



Ottawa, Wednesday, April 13, 1994

Appeal No. AP-92-368

IN THE MATTER OF an appeal heard on September 23, 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 January 20, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

DORAN CONTRACTORS LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Michèle Blouin
Michèle Blouin
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-368

DORAN CONTRACTORS LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of an assessment of the Minister of National Revenue dated February 1, 1989, in which the appellant was assessed as having received an overpayment of taxes on a refund claim and, therefore, as owing \$43,946.14 in federal sales tax and \$3,024.33 in interest and penalty. The issue in this appeal is whether generators purchased by the appellant and installed in an uninterruptible power supply system as part of a renovation project at the Dyad Production Centre, a data processing centre in Ottawa, Ontario, by Comstock International Ltd. are excluded from the exemption of federal sales tax under paragraph 1(r) of Part XIII of Schedule III to the Excise Tax Act or, in the alternative, whether the generators can be considered construction materials and, therefore, qualify for a reduced rate of tax under section 4 of Part I of Schedule IV to the Excise Tax Act.

HELD: *The appeal is allowed in part. The Tribunal is of the view that the generators are for the production of electricity for use primarily in a building that normally utilizes electricity supplied by a public utility and, therefore, are excluded from the exemption of federal sales tax under paragraph 1(r) of Part XIII of Schedule III to the Excise Tax Act. The Tribunal, therefore, dismisses this part of the appeal. Having considered the written submissions of the parties and the oral concession of counsel for the respondent, the Tribunal finds that the generators are construction materials and, therefore, qualify for a reduced rate of tax under section 4 of Part I of Schedule IV to the Excise Tax Act. The Tribunal, therefore, allows this part of the appeal.*

*Place of Hearing: Ottawa, Ontario.
Date of Hearing: September 23, 1993
Date of Decision: April 13, 1994*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
W. Roy Hines, Member
Michèle Blouin, Member*

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Janet Rumball

*Appearances: Réjean Leroux, for the appellant
Brian Tittlemore, for the respondent*

Appeal No. AP-92-368

DORAN CONTRACTORS LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
W. ROY HINES, Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of an assessment of the Minister of National Revenue (the Minister) dated February 1, 1989, in which the appellant was assessed as having received an overpayment of taxes on a refund claim and, therefore, as owing \$43,946.14 in federal sales tax (FST) and \$3,024.33 in interest and penalty. On March 1, 1989, the appellant served a notice of objection. On January 20, 1993, the Minister issued a notice of decision confirming the assessment.

The appellant is a building contractor. On or about July 14, 1986, the appellant was awarded a contract by the Department of Public Works for the renovation of the Dyad Production Centre, a data processing centre in Ottawa, Ontario. On July 28, 1986, the appellant entered into an agreement with Comstock International Ltd. (Comstock) for the supply and installation of all electrical works in the building, including an uninterruptible power supply (UPS) system which would be connected to the main electrical system in the building and which would permit the operation of the computer equipment and related air-conditioning equipment in the building and provide continuous and clean power in case of a power failure by the public utility. To complete this work, Comstock had to install two emergency diesel-driven generator sets.

The issue in this appeal is whether generators purchased by the appellant and installed in the UPS system as part of a renovation project at the Dyad Production Centre are excluded from the exemption of FST under paragraph 1(r) of Part XIII of Schedule III to the Act or, in the alternative, whether the generators can be considered construction materials and, therefore, qualify for a reduced rate of tax under section 4 of Part I of Schedule IV to the Act.

Neither of the parties presented any evidence at the hearing; however, they both presented oral argument which essentially reiterated the position taken in their respective written submissions.

The appellant's representative argued that the generators, whether stand-by, mobile or other, are machinery or apparatus for the purposes of section 1 of Part XIII of Schedule III to the Act. He argued that the generators are not excluded from the definition of tax-exempt goods under paragraph 1(r). The appellant's representative submitted that, to be excluded, the following conditions must be met: first, it must be determined that the generator sets are stand-by; second, it must be determined that the electricity produced is primarily used in a

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

building; and third, it must be determined that the building is used for activities other than the manufacture or production of goods. He accepted that the goods meet the first and third conditions. With respect to the second condition, he argued that the intent of the legislator was to exclude generators for the production of electricity for use primarily in the electrical system of a building and not to exclude generators used to supply electricity to equipment located in that building. He argued that the electricity produced by the generators is used primarily to provide continuous and clean power to data processing equipment and to ancillary equipment in case of a power failure. He also argued that the generators which are an integral part of the UPS system, which itself qualifies for FST exemption, should also qualify for FST exemption.

In the alternative, the appellant's representative argued that the generators constitute construction materials within the meaning of section 4 of Part I of Schedule IV to the Act and, therefore, qualify for the reduced rate of tax of 8 percent.

Counsel for the respondent agreed with the appellant's representative that there are certain conditions which must be met for the generators to fall within the meaning of paragraph 1(r) of Part XIII of Schedule III to the Act. He argued, however, that the generators are used for the production of electricity "for use primarily in a building," that the generators provide stand-by electricity to the computer equipment and related air-conditioning equipment which, in turn, are located in the building. He submitted that to give effect to the appellant's interpretation of paragraph 1(r) would be to read into the paragraph the words "electricity for use primarily ... [throughout] a building" or "electricity for use primarily in [the main electrical system of] a building," restrictive interpretations that the plain words of paragraph 1(r) do not support.

Counsel for the respondent accepted that the generators fall within the meaning of "Construction Materials" in section 4 of Part I of Schedule IV to the Act and would qualify for the reduced rate of tax of 8 percent.

Section 1 of Part XIII of Schedule III to the Act provides a list of goods which are exempt from FST. It also provides a list of goods which are excluded from the exemption. Paragraph 1(r) provides that the exemption does not include the following goods:

electric generators and electric alternators that are portable or mobile, including drive motors therefor, and generator and alternator sets that are portable or mobile, except when such generators, alternators or sets are purchased for use on a farm for farm purposes only; stand-by electric generators and stand-by electric alternators, including drive motors therefor, and stand-by generator and stand-by alternator sets, for the production of electricity for use primarily in a building that normally utilizes electricity supplied by a public or private utility where that building is used primarily for activities other than the manufacture or production of goods.

The Tribunal agrees with both the appellant's representative and counsel for the respondent that the generators must meet certain conditions to be excluded from the exemption. The only issue is whether the electricity produced is primarily used in a building.

In *The Royal Bank of Canada v. The Deputy Minister of National Revenue for Customs and Excise*,² the Supreme Court of Canada found that generators used as a back-up system in a

2. [1981] 2 S.C.R. 139.

building were used in the manufacture or production of electricity. The Supreme Court of Canada, therefore, found that the generators were tax-exempt goods. Following this decision, amendments were made to the Act. Included in these amendments was paragraph 1(r) of Part XIII of Schedule III to the Act.

The appellant's representative relied on the above-mentioned decision in support of the appellant's argument that the exclusion was only intended for generators producing electricity for the electrical system in a building and not for equipment or other material situated within that building. He argued that the former should be excluded from the exemption and that the latter should not. The Tribunal does not accept this argument. It is of the view that the intent of the legislator was to exclude stand-by generators from the exemption, unless they are used in or within a building used primarily for activities related to the manufacture or production of goods, and that no distinction of the kind argued by the appellant's representative is to be made. The Tribunal believes that this interpretation is in accordance with the object of the legislation. The words in the legislation must be given their plain meaning.³

Accordingly, the Tribunal dismisses this part of the appeal.

Having considered the written submissions of the parties and the oral concession of counsel for the respondent, the Tribunal finds that the generators are construction materials and, therefore, qualify for a reduced rate of tax under section 4 of Part I of Schedule IV to the Act.

Accordingly, the Tribunal allows this part of the appeal.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

W. Roy Hines

W. Roy Hines
Member

Michèle Blouin

Michèle Blouin
Member

3. *Chateau Manufacturing Limited v. The Deputy Minister of National Revenue for Customs and Excise*, (1983), 6 C.E.R. 100 at 102, Federal Court of Appeal, File No. A-797-80, December 9, 1983.