CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, April 28, 1994

Appeal No. AP-92-369

IN THE MATTER OF an appeal heard on September 27, 1993, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated December 22, 1992, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

E & E SEEGMILLER LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-369

E & E SEEGMILLER LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the appellant paid moneys in error that were taken into account as taxes under the Excise Tax Act and, thus, is entitled to a refund of those moneys under section 68 of the Excise Tax Act. In resolving this issue, it must be determined whether the appellant is a manufacturer or producer of asphalt paving mixtures liable for federal sales tax on the sale price of the asphalt mixtures. The appellant argued that it is not the legal manufacturer or producer of the asphalt paving mixtures and, as such, is not liable for the consumption or sales tax. As the province of Ontario supplied some or all of the raw materials and exerted quality control over the asphalt being made, it was the legal manufacturer or producer of the goods in issue.

HELD: *The appeal is dismissed. As the appellant was the physical manufacturer or producer of the goods in issue and as the Ministry of Transportation of Ontario was not regarded as a manufacturer or producer, liability for federal sales tax was imposed on the appellant.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*September 27, 1993*
Date of Decision:	*April 28, 1994*
Tribunal Members:	*Lise Bergeron, Presiding Member* *Sidney A. Fraleigh, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Bart Singh, for the appellant* *Gilles Villeneuve, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-369

E & E SEEGMILLER LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member
SIDNEY A. FRALEIGH, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of two determinations of the Minister of National Revenue (the Minister). The issue in this appeal is whether the appellant is a manufacturer or producer of asphalt paving mixtures liable for federal sales tax (FST) on the sale price of the asphalt mixtures.

The appellant is a licensed manufacturer of asphalt paving mixtures. In contracts with the Ministry of Transportation of Ontario (the Ministry), asphalt cement and aggregates were regularly provided to the appellant by the Ministry. The appellant provided the labour and portable equipment to crush and screen the aggregates and to mix and lay the asphalt. Mixing was done on the job site.

In 1988 and 1990, the appellant filed applications for a refund of FST. The 1988 claim was for $317,858.30. It was the appellant's position that the province of Ontario should be regarded as the legal manufacturer of the asphalt paving mixtures and liable for FST on the materials used to produce the mixtures. By notice of determination, the application for refund was rejected, as the province of Ontario was a participant in a reciprocal taxation agreement. This was based on the former *Excise Tax Act*.[2] The appellant's objection was disallowed by a notice of decision on the basis that the liability to pay FST lies with the physical/licensed manufacturer of asphalt paving mixtures in cases where a customer supplies some of the materials for a supply and install contract.

The 1990 claim, made on the same basis as the 1988 claim, was for $177,894.76. The application for refund was rejected by the respondent for reasons cited in the earlier refund claim. This determination was made on the basis of the amended Act.[3] The appellant's objection was disallowed in a notice of decision for the same reasons cited in the earlier decision. E & E Seegmiller Limited then appealed both determinations to the Tribunal.

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1. R.S.C. 1985, c. E-15.
2. R.S.C. 1970, c. E-13.
3. *Supra*, note 1.

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Mr. Robert E. Weber, Secretary-Treasurer of E & E Seegmiller Limited, served as a witness for the appellant. He explained that the appellant owns and operates portable asphalt plants, which it leaves on site to make the asphalt needed for its highway construction. For most of the contracts covered by the refund claims, the Ministry supplied the asphalt cement (liquid asphalt) for the asphalt paving mixtures. For a number of contracts, Crown pits were made available by the Ministry for the supply of sand and gravel. Mr. Weber noted that the Ministry supplied the aggregates for the majority of the appellant's Ontario roadwork construction in 1985. When supplied, the appellant crushes and screens the aggregates to obtain the aggregate products necessary for the asphalt mix design. There are occasions, however, where the appellant purchases the necessary aggregates from an outside source.

On certain contracts covered by the refund claims, the asphalt paving mixtures also contained recycled asphalt. Mr. Weber testified that, in these cases, the existing highway was milled or planed, and the resulting material was incorporated into the new asphalt paving mixture. The recycled materials were owned by the province of Ontario.

Mr. Weber explained that a mix design is a blend of different sizes of stone and sand along with the asphalt cement. Before it can be laid, the asphalt paving mixture must be approved by the Ministry. It may recommend that certain aggregates be added to the mixture before it meets approval. After laying has commenced, the Ministry maintains a testing lab at the job site to ensure that the mixture meets the contract specifications. Mr. Weber explained that the Ministry takes core samples from the laid asphalt paving mixture and, if it does not meet the specifications, the appellant could be liable for a penalty. On occasion, the asphalt paving mixture must be removed and relaid.

When produced, the asphalt is delivered to a spreader and laid on the highway, with very little asphalt being stored. When the contract is completed, the asphalt plant is moved to the next job site if the required quantity of asphalt warrants the cost of relocation. When quantities do not warrant the move and a commercial supply is available, the appellant purchases the asphalt required.

During cross-examination, Mr. Weber indicated that, between 1985 and 1990, the appellant had approximately 24 contracts with the Ministry for road construction. On questions from the Tribunal, he added that the appellant also did road construction for the County of Victoria and the Township of Bangor. However, the refund claims only covered contracts with the Ministry. Mr. Weber testified that the Ministry provided the liquid asphalt on all of the contracts covered by the first refund claim and, except for three, all of the contracts covered by the second refund claim. In addition, for 20 of the 24 contracts, the aggregates were supplied from Crown pits.

Mr. Weber argued that the appellant is not a manufacturer or producer of asphalt, rather, it is engaged in the construction of highways. He asserted that the machinery used to make the asphalt is located on the job site like any other piece of construction equipment. On this basis, the appellant's situation is distinct from the cases cited by counsel for the respondent. When the province of Ontario supplies all the materials or only the asphalt cement for use with the appellant's equipment located on the construction site, the province of Ontario is the manufacturer of the asphalt mix. In addition, he argued that asphalt made and used on a job site is not taxable. Rather, the materials are taxable before they get to the job site.

The appellant's representative distinguished the circumstances under which the appellant made asphalt paving mixtures from those described in *Lahrmann Construction Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,[4] where the Tribunal found that the appellant in that case was a manufacturer or producer of asphalt paving mixtures. It was noted that, in that case, the appellant was dealing with the federal government, whereas the appellant in this case was dealing with the Ontario government, a participant in a reciprocal taxation agreement. In addition, the appellant in the *Lahrmann* case purchased asphalt cement without paying tax where, to the best of his knowledge, the province of Ontario paid tax on the asphalt cement that it supplied.

The appellant's representative argued that the province of Ontario was a legal person and, therefore, could be considered a manufacturer or producer as defined at subsection 2(1) of the Act. In support, he referred to departmental rulings[5] and to paragraph 13 of Excise Memorandum ET 207[6] for the proposition, as stated in the latter, that "[w]here an end user supplies materials to another person to be physically manufactured into taxable products for the end user, the end user is regarded, for sales tax purposes, as the manufacturer of the goods."

Arguing in the alternative, the appellant's representative noted that the sand and gravel are tax-exempt and that the province of Ontario paid tax on the asphalt cement. As the province is a person that provided some or all of the materials incorporated into the asphalt paving mixtures and is a participant in a reciprocal taxation agreement, then the province has satisfied its tax obligations. Reference was made to paragraph 10 of Excise Memorandum ET 404[7] which states that "[w]here goods other than printed matter are manufactured by a province for its own use, tax is payable on the materials only." As taxes owing have been paid, the appellant's representative argued that the consumption or sales tax paid by the appellant, for which refunds were requested, was paid in error.

At the outset, counsel for the respondent reminded the Tribunal of the numerous contradictions in the evidence presented on behalf of the appellant. He noted that it is not clear how many contracts the two refunds encompass, and for which of these contracts the province of Ontario provided the asphalt cement and for which it provided the aggregates.

Counsel for the respondent submitted that the issue in this appeal is whether the appellant is entitled to a refund under section 68.19 of the Act for taxes paid on the sale price of the asphalt paving mixtures that it made pursuant to the contracts with the province of Ontario. Counsel submitted that, under subsection 68.19(1) of the Act, the appellant would be entitled to a refund of the taxes paid with respect to the goods purchased by the province of Ontario. However, under subsection 68.19(2) of the Act, the appellant, as the supplier of the asphalt paving mixtures, is not entitled to the refund because the province of Ontario is a participant in a reciprocal taxation agreement with the federal government.

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4. Appeal No. 3016, July 30, 1990.
5. See, for example, Revenue Canada Ruling 1160/94, September 9, 1985.
6. Goods Manufactured or Produced for Own Use, Department of National Revenue, Customs and Excise, March 5, 1990.
7. Provincial Governments, Department of National Revenue, Customs and Excise, March 15, 1989.

Counsel for the respondent argued that the province of Ontario is not the legal manufacturer or producer of the asphalt paving mixtures under paragraph (*b*)[8] of the definition of "manufacturer or producer" under subsection 2(1) of the Act. Counsel noted that it only applies to any "person, firm or corporation." It was submitted that the province of Ontario is not a person, firm or corporation. In support of this proposition, counsel argued that the Crown was not included within the definition of "person[9]" under subsection 2(1) of the Act. In addition, section 17 of the *Interpretation Act*[10] states that "[n]o enactment is binding on Her Majesty ... except as mentioned or referred to in the enactment." Referring to the definition of "Her Majesty" as found in the same act, counsel argued that it includes the province of Ontario. As such, unless a provincial government is mentioned or referred to in paragraph (*b*) of the definition of "manufacturer or producer" under subsection 2(1) of the Act, it is not included. As an instance of where the province would be bound, counsel referred to section 9 of the Act which indicates that Part II of the Act is binding on Her Majesty. Further, when one compares the wording of paragraph 2(1)(*c*) of the Act, which refers to "any province," there is the implication that paragraph 2(1)(*b*) of the Act does not envisage a province under that definition of a manufacturer.

Counsel for the respondent argued that the appellant meets the traditional definition of a manufacturer as defined in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*,[11] in that it has given to the raw materials "new forms, qualities and properties or combinations" in making the asphalt paving mixtures. In the alternative, making asphalt paving mixtures is a production process as defined in *The Minister of National Revenue v. Enseignes Imperial Signs Ltée*,[12] in that something new was produced that can perform a function that could not be performed by the raw materials. Counsel argued that it is irrelevant that the asphalt mixtures were manufactured or produced on site. In support, counsel referred to *Pick-A-Mix Concrete Limited v. The Minister of National Revenue*,[13] where the Tribunal found that the appellant, as a manufacturer of custom-ordered concrete, was allowed a transportation deduction in determining the sale price of the concrete that was mixed at the construction site. In summary, counsel acknowledged that the appellant constructed highways, but that it was a manufacturer or producer of asphalt paving mixtures therefor.

The Tribunal notes that the issue in this appeal is not whether the appellant is entitled to a refund of taxes under section 68.19 of the Act. The appellant did not argue that it was entitled to a refund of those taxes, as it sold asphalt paving mixtures to the province of Ontario. Rather, the issue is whether the appellant paid moneys in error that were taken into account as taxes under the Act and, thus, is entitled to a refund of those moneys under section 68 of the Act. The appellant's representative argued that it is not the legal manufacturer or producer of the asphalt paving mixtures and, as such, is not liable for the consumption or sales tax.

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8. *"[M]anufacturer or producer" includes*
(b) any person, firm or corporation that owns, holds, claims or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name or for or on their behalf by others, whether that person, firm or corporation sells, distributes, consigns or otherwise disposes of the goods or not.
9. *"[P]erson" includes any body corporate or association, syndicate, trust or other body.*
10. R.S.C. 1985, c. I-21
11. [1968] S.C.R. 140.
12. (1990), 116 N.R. 235, Federal Court of Appeal, unreported, File No. A-264-89, February 28, 1990.
13. Canadian International Trade Tribunal, Appeal No. 3093, September 25, 1990.

Therefore, the moneys that it paid as taxes on the sale of those goods were paid in error. He further argued that the province of Ontario is liable for the tax as it was the legal manufacturer or producer of the goods in issue.

The appellant's representative argued that the province of Ontario, as a "person, firm or corporation," is the manufacturer or producer of the asphalt paving mixtures as it "owns, holds, claims or uses any patent, proprietary, sales or other right to goods being manufactured ... in their name or for or on their behalf by others." Specifically, he argued that the province of Ontario was a "person," as defined in the Act. However, the Tribunal believes that the province of Ontario does not fall within the terms "person, firm or corporation" as used in paragraph (*b*) of the definition of "manufacturer or producer" under subsection 2(1) of the Act.

As argued by counsel for the respondent, section 17 of the *Interpretation Act* requires that "Her Majesty" be referred to in an enactment for it to be binding thereon. The Tribunal interprets "Her Majesty" to include the Crown in right of a province.[14] The Tribunal believes that, unless the Act expressly states that its provisions are binding on Her Majesty, they are not.[15] The definition of "person" in the Act does not include a reference to Her Majesty and, therefore, the province of Ontario does not fall within that definition. In support of this proposition, the Tribunal notes that, under section 21.11 of the Act, it is stated that Part II.1 of the Act is binding on the Crown. As such, the word "person" in section 21.12 of the Act must be interpreted to include the Crown; otherwise, it would not. There is no provision similar to section 21.11 of the Act affecting Part VI of the Act, under which a consumption or sales tax is imposed on manufacturers or producers.

Where the province of Ontario has provided all of the raw materials for the appellant to manufacture or produce asphalt paving mixtures, the Tribunal believes that the finished product is not purchased by the province, nor did the property in the goods ever pass from the province to the appellant. In this regard, the Tribunal notes that, under section 45.1 of the Act, a person is deemed to have sold goods when they are manufactured or produced from any article or material supplied by another person. This provision, however, applies only to unlicensed manufacturers. As such, the provisions of subparagraph 50(1)(*a*)(i) of the Act would not apply to the appellant. Yet, at subparagraph 50(1)(*a*)(iii) of the Act, FST becomes payable, on manufactured or produced goods, by the manufacturer or producer when appropriated for its use. In this case, the appellant manufactured or produced asphalt paving mixtures that were appropriated by it for use in the construction of highways. As such, the appellant became liable for FST on asphalt paving mixtures made from materials supplied by the province of Ontario at the time that the asphalt paving mixtures were appropriated for use by the appellant.

The question of the tax liability of a physical manufacturer of asphalt paving mixtures, when part of the raw materials were supplied by the Crown, was addressed by the Tribunal in the *Lahrmann* decision. In that case, the appellant used gravel supplied at no cost by the Department of Public Works and purchased asphalt cement for the manufacture of asphalt paving mixtures for use in the construction of a part of the Trans-Canada Highway. The Minister found that the appellant in the *Lahrmann* case was the manufacturer or producer of the

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14. See *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61 at 70-71, where the Supreme Court stated: "I do not think that the definition itself establishes a limitation of the reference to 'Her Majesty' as being a reference only to the Crown in right of Canada."

15. *Ibid.* at 75.

asphalt paving mixtures and was required to pay tax on the sale price of the mixtures sold to the Department of Public Works. In dismissing the appeal, the Tribunal found that "the Deputy Minister was correct in finding that the appellant was, for the purposes of the Act, the manufacturer or producer of asphalt paving mixtures.[16]" Consistent with that finding, the Tribunal believes that E & E Seegmiller Limited was the manufacturer or producer of asphalt paving mixtures when part of the raw materials were supplied by the province of Ontario. As the manufacturer or producer, the appellant is liable for sales tax based on the sale price of the asphalt paving mixtures. The Tribunal does not distinguish between situations where the province of Ontario provided either the aggregates, asphalt cement or recycled asphalt.

Accordingly, the appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Charles A. Gracey
Charles A. Gracey
Member

16. *Supra*, note 4 at 9.