CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, November 8, 1994

Appeal No. AP-93-266

IN THE MATTER OF an appeal heard on May 5, 1994, 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 12, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

CONSTRUCTION PRODUCTS INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal refers the matter back to the Minister of National Revenue for reconsideration in a manner consistent with the Tribunal's decision.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-93-266

CONSTRUCTION PRODUCTS INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant carried on the business of manufacturing concrete-forming systems used by contractors for the construction of concrete buildings and structures. The systems in issue were composed of numerous components, either welded or bolted together, in unique arrangements to create the form required by a contractor to construct the desired concrete structure. A small number of individual components were also sold or rented as replacement parts for systems that had previously been purchased. The issue in this appeal is whether the $2,000 threshold for exemption under paragraph 1(b) of Part XVI of Schedule III to the Excise Tax Act applies to an entire concrete-forming system or to each individual component comprising a system.

HELD: *The appeal is allowed. The Tribunal finds that the appellant and a second company, Economy Forms Corporation (EFCO), represented a single business entity and that EFCO was the legal manufacturer of the forming systems. The Tribunal is satisfied that EFCO's customers were purchasing highly engineered forming systems and not a mere collection of individual components that comprise a system. Therefore, the Tribunal finds that the $2,000 threshold for exemption under paragraph 1(b) of Part XVI of Schedule III to the Excise Tax Act applies to an entire concrete-forming system.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 5, 1994*
Date of Decision:	*November 8, 1994*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Arthur B. Trudeau, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*W. Jack Millar, for the appellant* *Brian Tittemore, for the respondent*

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Appeal No. AP-93-266

CONSTRUCTION PRODUCTS INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ARTHUR B. TRUDEAU, Member
LISE BERGERON, 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) in respect of the period from March 23, 1986, to September 30, 1989. By notice of assessment dated March 30, 1990, the Minister assessed the appellant for unpaid federal sales tax (FST), including interest and penalty, in the amount of $502,894.78.

At all relevant times, the appellant carried on the business of manufacturing concrete-forming systems used by contractors for the construction of concrete buildings and structures. The systems in issue were composed of numerous components, either welded or bolted together, in unique arrangements to create the form required by a contractor to construct the desired concrete structure. A small number of individual components were also sold or rented as replacement parts for systems that had previously been purchased. Considering itself exempt from FST pursuant to paragraph 1(*b*) of Part XVI of Schedule III to the Act (paragraph 1(*b*) of the Act), the appellant did not pay FST in respect of any system or component with a sale price in excess of $2,000.

The appellant was assessed on the basis that the $2,000 threshold for exemption under paragraph 1(*b*) of the Act applies to the sale price of the individual components comprising a system rather than to the sale price of the entire system. A notice of objection was served on June 27, 1990, and on July 12, 1993, the Minister issued a notice of decision disallowing the objection and confirming the assessment. The assessment was then appealed to the Tribunal.

The issue in this appeal is whether the $2,000 threshold for exemption under paragraph 1(*b*) of the Act applies to an entire concrete-forming system or to each individual component comprising a system.

The relevant provisions of the Act state:

> *50. (1) There shall be imposed, levied and collected a consumption or sales tax ... on the sale price or on the volume sold of all goods*
> *(a) produced or manufactured in Canada*
> *(i) payable ... by the producer or manufacturer.*

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

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51. (1) The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III.

Paragraph 1(*b*) of the Act provides as follows:[2]

SCHEDULE III

PART XVI

CONSTRUCTION EQUIPMENT

1. The following goods ... where the sale price by the Canadian manufacturer or the duty paid value of the imported article exceeds two thousand dollars per unit:
(b) equipment designed for use directly in the preparation, placing, paving, laying, finishing or spreading of concrete, mortar or asphalt; attachments for the foregoing.

In addition, subsection 52(3) of the Act provides that where goods that were manufactured or produced in Canada are leased, or the right to use the goods is sold by the manufacturer or producer, the goods shall be deemed to have been sold and the sale price of the goods shall be deemed to be equal to the sale price that would have been reasonable in the circumstances if the goods had been sold at that time.

The appellant's first witness was Mr. Bernie J. Savard who was, at the time of the assessment, Vice-President and General Manager of Economy Forms Corporation (EFCO). He was also an officer of a related company, Construction Products Inc., the appellant. In that capacity, Mr. Savard was in charge of engineering, manufacturing operations and marketing. In 1991, the two companies, the appellant and EFCO, merged to create Economy Forms, Ltd., of which Mr. Savard is presently President and General Manager.

In defining the corporate relationship prior to the merger, Mr. Savard told the Tribunal that the appellant's shares were owned by EFCO and that EFCO's shares were owned by a holding company called Wilian Holding Company. He explained that the directors of the holding company were also directors of both the appellant and EFCO.

Mr. Savard said that he was in charge of the day-to-day operations of both the appellant and EFCO. In that capacity, all employees reported to him directly. He explained that all management personnel overseeing both companies, including the production managers, plant superintendent and foremen, as well as all engineers, were employed by EFCO. The unionized "hourly employees" were employed by the appellant.

It was EFCO's responsibility to determine the concrete-forming systems to be manufactured and the appellant's responsibility to manufacture those systems. The appellant only manufactured to EFCO's orders and only sold finished forms to EFCO. The price charged to EFCO by the appellant for a form was determined by the cost of manufacturing the form plus 5 percent. Mr. Savard told the Tribunal that no sales invoice was generated with respect

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2. For the assessment period prior to January 1, 1988, that portion of section 1 of Part XVI of Schedule III to the Act preceding paragraph (*a*) stated: "The following goods ... where, in the opinion of the Minister, the fair sale price by the Canadian manufacturer or the fair duty paid value of the imported article exceeds two thousand dollars per unit." Counsel for both parties agreed that the legislative change was without effect to this appeal.

to a sale. Rather, an internal charge was calculated monthly with no payment being made between the companies.[3] Profits generated from the sale and lease of forms were allocated between the two companies at the end of the year and distributed to the respective shareholders. Mr. Savard went on to explain that both companies worked out of the same premises that were identified by an EFCO sign; the premises were owned by EFCO, which, together with the equipment, were insured by EFCO; only EFCO had a telephone number and listing; and though EFCO and the appellant had separate bank accounts, the signing officers for both accounts were EFCO employees.

Mr. Savard told the Tribunal that EFCO designs concrete-forming systems to meet the specific requirements of contractors. The forms are used to produce cast-in-place concrete for the construction of various buildings and structures. Mr. Savard guided the Tribunal through EFCO brochures and photographs showing forming systems for bridges, columns, stadiums, walls, buildings, culverts and tunnels. He confirmed that a contractor would purchase or lease an entire forming system for a specified price. EFCO only sells individual components of a forming system when a contractor needs a replacement part for a previously purchased system. FST was charged and remitted on the sale of individual components with a sale price of less than $2,000.

A forming system is assembled from individual components according to engineering drawings created by EFCO. Many of the components are of a standard size, facilitating reuse, and are kept in inventory for that purpose. The components are either welded or bolted together to create a form, which is completely assembled and tested at EFCO's premises. When satisfied that a form is properly engineered, it is dismantled into sections of maximum size, which is dictated by shipping limitations, and moved to the site.[4] As an illustration, Mr. Savard referred to a wall-forming system comprised of between 50 and 70 components that would be shipped to the site in four sections. At the work site, the forming system is assembled by the customer with supervision by EFCO. When a form is leased, it is returned to EFCO at the expiry of the lease. There, it is disassembled into its component parts, which are cleaned and refurbished for reuse.

To illustrate the documentation associated with a typical sale, Mr. Savard referred the Tribunal to Exhibit A-6. The purchase order from Dynatec Mining Limited, dated June 26, 1986, identified the vendor as EFCO and the goods as a "20' High X 13'-0" Dia Mine Shaft Form - Blast proof construction." The purchase order indicated the single price of $33,150 for the form. The bill of lading gave a detailed breakdown of the various components comprising the forming system. Mr. Savard confirmed, however, that the form was shipped in large sections comprising several components, many of which were welded together. He told the Tribunal that an invoice often lists the various components comprising a form. Such information, he explained, allows a purchaser to order replacement parts and to calculate the total weight of the forming system as the aggregate of the weights of the individual components comprising the system. He reiterated that EFCO negotiates a single price for a forming system. It was noted that this transaction formed part of the assessment.

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3. However, during cross-examination, Exhibit B-2 was introduced. Exhibit B-2, which has an EFCO letterhead, indicates that it is an invoice from the appellant to EFCO for EFCO records only. The document, dated November 11, 1988, identifies the components that comprise a wall-forming system sold to Lonco Construction.

4. Approximately 20 percent of the forming systems are shipped to the site fully assembled.

Reference was made to Exhibit A-7 to illustrate a typical lease agreement. The bill of lading and lease value notice listed the various components of the forming system. In addition, the latter indicated the value of the various components. Mr. Savard explained that these values are used to calculate the rental rate of the forming system and to identify the replacement cost of components not returned or destroyed. The invoice indicated the period of rental, the total value of the forming system at $23,786.95, the rental rate per day and the amount of $2,207.43 as the cost of renting the system. It was confirmed that this transaction formed part of the assessment.

Mr. Savard also referred the Tribunal to a tax ruling of a tax interpretations officer of the Excise Branch of the Department of National Revenue (Revenue Canada) with regard to prefabricated steel forms valued at approximately $11,000 each. The substance of the ruling was that the forms were exempt from FST under paragraph 1(*b*) of the Act. Mr. Savard told the Tribunal that FST was not charged on the prefabricated steel forms as a result of the tax interpretation and that Revenue Canada subsequently assessed the appellant for more than $60,000 in respect of these forms.

The respondent's witness was Ms. Johanna Husslage, who conducted the audit of the appellant. After reviewing the notice of assessment, she explained that documents internal to the appellant and EFCO, such as Exhibit B-2,[5] were used to establish the appellant's tax liability. Ms. Husslage explained that she reviewed the itemized list of components comprising a forming system that had been sold or leased. Those components valued at less than $2,000 were included in the assessment. She stated that, because these prices were between EFCO, the marketing company, and its customer, a contractor, the listed prices were discounted to determine the tax liability of the appellant, the manufacturer, in its sales to EFCO. During cross-examination, Ms. Husslage explained why the tax ruling with respect to the prefabricated steel forms was disregarded.

In argument, counsel for the appellant asserted that there has been no sale of forming systems between the appellant and EFCO. After reviewing the facts, it was submitted that EFCO exercises dominant control over the appellant and that these two companies are, in fact, a single business entity.[6] Counsel argued that the real transaction was between EFCO and its customers, the contractors.

Believing that the respondent has concluded that EFCO sells only collections of individual components and not forming systems, counsel for the appellant submitted that making forming systems was manufacturing.[7] As EFCO exercises control over the entire manufacturing operation, it is the legal manufacturer. In addition, EFCO would qualify as the legal manufacturer of the forming systems under paragraph (*f*) of the definition of "manufacturer or producer" at subsection 2(1) of the Act.

In determining what is being sold or leased, counsel for the appellant contended that the purchase orders and leases between the contractors and EFCO must be considered. Referring to Exhibits A-6, A-7 and B-1, counsel noted that the contractors have contracted for a mine shaft

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5. *Supra*, note 3.

6. In support of this proposition, counsel for the appellant referred to *TWC Furniture Ltd. v. The Minister of National Revenue* (1988), 13 T.B.R. 474; and *The Geo. Cluthé Manufacturing Company Limited v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. 3031, June 5, 1989.

7. *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*, [1968] S.C.R. 140.

form, a plate girder forming system and "EFCO Lite Wall Forms," respectively. It was submitted that the contractors are purchasing or leasing concrete-forming systems and not collections of individual components that have been organized into a functional system.[8] In addition, the individual components have no utility by themselves.

Counsel for the respondent contended that it is irrelevant whether the transaction between the appellant and EFCO or the transaction between EFCO and its customers is considered in determining tax liability. The key issue is whether the components or the forming systems must be used to determine whether the $2,000 threshold for exemption under paragraph 1(*b*) of the Act has been met.

Counsel for the respondent submitted that the individual components are unique in and of themselves and that they should not be viewed as components of a greater whole. Many of the components are standard inventory items that can be used in several applications. As such, they do not become a permanent part of one particular system that is sold or leased. In addition, they have a value separate from that derived from their role in a concrete-forming system. Therefore, the components should be considered in determining whether the $2,000 threshold for exemption has been met.

At the outset, the Tribunal notes that counsel for the respondent acknowledged that the assessment with respect to the sale of concrete-forming systems to Canadian Electrolytic Zinc Limited, under alleged tax-exempt circumstances, should be vacated. As such, counsel consented to have the assessment referred back to the Minister for reconsideration and reassessment on that basis.

The question at issue before the Tribunal is narrow, in that it must be determined whether the sale price of the concrete-forming systems or the individual components comprising these systems must be used to determine whether the $2,000 threshold for exemption under paragraph 1(*b*) of the Act has been met. It was not an issue between the parties whether the other conditions of paragraph 1(*b*) of the Act have been met and, upon consideration, the Tribunal is satisfied that they have been met.

In resolving the issue in this appeal, the Tribunal believes that it must determine what is being sold or leased by a manufacturer or producer to attract FST. Once that question is answered, it is possible to determine whether the article is exempt under paragraph 1(*b*) of the Act. Furthermore, the Tribunal believes that these questions must be determined as of the date on which the article was sold or leased.[9]

In recapitulation, counsel for the appellant argued that no sale or lease occurred between EFCO and the appellant, as they constitute a single business entity. It was submitted, therefore, that the Tribunal must consider the transactions between EFCO and its customers, the contractors, in determining what is being sold or leased.

In considering whether EFCO and the appellant constitute a single business entity, the Tribunal paid particular attention to the "actual transactions that took place[10]" between the two companies. The resolution of this issue is largely a question of fact. Based on the evidence,

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8. *W.T. Hawkins Limited v. The Deputy Minister of National Revenue for Customs and Excise*, [1958] Ex. C.R. 152, affirming (1957), 2 T.B.R. 10.
9. *Ibid.*
10. *His Majesty the King v. Leon L. Plotkins*, [1938-39] C.T.C. 138 (Ex. Ct.) at 145.

the Tribunal is satisfied that EFCO and the appellant did constitute a single business entity. In reaching this conclusion, the Tribunal is satisfied that EFCO exercised sufficient direction and control over the appellant's operations for the latter company to be considered a mere agent of the former company. For instance, there was common ownership and directorship between the two companies; the appellant's day-to-day operations were managed by EFCO personnel; the appellant only manufactured forms to EFCO's orders; no payment was made between the two companies and profits were distributed between the two companies at the end of the year; the appellant's bank account was controlled by EFCO personnel; and the premises and all equipment were owned and insured by EFCO. As EFCO and the appellant constituted a single business entity, and the relationship between them is properly characterized as that of principal and agent as opposed to purchaser and vendor, no sale occurred between these two companies. As such, the only true sale or lease occurred between EFCO and its customers, the contractors. It must be determined, therefore, what was sold or leased by EFCO to the contractors.

The Tribunal received sufficient evidence to be satisfied that contractors purchased or leased highly engineered concrete-forming systems to meet their specific requirements to produce cast-in-place concrete for the construction of various buildings and structures.[11] Contrary to the perspective advocated by counsel for the respondent, the Tribunal does not believe that what was being sold or leased was a mere collection of individual components that comprised a system. Though documentation associated with a sale or lease agreement itemized the components comprising a forming system, the Tribunal is satisfied by the evidence that such information was provided for reasons other than identifying the subject of the transaction. Therefore, the Tribunal believes that the $2,000 threshold for exemption under paragraph 1(*b*) of the Act applies to an entire concrete-forming system.

Accordingly, the appeal is allowed. The Tribunal refers the matter back to the Minister for reconsideration in a manner consistent with the Tribunal's decision.

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11. See, for instance, Exhibits A-6, A-7 and B-1.