



Ottawa, Tuesday, May 17, 1994

Appeal No. AP-93-067

IN THE MATTER OF an appeal heard on November 17, 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 April 8, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

SIMSON-MAXWELL

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Anthony T. Eyton

Anthony T. Eyton
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-067

SIMSON-MAXWELL

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The goods in issue are used to repair standby generator sets (20 kW to 500 kW) installed in buildings as a means to produce electricity in case of an emergency or a power outage. The purchasers paid federal sales tax on the goods in issue, and the appellant remitted this tax. The issue in this appeal is whether parts for goods, which are themselves taxable, may be exempt from federal sales tax under paragraph 1(l) of Part XIII of Schedule III to the Excise Tax Act.

HELD: *The appeal is dismissed. The Tribunal agrees with counsel for the respondent that, once the goods in paragraph 1(r) of Part XIII of Schedule III to the Excise Tax Act were removed from paragraph 1(a), they could no longer be considered to be included in paragraph 1(a). The Tribunal also agrees with counsel for the respondent that paragraph 1(l) refers to parts that are properly described in paragraphs 1(a) to (k). Since standby generators are no longer exempt because they are now in paragraph 1(r), the Tribunal is of the opinion that any reference in paragraph 1(l) to paragraph 1(a) could not refer to a part that would be a part for a product in paragraph 1(r) and, thus, could not be said to include the goods in issue.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: November 17, 1993
Date of Decision: May 17, 1994*

*Tribunal Members: Anthony T. Eyton, Presiding Member
Arthur B. Trudeau, Member
Sidney A. Fraleigh, Member*

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

*Appearances: Michael Kaylor, for the appellant
Pamela D. Owen-Going, for the respondent*

Appeal No. AP-93-067

SIMSON-MAXWELL

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
ARTHUR B. TRUDEAU, 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 a decision of the Minister of National Revenue (the Minister) dated April 8, 1993.

The appellant is a licensed manufacturer and a licensed wholesaler which sells generator parts. The goods in issue are used to repair standby generator sets (20 kW to 500 kW) installed in buildings as a means to produce electricity in case of an emergency or a power outage. The buildings in which they are used include some buildings in remote locations serviced by B.C. Hydro. The purchasers paid federal sales tax (FST) on the goods in issue, and the appellant remitted this tax.

The appellant applied for a refund of FST in the amount of \$160,000 on May 15, 1992. The respondent issued a notice of determination rejecting the refund application. The appellant served a notice of objection on September 9, 1992. By decision dated April 8, 1993, the Minister confirmed the determination on the basis that the standby generators are goods that come within paragraph 1(*r*) of Part XIII of Schedule III to the Act. Therefore, the parts were not "parts for goods described in paragraphs (*a*) to (*k*)," as provided for in paragraph 1(*l*) and, thus, not exempt from FST under section 1 of Part XIII of Schedule III to the Act.

The issue in this appeal is whether parts for goods, which are themselves taxable, may be exempt from FST under paragraph 1(*l*) of Part XIII of Schedule III to the Act.

The relevant portions of section 1 of Part XIII of Schedule III to the Act are as follows:

PART XIII

PRODUCTION EQUIPMENT, PROCESSING MATERIALS AND PLANS

1. All the following:

(a) machinery and apparatus sold to or imported by manufacturers or producers for use by them primarily and directly in

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

- (i) *the manufacture or production of goods,*
 - (ii) *the development of manufacturing or production processes for use by them, or*
 - (iii) *the development of goods for manufacture or production by them,*
 - (l) *parts for goods described in paragraphs (a) to (k),*
- but not including:*
- (r) *... 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 appellant accepted the facts set out in the respondent's brief and, thus, no witnesses were called at the hearing. Counsel for the appellant began his argument by submitting that the generators in which the goods in issue are used are, in the ordinary sense of the phrase, "machinery and apparatus" and that, but for paragraph 1(r) of Part XIII of Schedule III to the Act, they would be exempt from FST under Part XIII. Counsel suggested that paragraph 1(r) did not affect the status of standby generator sets as machinery, but rather simply removed such goods from the benefit of the exemption under paragraph 1(a).

Counsel for the appellant submitted that, if Parliament had wanted to ensure that standby generator sets would not be considered to be machinery, then it would have been necessary for Parliament to use either a deeming provision or a specific definition, which it did not do. Counsel compared the words used in section 1 of Part XIII of Schedule III to the Act to other provisions in the Act. For instance, counsel submitted that, under section 1 of Part V of Schedule III to the Act, food and drink for human consumption "other than" items such as wine, spirits and beer are exempted. He argued that, notwithstanding their exclusion from the exemption, these items do not cease to have their status as drink for human consumption.

With respect to the wording of paragraph 1(l) of Part XIII of Schedule III to the Act, counsel for the appellant highlighted the fact that Parliament did not use the words "parts for the tax-exempt goods described in paragraphs (a) to (k)" as further support for the proposition that the only effect of paragraph 1(r) was to render standby generators taxable, so that they are no longer tax-exempt goods described in paragraph 1(a). He also submitted that *Manitoba Hydro v. The Deputy Minister of National Revenue for Customs and Excise*,² cited by counsel for the respondent, was distinguishable on the basis that the goods in issue in that case were immovables and, thus, outside the purview of the Act, while the goods in issue in this case are movables that come within the purview of the Act.

Counsel for the respondent submitted that the Tribunal must not only look at the meaning of section 1 of Part XIII of Schedule III to the Act in its entirety but also consider the issue before it in the context of the amendment to the section by which paragraph 1(r) was introduced. More specifically, counsel referred to the decision of the Supreme Court of Canada in *The Royal Bank of Canada v. The Deputy Minister of National Revenue for Customs and Excise*.³

Counsel for the respondent argued that the purpose of paragraph 1(r) of Part XIII of Schedule III to the Act was to exclude from paragraph 1(a), and thus from the exemption, the specific goods set out in paragraph 1(r). Once this is done, she submitted, it follows that such goods are no longer included in paragraph 1(a), and, therefore, one cannot properly say that

2. (1970), 5 T.B.R. 71.

3. [1981] 2 S.C.R. 139.

standby generators are included in paragraph 1(a) because they are now included in paragraph 1(r). Turning to paragraph 1(l), counsel submitted that the intent of this paragraph is to refer to parts that are properly described in paragraphs 1(a) to (k). Since standby generators are no longer exempt because they are now in paragraph 1(r), counsel stated that any subsequent reference to paragraph 1(a), such as in paragraph 1(l), could not possibly refer to a part that would be a part for a product in paragraph 1(r).

Counsel for the respondent indicated that the only case, to her knowledge, dealing with the interpretation of section 1 of Part XIII of Schedule III to the Act was *Manitoba Hydro*. That case, counsel submitted, not only looked at the nature of the goods in issue but also at how to interpret the predecessor to paragraph 1(l), which was then paragraph 1(o). Counsel submitted that the Tariff Board indicated that, before one could have recourse to paragraph 1(o), one must be able to show that the "apparatus" or goods in issue fall under paragraph 1(a), and if the "apparatus" or goods cannot be included under paragraph 1(a), then paragraph 1(o) is inoperative with respect to such goods.

Finally, counsel for the respondent submitted that the intent of the amendments should be seen as attempting to remove from the exemption the entire article, including the parts therefor, because, otherwise, it would be possible to avoid the exclusion from the exemption by taking goods apart and having them exempted on the basis of their parts. This, she submitted, could not have been the intent of Parliament.

In reply, counsel for the appellant submitted again that the Tribunal must respect the words used by Parliament to express its intent. He argued that Parliament could have done one of two things if it had wished to eliminate the benefit of the exemption for the parts for standby generators. First, Parliament could have drafted paragraph 1(l) to read "parts for the tax-exempt goods described in paragraphs (a) to (k)." Second, Parliament could have, in addition to paragraph 1(r), made a provision for parts so that the phrase "but not including" would have, in effect, read with respect to paragraph 1(r) "standby generator sets and parts therefor." As Parliament did neither of these things, nor changed the wording of paragraph 1(a), counsel argued that all Parliament has done through the phrase "but not including" was change the status of subsequently enumerated goods for FST purposes only and, thus, the exemption for parts remains.

The Tribunal is of the view that the current wording of section 1 of Part XIII of Schedule III to the Act cannot bear the interpretation urged on it by counsel for the appellant. The Tribunal notes that, in the *Royal Bank* decision, the Supreme Court of Canada found that generators used as a back-up system in a building were used in the manufacturing or production of a product, namely, electricity, and thus were tax-exempt goods. Following this decision, amendments were made to the Act, which included the introduction of paragraph 1(r).

The Tribunal agrees with counsel for the respondent that, once the goods in paragraph 1(r) of Part XIII of Schedule III to the Act were removed from paragraph 1(a), they could no longer be considered to be included in paragraph 1(a). The Tribunal also agrees with counsel for the respondent that paragraph 1(l) refers to parts that are properly described in paragraphs 1(a) to (k). Since standby generators are no longer exempt because they are now in paragraph 1(r), the Tribunal is of the opinion that any reference in paragraph 1(l) to paragraph 1(a) could not refer to a part that would be a part for a product in paragraph 1(r) and, thus, could not be said to include the goods in issue. Therefore, the appeal must fail. The Tribunal finds support for these conclusions in the reasoning in the *Manitoba Hydro* case, with which the Tribunal agrees.

Further, the Tribunal is of the view that the rationale for its decision in this case is also supported by the argument that it would be possible to avoid the exclusion from the exemption that was intended by the introduction of paragraph 1(*r*) simply by taking goods that come within paragraph 1(*r*) apart and having such goods exempted on the basis of their parts. It is difficult for the Tribunal to see how such a result could have been intended by Parliament.

Accordingly, the appeal is dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member