CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, May 5, 1994

Appeal No. AP-92-158

IN THE MATTER OF an appeal heard on November 3, 1993, 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 July 20, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

ARDEL STEEL LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

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

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-158

ARDEL STEEL LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

There are two issues in this appeal. The Tribunal must determine whether cutting reinforcing steel bar (rebar) to length constitutes manufacturing or production under the Excise Tax Act. In addition, the Tribunal must determine whether bending rebar to customer specifications constitutes manufacturing or production under the Excise Tax Act. If these activities are found not to constitute manufacturing or production, the appellant paid taxes in error on the sale price of the resulting cut and/or bent rebar. If taxes were paid in error, the Minister of National Revenue incorrectly determined that the appellant was not entitled to the refund for which it applied.

***HELD**: The appeal is allowed. The cutting of rebar to length cannot be considered as giving new form to the rebar, and there has been no change in the qualities or properties of the rebar. In addition, the Tribunal does not believe that the appellant was producing rebar merely because it cut rebar to length. Nor does the Tribunal believe that the appellant is a marginal manufacturer under paragraph (f) of the definition of "manufacturer or producer" under subsection 2(1) of the Excise Tax Act.*

The Tribunal also concludes that bending rebar to a customer's specifications does not constitute manufacturing or production. Though bent rebar may have new form in the sense that it has taken on a new shape, the Tribunal does not believe that this rebar has obtained new qualities and properties. By adding a bend, the nature of the rebar has not been altered, and it would continue to serve the same function as the straight rebar. The rebar was completely functional before being bent and ready for sale as such. Something new has not been created by bending rebar, as straight rebar can perform all the functions of bent rebar, though not necessarily as well.

Place of Hearing:	*Calgary, Alberta*
Date of Hearing:	*November 3, 1993*
Date of Decision:	*May 5, 1994*
Tribunal Members:	*Anthony T. Eyton, Presiding Member* *Sidney A. Fraleigh, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Douglas G. Mills, for the appellant* *Brian Tittemore, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-158

ARDEL STEEL LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
SIDNEY A. FRALEIGH, Member
ROBERT C. COATES, Q.C., 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) rejecting an application for a refund of taxes claimed to have been paid in error. There are two issues in this appeal. The Tribunal must determine whether cutting reinforcing steel bar (rebar) to length constitutes manufacturing or production under the Act. In addition, the Tribunal must determine whether bending rebar to customer specifications constitutes manufacturing or production under the Act. If these activities are found not to constitute manufacturing or production, the appellant paid taxes in error on the sale price of the resulting cut and/or bent rebar. If taxes were paid in error, the Minister incorrectly determined that the appellant was not entitled to the refund for which it applied.

For purposes of this appeal, the relevant provisions of the Act state:

> *50. (1) There shall be imposed, levied and collected a consumption or sales tax ... on the sale price or on the volume sold of all goods*
> *(a) produced or manufactured in Canada*
> *(i) payable ... 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.*

The respondent determined that the cut and/or bent rebar were goods produced or manufactured in Canada. In addition, the respondent determined that the appellant qualified as a marginal manufacturer of the cut rebar under paragraph (*f*) of the definition of "manufacturer or producer" under subsection 2(1) of the Act (paragraph 2(1)(*f*) of the Act), which states:

> *"manufacturer or producer" includes*
> ...
> *(f) any person who, by himself or through another person acting for him, prepares goods for sale by assembling, blending, mixing, cutting to size, diluting, bottling, packaging or repackaging the goods or by applying coatings or finishes to the goods, other than a person who so prepares goods in a retail store for sale in that store exclusively and directly to consumers.*

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

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Counsel for the appellant called Mr. Arnold Steven Matt, President, Director and sole shareholder of Ardel Steel Ltd., as the appellant's witness. Mr. Matt told the Tribunal that the appellant is in the business of supplying rebar to its customers. Its operations include cutting rebar to lengths specified by its customers and, in some instances, bending the rebar to meet its customers' requirements. The majority of these customers are contractors that purchase the rebar for use in construction projects. Mr. Matt noted that rebar is not cut or bent for purposes of stocking inventory.

When bidding for the supply of rebar, the appellant tenders a lump sum bid based on the customer's specifications or the structural engineer's drawings, which specify the length, grade and diameter of rebar needed for the project. If awarded a contract, the appellant prepares detailed drawings of the rebar needed to satisfy the contract or the drawings are supplied by the customer. From these drawings, a list of the rebar needed is prepared. Once the rebar has been cut and, if necessary, bent, it is either delivered to the job site or made available for pickup. In addition, smaller orders are placed over the phone or in person. In either case, the customer will specify the length, diameter and quantity of rebar needed.

Mr. Matt noted that the appellant has been a licensed manufacturer under the Act since 1985 and has been paying sales tax on the sale price of the rebar sold to its customers. He explained how the appellant was led to believe that the activities at issue did not constitute manufacturing or production under the Act. In addition, he described the series of events that led to three refund applications being filed, the subsequent determinations of the Minister, the objections to those determinations, the subsequent decisions of the Minister and the ultimate appeal of one of those determinations to the Tribunal.

Counsel for the appellant argued that cutting rebar to length does not constitute manufacturing in the traditional sense. He distinguished the activity of cutting rebar to length from the substantial activities described as manufacturing by the Supreme Court of Canada in *Her Majesty The Queen v. York Marble, Tile and Terrazzo Limited*.[2] In that case, the Supreme Court of Canada adopted a definition of "manufacture" to mean:

> *the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.*[3]

Counsel for the appellant referred to *The Queen v. Stuart House Canada Limited*,[4] where a company that purchased aluminum foil in bulk, cut it to length, wound it onto cardboard tubes, placed the smaller rolls into cardboard packages and sold it wholesale was found not to be a manufacturer or producer of aluminum foil. Arguing by analogy, counsel submitted that cutting rebar to length does not alter its form, qualities or properties; it does not change the nature of the rebar in any way. Just as the activities described in the *Stuart House* decision did not constitute manufacturing or production in the traditional sense, neither does cutting rebar to length constitute manufacturing or production. Counsel also noted the *obiter dictum* of Addy J., who indicated that the words in the expression "new forms, qualities and properties or combinations" must be considered conjunctively such that:

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2. [1968] S.C.R. 140.
3. *Ibid.* at 145.
4. [1976] 2 F.C. 421.

> *there must be some change in the form, in the qualities and in the properties of the material or in the form, in the qualities and in the combinations of the materials used in order to constitute either manufacture or production in the ordinary meaning of these words.*[5]

In further support of the proposition that cutting rebar to length does not constitute traditional manufacturing or production, counsel for the appellant referred to two ruling cards of the Department of National Revenue (Revenue Canada). In the first, coded 1115/69-1 Passive,[6] it is stated that:

> *[t]he sawing or otherwise cutting to length only of ... reinforcing rod ... is not held to constitute a process of manufacturing or production for purposes of the Act.*

In the second ruling card, coded 1115/15 Active, dated December 16, 1963,[7] it was decided that the cutting of posts to length only, to the order of a customer, is not considered to be manufacturing or production.

As to paragraph 2(1)(*f*) of the Act, counsel for the appellant argued that the appellant did not prepare rebar for sale by cutting it to size. Referring to dictionary definitions of "prepare," he argued that paragraph 2(1)(*f*) of the Act targets persons who prepare goods for sale prior to the goods being the subject of a contract of sale. Counsel noted that, when the appellant cuts the rebar, the contract for its sale has already been concluded. This case is distinguished from a case where goods are cut to length for purposes of stocking inventory prior to a contract for the sale of the goods.

Counsel for the appellant submitted that, in case of doubt concerning the meaning of legislation, administrative policy and interpretation become an important factor.[8] In this regard, counsel referred to Excise News,[9] issued by Revenue Canada in December 1980, entitled "Expanded Definition of Manufacturer or Producer (Marginal Manufacturing)." Counsel submitted that this publication described how Revenue Canada intended to interpret paragraph 2(1)(*f*) of the Act. On page 3 of the publication, certain operations were considered not to fall within this provision, including "(6) the single operation of cutting of goods to the length specified by the individual customer's order, i.e.: wire, cable, drapery material which is sold by the foot, yard or meter.[10]" Counsel submitted that there is little distinction between these itemized goods and rebar, which is sold by the foot.

Counsel for the appellant also referred to guidelines published by the Assistant Deputy Minister for Excise in a memorandum directed to the regional directors and dated July 6, 1981, entitled Principles and Philosophy of Marginal Manufacturing.[11] This publication indicated that:

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5. *Ibid*. at 426.
6. The ruling card indicates that it was transferred to passive on November 28, 1985, as it was considered in contradiction to paragraph 2(1)(*f*) of the Act.
7. As the ruling card rendered a decision for purposes of the Act as it read on January 1, 1981, counsel for the appellant argued that it was improperly dated.
8. See *Gene A. Nowegijick v. Her Majesty The Queen*, [1983] 1 S.C.R. 29.
9. As reported in *ECG Canada Inc. v. The Queen*, [1987] 2 F.C. 415 at 420.
10. *Ibid.*
11. *Supra*, note 9 at 421.

> *The activities mentioned, i.e. assembly, blending, are all related to preparing goods for sale in the sense of changing, altering or enhancing the commercial presentation of the goods in anticipation of a sale.*
>
> *Preparing goods in anticipation of a sale would not include packing goods for shipment only nor would it include preparing goods to meet an individual user's requirement, where there is no "commercial enhancement" aspect to the activity, but rather a service is offered to the user of the goods.*[12]

Counsel for the appellant submitted that the appellant's activities are directed to preparing goods to meet an individual user's requirements, in that it is providing a service by cutting the rebar to length.

Counsel for the appellant submitted that the expression "cutting to size," as used in paragraph 2(1)(*f*) of the Act, excludes the single operation of "cutting to length." After referring to a dictionary definition of the word "size," counsel submitted that the word typically denotes more than one dimension of measurement. Therefore, the operation of "cutting to size" involves the cutting of goods along more than one dimension, which excludes the single operation of cutting to length. In the alternative, the expression "cutting to size" can only refer to the operation of cutting goods to stock lengths, which would exclude the cutting of rebar to customer-specified lengths.

In addition, counsel for the appellant argued that the cutting of rebar to customer-specified lengths constitutes the preparation of goods in a retail store for sale in that store exclusively and directly to customers. As such, the appellant's activities are excluded from paragraph 2(1)(*f*) of the Act.

With regard to bending rebar, counsel for the appellant noted that marginal manufacturing does not include that activity. As such, it must be seen as traditional manufacturing or production for the resulting product to be taxable. Referring to the *York Marble* decision, counsel submitted that the simple operation of bending rebar does not give new form to the rebar, nor does it change its qualities, properties or combination of materials.

Counsel for the appellant argued that the generally accepted commercial view of a particular operation is relevant to interpreting whether the operation constitutes manufacturing or production. The bending of rebar to a customer's specifications would not generally be recognized as constituting the manufacturing or production of goods. The operation of bending rebar does not result in something new; rather, it is a service offered by the appellant.

Counsel for the respondent argued that cutting rebar to length constitutes traditional manufacturing or production, as well as marginal manufacturing, under paragraph 2(1)(*f*) of the Act. The *York Marble* decision was cited as the leading case for defining a manufacturer. Counsel submitted that, when the appellant cuts rebar to specific lengths to conform to the specifications of a particular project, particularly when working from blueprints, it adds new form, qualities, properties or combinations to the goods. When rebar is cut to length, it exhibits new form. In addition, the cut rebar has new qualities and properties, as its shorter length allows it to be used in new ways.

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12. *Ibid.*

As to marginal manufacturing, counsel for the respondent argued that the cutting process is a condition of sale of the rebar. If the rebar were not cut to the specifications of the contract, it would not be purchased. As such, cutting to length is an activity through which the rebar is prepared for sale. In addition, the appellant is commercially enhancing the rebar and not merely providing a service to its customers. After reexamining the dictionary definitions of "size" provided by counsel for the appellant, counsel for the respondent argued that cutting to length is subsumed within the expression "cutting to size." As to the appellant's contention that it prepares rebar "in a retail store for sale in that store exclusively and directly to consumers," counsel made several points. First, he noted that the appellant sells some rebar to lumber yards that subsequently sell to consumers. As such, it does not sell exclusively to consumers. Second, the bulk of its sales are made through tender, which has nothing to do with a retail store. Third, in ordinary usage, the expression "retail store" implies a place open to the public where consumers can examine and purchase goods. After acknowledging that some customers place orders on the appellant's premises, counsel argued that the bulk of the appellant's sales are made through the tendering process. Finally, counsel submitted that the contractors and construction companies that purchase rebar from the appellant are not the consumers of the rebar. Rather, they use the rebar to construct something and subsequently sell that thing and the rebar.

In arguing that cutting rebar to length constitutes production, counsel for the respondent referred to two cases[13] and submitted that production is the process whereby something usable is created. Counsel noted that cutting rebar to length is a process that is required before the rebar is usable by the purchasers. In addition, cutting rebar to length is like cutting sides of beef into various cuts[14] or "cutting ... steel to specific measures,[15]" activities that have been found to constitute production.

Counsel for the respondent argued that bending rebar constitutes manufacturing or production. Again referring to the *York Marble* decision, counsel submitted that the activity gives new form to the rebar and adds new qualities and properties because it is usable in ways not otherwise possible. In addition, the activity may be considered production in that it creates something usable for an intended purpose and creates something new.[16]

In arguing that the appellant's activities would be commercially accepted as manufacturing or production, counsel for the respondent noted the heavy equipment used by the appellant in cutting and bending rebar.

Consistent with the reasoning in the *Stuart House* decision, the Tribunal does not consider cutting rebar to length as the manufacturing or production of goods in the traditional sense. This activity cannot be considered as giving new form to the rebar, and there has been no change in the qualities or properties of the rebar. In addition, the Tribunal does not believe that the appellant was producing rebar merely because it cut rebar to length.

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13. *Fiat Auto Canada Limited v. The Queen*, [1984] 1 F.C. 203, and *Lorne Shields Intertrade Corp. v. The Deputy Minister of National Revenue for Customs and Excise* (1985), 10 T.B.R. 215.
14. *Hobart Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise* (1985), 10 C.E.R. 64, Federal Court of Appeal, File No. A-1868-83, September 18, 1985.
15. *M. Brown & Sons Limited v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. 2798, September 3, 1992.
16. *Supra*, note 13.

Nor does the Tribunal believe that the appellant is a marginal manufacturer under paragraph 2(1)(*f*) of the Act. It has been held that, in case of doubt concerning the meaning of legislation, administrative policy and interpretation "are entitled to weight and can be an 'important factor'[17]" in the interpretation of the legislation. In this regard, counsel for the appellant referred to Excise News, where Revenue Canada stated that the "single operation of cutting of goods to the length specified by the individual customer's order" does not fall within the meaning of paragraph 2(1)(*f*) of the Act. Upon its consideration of the legislation and arguments presented on behalf of the parties, the Tribunal is persuaded by this statement of Revenue Canada's interpretation of this provision that the appellant's act of cutting rebar to lengths specified by its customers does not constitute marginal manufacturing as defined in paragraph 2(1)(f) of the Act.

The Tribunal also concludes that bending rebar to a customer's specifications does not constitute manufacturing or production. The Tribunal is in agreement with the statements of Addy J. in the *Stuart House* decision, where he reasoned that the words in the expression "forms, qualities and properties or combinations," as adopted by the Supreme Court of Canada in the *York Marble* decision, must be read conjunctively. Though bent rebar may have new form in the sense that it has taken on a new shape, the Tribunal does not believe that this rebar has obtained new qualities and properties. By adding a bend, the nature of the rebar has not been altered, and it would continue to serve the same function as the straight rebar. In addition, the rebar was completely functional before being bent and ready for sale as such. Something new has not been created by bending rebar, as straight rebar can perform all the functions of bent rebar, though not necessarily as well.

In addition, the Tribunal believes that combining the operations of cutting and bending rebar does not constitute manufacturing or production.

Accordingly, the appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Sidney A. Fraleigh
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Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
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17. *Supra*, note 8 at 37.