CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, May 17, 1993

Appeal No. AP-92-072

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 April 24, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

GOLDEN BEAR OPERATING COMPANY LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-072

GOLDEN BEAR OPERATING COMPANY LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant operates a gold mine and mill in northern British Columbia. Due to the remote location, there is no access to electricity from B.C. Hydro facilities, and, thus, the appellant uses diesel fuel to generate electricity and heat at the mine and mill, and to operate surface vehicles on and around the site. The fuel is delivered to the tank farm, that is the subject of this appeal, and is then distributed for various end uses by means of a circular piping system integrated with the tank farm. The issue in this appeal is whether the goods in issue, namely the fuel tanks on the appellant's tank farm and related goods, are exempt from sales tax because they are used primarily and 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 is of the view that the evidence shows a sufficiently close nexus or connection between the fuel tank farm and the production of electricity for the appellant's milling activities and that there is no intervening medium or agency sufficiently important to consider that such medium or agency interrupts the "directness" of the relationship between the fuel tank farm and the production of electricity.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*December 9, 1992*
Date of Decision:	*May 17, 1993*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Arthur B. Trudeau, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Kimberley L.D. Cook, for the appellant* *Linda J. Wall, for the respondent*

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

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(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-072

GOLDEN BEAR OPERATING COMPANY LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., 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) from a determination of the Minister of National Revenue (the Minister).

The appellant operates a gold mine and mill in northern British Columbia. The mining process used by the appellant involves the extraction of ore from both underground and open pit mines and the milling of the ore into gold ingots. Due to the remote location, there is no access to electricity from B.C. Hydro facilities, and, thus, the appellant uses diesel fuel to generate electricity and heat at the mine and mill.

The appellant contracted with Shell Canada Products Limited (Shell) for the supply and installation of a fuel tank farm which it uses to store diesel fuel. More specifically, the tank farm, which is located off the mine site, is connected by a circular piping system to various pieces of equipment (i.e. generators, heaters, engines, etc.) in which the fuel is actually used. There is a day tank through which the fuel moves prior to being used in the generators for the milling activities.

Shell purchased the tanks, liners, pumps and other equipment used to construct the tank farm on a tax-paid basis. The appellant then instructed Shell to apply for a refund of the tax paid on the materials for the tank farm.

On February 14, 1991, Shell submitted a refund claim for the period from September 1 to December 31, 1989, in the amount of $15,267. On April 30, 1991, the respondent issued a notice of determination disallowing the refund on the basis that the goods were sold under taxable conditions. By notice of objection served on July 10, 1991, the appellant, having been assigned Shell's rights to object or appeal under the Act, objected to the determination. By notice of decision dated April 24, 1992, the respondent confirmed the determination.

The issue in this appeal is whether the goods in question, namely the tanks on the appellant's tank farm and related goods, are exempt from sales tax because they are used primarily and 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.

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

Counsel for the appellant called one witness, Mr. Jeffrey Mason, Controller of North American Metals Corporation, the appellant's parent corporation. Mr. Mason explained the nature of the appellant's mining and milling activities on the Golden Bear property. He stated that the primary reason for building the tank farm was to provide for sufficient storage capacity to operate in such an isolated location. Mr. Mason indicated that the day tank was built principally to deal with pressure concerns in the fuel flow system. He pointed out that the capacity of the day tank was approximately one third of the normal daily fuel consumption of the generators. He also stated that, while the appellant's activities could continue and sometimes had done so without using the day tank, they could not continue without the tank farm because it was the only facility that had greater capacity than the amount of fuel consumed on a daily basis at the site. Mr. Mason testified that 81 percent of fuel used at the site was consumed by the generators that produce electricity.

During cross-examination, Mr. Mason indicated that, of the remaining 19 percent of fuel used, 9 percent could be attributed to the roaster and sag mill burners, which are used to heat ore in the milling process, and the balance to surface vehicles used on and around the site. When it was pointed out that these figures were in conflict with figures in the appellant's brief, Mr. Mason stated that the figures that he was providing at the hearing were those for the last month for which they were available, that is November 1992. Under further questioning, Mr. Mason agreed that the percentages varied from month to month and that it was not possible to know in advance what the exact breakdown of usage would be. During reexamination, Mr. Mason indicated that the only situation that he could think of where use by the generators would drop below 50 percent of fuel consumption would be if the mill were closed for an extended period of time.

Counsel for the appellant began her arguments by submitting that the important fact to keep in mind was that there would be no electricity produced without the tank farm. Counsel supported this position by analyzing the facts of the instant case in the context of four authorities. The first case to which counsel referred was *Esso Resources Canada Limited v. The Minister of National Revenue*.[2] Counsel reviewed the criteria set out by the Tribunal in *Esso Resources* and attempted to distinguish the instant case from the fact situation in that case.

Counsel relied on the Federal Court of Appeal's decision in *The Deputy Minister of National Revenue for Customs and Excise v. Amoco Canada Petroleum Company Ltd.*[3] for the proposition that the tanks were used directly in the production of electricity and that, without the tanks, production of electricity would not have been possible. Counsel noted that, in *Amoco Canada*, the Federal Court of Appeal found that a pipeline supplying a raw material to a manufacturing facility 30 km distant was being used "directly" in the manufacturing process.

Counsel went on to quote the following passage from *Amoco Canada*:

> *Any pumping which is required to ensure the flow of the mix [of hydrocarbons] through the pipelines, it was agreed, is not a factor which need be taken into account in the circumstances of this case since it only facilitates the movement of the mix and does not affect in any way the nature of the product being conveyed.*

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2. (1989), 2 T.C.T. 1241, Canadian International Trade Tribunal, Appeal No. 2984, December 4, 1989.

3. 13 C.E.R. 102, unreported, Federal Court of Appeal, Appeal No. A-1845-83, December 3, 1983.

Counsel submitted that the day tank did not represent an intervening step in the production process between the tanks and the generators; rather, it should be seen as one part of an integrated system. Counsel used the next case that she considered, *Petro-Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*,[4] to reinforce these points and, in particular, the notion that there is no intervening medium between the tanks and the generators where the electricity is produced.

The final case that counsel reviewed was *Horton CBI Limited v. The Deputy Minister of National Revenue for Customs and Excise*.[5] Counsel submitted that this decision, which she contended had a very similar fact situation to that before the Tribunal, had not been overruled by the subsequent jurisprudence to which she had referred.

In reply, counsel for the appellant stated that the evidence of Mr. Mason indicated that the tank farm was not a mere storage facility, but rather part of an integrated system used in the production of electricity. Counsel also confirmed that her arguments were not directed to the production of gold, but specifically to the production of electricity.

Counsel for the respondent argued that, since the Tribunal's decision in *Esso Resources*, the test was not whether the goods in issue were an integral or essential part of the goods produced, as apparently suggested by the appellant, but rather the functional relationship between the tanks and the appellant's generators. Counsel stated that this view was supported by the Tribunal's direction in *Esso Resources* to look at the "nexus or connection" between the goods in issue and the production process. Counsel submitted that the evidence showed that the function of the tanks was primarily for storage of fuel and that the tanks did not process or prepare fuel as did the tanks in issue in *Horton*.

Counsel for the respondent then turned to consider case law concerning the "intervening medium" test. Counsel submitted that this test was specifically approved by the Federal Court of Appeal in cases such as *Amoco Canada* and was the relevant test for this appeal. Counsel suggested that the test was not met in the instant case because the evidence showed that both the pump and the day tank, which function within the production process between the tanks and the generators, played a role in controlling the pressure of the fuel as it moved through the system. Counsel noted that, although Mr. Mason indicated that the system did not really need the day tanks, there was no evidence that the appellant did not use them.

With respect to the issue of the multi-purposes of the fuel, counsel stated that the Tribunal should take into consideration that there is no connection between certain uses, such as using the fuel to run surface vehicles, and the production of electricity. Finally, counsel submitted that, if the Tribunal took the view that it should consider the production of gold and not the production of electricity, as urged by the appellant, the connection between the tanks and the production of gold would be too remote to be accepted by the Tribunal.

The Tribunal finds that the tank farm and related goods qualify for exemption from tax as machinery or apparatus sold to a producer (the appellant) for use by that producer primarily and 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.

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4. 9 C.E.R. 121.
5. 6 T.B.R. 415.

In coming to this conclusion, the Tribunal had to answer two questions. First, whether electricity was considered as "goods" for purposes of the Act. Second, if electricity was found to be considered as "goods," whether the appellant's tank farm was used primarily and directly in the manufacture or production of electricity.

With respect to the first question, the Tribunal notes that, in its decision in *Hydro-Québec v. The Minister of National Revenue*,[6] it found that companies involved in the generation of electricity could be considered to be manufacturing or producing goods within the meaning of the Act.[7] Having answered the first question in the positive, the Tribunal turns to consider the second question set out above.

In giving meaning to the word "directly," the Tribunal notes that, in its recent decision in *BHP-Utah Mines Ltd. v. The Minister of National Revenue*,[8] the Tribunal relied on the *Amoco Canada* decision where the Federal Court of Appeal held that the word "directly" should not be interpreted restrictively and that there 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.[9]" In *BHP-Utah*, the Tribunal also noted that it shared the view of the Federal Court of Appeal in *Amoco Canada* that the word "directly" 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 the tank farm plays a direct role in the production of electricity and that that role is not interrupted by the day tank and related goods. The evidence indicated that the capacity of the day tank was approximately one third of the normal daily fuel consumption of the generators. Furthermore, the role that the tanks played in relation to pressure concerns in the fuel flow was not so crucial that the tank farm system could function without the day tank. Therefore, the tank farm and related goods meet the test set out in *Amoco Canada*.

The Tribunal is also of the opinion that the role of the goods in issue in the appellant's production of electricity 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 then 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 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 pipelines 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 the tank farm system transported the fuel from which the electricity was generated and, also, that this role in the production process helped in an important way to bring the electricity to its final state. In effect,

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6. Appeal No. 2374, December 20, 1991.
7. *Ibid*. at 20. In coming to this conclusion, the Tribunal relied on various cases, including, in particular, the Supreme Court of Canada's decision in *The Royal Bank of Canada v. The Deputy Minister of National Revenue for Customs and Excise*, [1982] C.T.C. 183, [1981] 2 S.C.R. 139.
8. Appeal No. AP-91-047, March 19, 1993.
9. *Supra*, note 3 at 109.

without the tank farm system, there would be no electricity for the mill at this site. In addition, the Tribunal finds that, while the evidence showed that the fuel was used for various purposes, the amount of fuel used in the production of electricity is sufficient to establish a close nexus or connection between the tank farm and such production.

Accordingly, the appeal is allowed.

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

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Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member