

Ottawa, Wednesday, September 8, 1993

Appeal No. AP-92-213

IN THE MATTER OF an appeal heard on April 13, 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 24, 1992, with respect to a
notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

UNION TRACTOR LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-213

UNION TRACTOR LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issues in this appeal are whether the federal sales tax remitted by the appellant on the sale of used parts was paid in error by the appellant and whether Caterpillar Vehicle Engines 3208 sold by the appellant are tax-exempt pursuant to section 1 of Part XVI of Schedule III to the Excise Tax Act.

HELD: *The appeal is dismissed. The evidence has not convinced the Tribunal that there exists an agency relationship between the appellant and its subsidiary, Union Tractor Sales (1980) Ltd. The appellant is a licensed wholesaler, and it had to remit tax on the sale of the used parts. As to the second issue, the evidence is unambiguous as to the multiplicity of uses or applications intended by the manufacturer for the Caterpillar Vehicle Engines 3208. It cannot be concluded that these engines are intended to be used specifically in construction equipment.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 13, 1993
Date of Decision: September 8, 1993

Tribunal Members: Michèle Blouin, Presiding Member
Arthur B. Trudeau, Member
Lise Bergeron, Member

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Janet Rumball

Appearances: Susan Kyle and Michael McCourt, for the appellant
Brian Tittlemore, for the respondent

Appeal No. AP-92-213

UNION TRACTOR LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
ARTHUR B. TRUDEAU, Member
LISE BERGERON, Member

REASONS FOR DECISION

Union Tractor Ltd. appealed two decisions of the Minister of National Revenue (the Minister) to the Tribunal, Appeal Nos. AP-92-160 and AP-92-213. These appeals were to be heard jointly, but, at the hearing, at the request of both parties, the Tribunal agreed that Appeal No. AP-92-160 should be adjourned *sine die* until the Tribunal issued its decision in Appeal No. AP-92-213.

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) from an assessment of the Minister relating to unpaid federal sales tax (FST).

There are two issues before the Tribunal, namely, whether the FST remitted by the appellant on the sale of used parts was paid in error by the appellant and whether the Caterpillar Vehicle Engines 3208 (CAT 3208 engines) sold by the appellant are tax-exempt pursuant to section 1 of Part XVI of Schedule III to the Act. The Tribunal notes that the remaining questions raised in this appeal have been settled by the parties.

Mr. Max Yuen, controller of the appellant, appeared on its behalf. He underlined the relationship between the appellant (a licensed wholesaler) and its wholly owned subsidiary, Union Tractor Sales (1980) Ltd. (Union Sales). The latter company sells used parts in a number of ways, including "over the counter" and according to the appellant's work orders. On this last point, as Mr. Yuen explained, a customer may request that second-hand parts be used by the appellant in carrying out repair work on an engine. Having no inventory of used parts, the appellant would then obtain the relevant parts from Union Sales. Upon completion of the work, the appellant would invoice the customer for the work completed and for the used parts on which FST would be charged. He pointed out that the appellant does not own the parts thus sold to the clients; ownership in these used parts remains, prior to the sale, vested in the hands of Union Sales. Mr. Yuen further indicated that the transaction between the appellant and Union Sales is not considered a sale of goods in the corporate group's accounting system.

On the second issue, Mr. Yuen told the Tribunal that the CAT 3208 engines, manufactured by Caterpillar Inc., were for construction equipment and were, thus, exempt from FST.

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

The cross-examination essentially addressed the relationship between the appellant and Union Sales. In this connection, Mr. Yuen indicated that the appellant did not receive any commission from Union Sales on the sales of used parts. He also told the Tribunal that the appellant, in case of failure by a customer to pay for the invoice, would invariably have a lien on the repaired engine. Furthermore, should there be no payment by the customer, there would be no compensation paid by the appellant to Union Sales for the used parts.

Finally, Mr. Yuen indicated that the appellant was basically selling used parts on behalf of Union Sales. As to the CAT 3208 engines, he explained that they were acquired from different suppliers, rebuilt to the manufacturer's specifications and sold to customers. Mr. Yuen had no knowledge as to the particular use by customers of such engines.

Mr. Don Gunderson, who was an auditor with the Department of National Revenue conducted the original audit in the present case at the time he appeared on behalf of the respondent. Mr. Gunderson essentially testified about the assessment of the over-the-counter sales of CAT 3208 engines. On the basis of the information available at that time, he came to the conclusion that these engines were multi-purpose engines. In his view, as he indicated during cross-examination, these engines were, therefore, not designed for construction equipment and could not fall within the exempting provision of Part XVI of Schedule III to the Act.

The appellant's representatives first argued that the FST paid by the appellant on the used parts was paid in error, as these parts were not goods owned by the appellant, but rather by Union Sales. They also underlined a point raised by Mr. Yuen, namely, that the use of the appellant's invoices was solely for the convenience of the customers. They contended that an agency relationship existed between the appellant and Union Sales. Thus, no sale took place between the appellant and its subsidiary. As put by the representatives, the intention is to give the goods to Union Tractor Ltd. in order to sell them.

With respect to the CAT 3208 engines, the appellant's representatives argued that these engines fell within the provisions of paragraph 1(c) of Part XVI of Schedule III to the Act. Under these provisions, "repair and replacement parts designed for the equipment referred to in paragraphs (a) and (b)" (i.e. construction equipment) are tax-exempt. In their view, the engines are designed for construction equipment. Since this design condition is satisfied, it does not matter whether the goods have other uses.

Counsel for the respondent submitted that the appellant has failed to provide evidence (such as a contract) of an agency or assignment relationship between the appellant and Union Sales. The evidence, rather, raises doubts as to whether there existed a genuine consignment. In this connection, counsel noted a few points, including the absence of commission on sales purportedly made by the appellant on behalf of Union Sales, as well as the absence of an arrangement whereby the appellant would compensate Union Sales in case of non-payment of the used parts by customers.

On the second issue, counsel for the respondent submitted that the words "designed for" in the exempting provision have to be given a narrow meaning. In his view, the condition set out in the relevant provision is for the goods to be designed specifically for the listed construction equipment. In this connection, he noted that the adduced evidence (e.g. the manufacturer's literature) indicates that the manufacturer's intention was for the CAT 3208 engines to be multi-purpose.

Having reviewed the evidence and considered the arguments, the Tribunal concludes that the appeal should be dismissed. As to the first issue, the Tribunal has not been convinced by the evidence adduced by the appellant regarding the agency relationship between the appellant and Union Sales. The Tribunal agrees with counsel for the respondent that the evidence raises doubts as to the existence of such a contractual relationship. What is clear, on the other hand, is that customers dealt directly with the appellant and that the appellant's invoices showed actual sales transactions between it and those customers that paid the appellant for the goods thus sold. At this point, the Tribunal observes that it has not been impressed by the convenience argument made by the appellant's representatives. The appellant is a licensed wholesaler, and it had to remit tax on the sale of the used parts.

As to the second issue, the Tribunal also agrees with the interpretation suggested by counsel for the respondent that the CAT 3208 engines are not designed specifically for the equipment exempt from tax pursuant to Part XVI of Schedule III to the Act. As seen in a prior case,² the term "designed for" relates to a deliberate intention in the mind of the manufacturer of the system (or goods) as to the nature of its ultimate use or ultimate function. In the Tribunal's view, this is the key factor. In this appeal, the Tribunal finds that the appellant has been unable to adduce sufficient evidence to establish that the engines in issue were "designed for" construction equipment. To the contrary, the documentary evidence offered by the respondent is unambiguous as to the multiplicity of uses or applications intended by the manufacturer for the CAT 3208 engines. These diesel engines are found in boats, in fire trucks, as well as in irrigation systems. Thus, in the Tribunal's view, it cannot be concluded that these engines are intended to be used specifically in construction equipment.

For these reasons, the appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lise Bergeron
Lise Bergeron
Member

2. *Walkem & Wing Machinery Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, 8 T.B.R. 724.