

Ottawa, Thursday, April 28, 1994

Appeal No. AP-93-048

IN THE MATTER OF an appeal heard on November 4, 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 February 19 and 26, 1993, with
respect to notices of objection served under section 81.17 of
the *Excise Tax Act*.

BETWEEN

STUART OLSON INDUSTRIAL CONTRACTORS INC.

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

Anthony T. Eyton
Anthony T. Eyton
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-048

STUART OLSON INDUSTRIAL CONTRACTORS INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of two determinations of the Minister of National Revenue. The appellant is a general contractor who was awarded a contract by Syncrude Canada Ltd. for the construction of an explosion-proof enclosure at its production facilities in Fort McMurray, Alberta. The goods in issue (precast concrete blast panels, structural steel, metal decking, waterproof membranes and reinforcing steel) were used in the construction of the explosion-proof enclosure. The issue in this appeal is whether the goods in issue are safety devices and equipment, or parts therefor, for use in the prevention of accidents in the manufacture or production of goods and, therefore, whether they qualify for a federal sales tax exemption under paragraph 1(d) or 1(l) 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 clearly shows that the goods in issue were designed and fabricated specifically to withstand a large explosive force. The goods in issue are devices, as they were designed or adapted for a special purpose, i.e. to perform various functions related to the acceptance of a large explosive force to protect the Syncrude Canada Ltd. production facilities and their contents. As such, the Tribunal is also of the view that the goods in issue incorporate a safety feature. The Tribunal, therefore, finds that the goods in issue are exempt from federal sales tax under paragraph 1(d) of Part XIII of Schedule III to the Excise Tax Act as safety devices sold to a manufacturer or producer for use by it in the prevention of accidents in the manufacture or production of goods.*

*Place of Hearing: Calgary, Alberta
Date of Hearing: November 4, 1993
Date of Decision: April 28, 1994*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Anthony T. Eyton, Member
Sidney A. Fraleigh, Member*

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

*Appearances: Douglas R. Densmore, for the appellant
Brian Tittmore, for the respondent*

Appeal No. AP-93-048

STUART OLSON INDUSTRIAL CONTRACTORS INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ANTHONY T. EYTON, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of determinations of the Minister of National Revenue (the Minister) dated June 25 and September 10, 1991, which rejected applications for refund of federal sales tax (FST) in the amount of \$100,050.75 and \$42,957.60, respectively. The appellant served notices of objection on July 30 and October 15, 1991. In a notice of decision dated February 26, 1993, the Minister vacated the first determination and approved an amount of \$11,355.95. In a notice of decision dated February 19, 1993, the Minister confirmed the second determination.

The appellant is a general contractor that was awarded a contract by Syncrude Canada Ltd. (Syncrude) for the construction of an explosion-proof enclosure at its production facilities in Fort McMurray, Alberta. Syncrude operates the largest synthetic crude oil production facility in the world. It mines oil sands from an open-pit mine, extracts the bitumen (raw oil) from the oil sands using steam and hot water, and upgrades the bitumen into synthetic crude oil. The upgrading of bitumen involves a number of highly specialized procedures which present a high-risk environment conducive to fires and explosions.

At the hearing, the appellant was represented by Mr. Douglas R. Densmore. Mr. Donald E. Morse, a structural engineer employed by Lafarge Construction Materials, the company that fabricated and supplied the precast concrete wall panels used in the construction of the explosion-proof enclosure, and Mr. Oscar Rutar, Project Manager for Stuart Olson Construction Inc., testified on behalf of the appellant. They explained that the goods in issue (precast concrete blast panels, structural steel, metal decking, waterproof membranes and reinforcing steel) were designed and fabricated according to engineering plans and specifications to perform various functions related to the acceptance of a large explosive force. The goods in issue were used in the construction of an explosion-proof enclosure, which was a free-standing, open air, blast-resistant barrier surrounding a plant within the Syncrude production facility. The plant contained both equipment and personnel whose function was to control the upgrading facilities producing synthetic crude oil. In the event of an explosion, the plant personnel would be required to shut down certain systems, redirect the movement of materials throughout the production facility and assist in fire-fighting operations. Failure to do so could not only result in immediate injury to personnel and damage to property, but also have secondary consequences, e.g. the release of lethal gases and liquids into the environment.

The issue in this appeal is whether the goods in issue are safety devices and equipment, or parts therefor, for use in the prevention of accidents in the manufacture or production of

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

goods and, therefore, whether they qualify for an FST exemption under paragraph 1(d) or 1(l) of Part XIII of Schedule III to the Act.

Mr. Densmore argued that the components, and not the explosion-proof enclosure itself, should be exempted from FST as safety devices. Tax was paid when each component was purchased. He argued that, to determine whether goods qualify for an exemption, one must look at their use. He argued that, since their overall function was to make up an explosion-proof enclosure which was clearly for use in the prevention of accidents, the goods in issue should be exempt from FST. Relying on the Federal Court of Appeal decision in *The Deputy Minister of National Revenue for Customs and Excise v. Steel Company of Canada Limited*,² Mr. Densmore submitted that subsequent incorporation into realty does not alter the fact that the goods qualify for exemption as safety devices. Since the Minister found, in the first notice of decision, that the blast-proof doors and roof hoods were exempt as safety devices, Mr. Densmore argued that the goods in issue should also be exempt because the safety equipment cannot function independently of these goods. Because of their use and design, the goods in issue should be considered safety devices.

Counsel for the respondent submitted that, when purchased, the materials were not safety devices and that, once put into place, they lost their identity as goods and became part of real property, as they formed part of the structure erected on site. He argued that the determination as to whether goods are to be taxed must be made at the point of sale. Therefore, the goods must be considered in light of their nature and use at that point. He submitted that, at the point of sale, the goods in issue were not safety devices; rather, they were materials used in the construction of an enclosure. Except for the blast-proof doors and roof hoods as well as fire alarms, all other goods could only serve their safety function when combined in a specific manner to create the enclosure. At the time of sale, the enclosure did not exist, and the materials were not part of the enclosure.

For the purposes of this appeal, the relevant exempting provisions are found at paragraphs 1(d) and 1(l) of Part XIII of Schedule III to the Act, which state as follows:

1. *All the following:*

(d) *safety devices and equipment sold to or imported by manufacturers or producers for use by them in the prevention of accidents in the manufacture or production of goods.*

(l) *parts for goods described in paragraphs (a) to (k).*

Both the appellant and the respondent have relied on the Tariff Board decision in *Pacific Petroleum Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*³ in support of their arguments. In that case, the Tariff Board had to determine whether the goods used as fire-fighting equipment installed or placed at various locations in the applicant's premises, which included, for example, a crude oil refinery and a natural gas cleaning plant, were safety devices and equipment used in the prevention of accidents. In order to determine this issue, the Tariff Board felt that it needed to answer a number of questions. The first question related to the nature of the applicant's activity. In the present case, this issue is not in dispute. Both the appellant and the respondent agreed that Syncrude's status is that of a manufacturer or producer engaged in the manufacture or production of synthetic crude oil.

In the *Steel Company* case, the Federal Court of Appeal considered whether goods were exempt under paragraph 1(a) of Part XIII of Schedule III to the Act as "machinery and apparatus

2. 83 D.T.C. 5301, Federal Court of Appeal, File No. A-239-82, June 13, 1983.

3. (1977), 6 T.B.R. 459.

sold to or imported by manufacturers or producers for use by them directly in the manufacture or production of goods" or under paragraph 1(l) as parts therefor. The Federal Court of Appeal stated that "[t]he expression 'for use' clearly envisages ... that the question of liability for an exemption from sales tax is to be answered before the goods are utilized," and that there is "nothing in the provisions of the Act expressly limiting the exemption so as to exclude from it goods which subsequently became attached to realty."⁴ The Federal Court of Appeal concluded that the Tariff Board had not erred in finding that columns, which had been designed specifically as parts of an overhead crane system, were parts of machinery used directly in the production of goods, and, therefore, not subject to sales tax under paragraph 1(l) of Part XIII of Schedule III to the Act.

In the present case, the Tribunal is of the view that the evidence clearly shows that the goods in issue were designed and fabricated specifically to withstand a large explosive force. In *Foundation Comstock Joint Venture v. The Deputy Minister of National Revenue for Customs and Excise*,⁵ the Tariff Board stated that "[s]afety devices are commonly considered to be those devices which incorporate a safety feature of some sort, for example, the construction worker's 'hard hat,' steel-toed boots, safety goggles."⁶ Relying on this definition, the Tariff Board, in *Pacific Petroleum*, stated that, to be exempt, it must be determined that the product is a device or piece of equipment incorporating a safety feature.⁷ The New Lexicon Webster's Dictionary of the English Language⁸ defines the word "device" as "something designed or adapted for a special purpose." In this case, the Tribunal is of the view that the goods in issue are devices, as they are goods which were designed or adapted for a special purpose. They were designed to perform various functions related to the acceptance of a large explosive force in order to protect the Syncrude production facilities and their contents. As such, the Tribunal is also of the view that the goods in issue incorporate a safety feature.

The Tribunal, therefore, finds that the goods in issue are exempt from FST under paragraph 1(d) of Part XIII of Schedule III to the Act as safety devices sold to a manufacturer or producer for use by it in the prevention of accidents in the manufacture or production of goods.

Accordingly, the appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton

Anthony T. Eyton
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

4. *Supra*, note 2 at 5303.

5. (1970), 5 T.B.R. 32.

6. *Ibid.* at 35.

7. *Supra*, note 3 at 467.

8. Encyclopedic ed. (New York: Lexicon Publications, 1987) at 261.