the manufacture or production of any goods. The motor scrapers merely removed earth fill to other locations. Counsel submitted, in the alternative, that if the Tribunal finds that

the appellant is a "manufacturer" or "producer" of "goods," that such manufacture or production is merely incidental to what it is engaged to do, namely, to construct highways.

With regard to paragraph 1(j) of Part XIII of Schedule III to the Act, counsel submitted that the appellant failed to show that the construction equipment was used in the development or exploration of minerals. She reiterated that the appellant is in the business of building roads and not of developing minerals.

In summary, counsel submitted that, since the construction equipment does not fall within the exemptions under paragraph 1(a) or (j) of Part XIII of Schedule III to the Act, the appellant is not entitled to the exemption in paragraph 1(l) for the parts.

With regard to paragraph 1(a) of Part XIII of Schedule III to the Act, the Tribunal does not believe that the activities of the appellant constitute the manufacture or production of goods. This point was clearly decided in an earlier decision² of the Tribunal. Nor does the Tribunal believe that clay or other compactible materials, including sand, gravel or rock, qualify as "minerals" as that term is used in paragraph 1(j) of Part XIII of Schedule III to the Act. As the construction equipment does not fall under paragraph 1(a) or (j), the repair parts for such equipment do not fall under paragraph 1(l).

For these reasons, the appeal is dismissed.

Sidney A. Fraleigh

Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau

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Member

Desmond Hallissey

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Member

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.