

Ottawa, Tuesday, September 20, 1994

Appeal No. AP-93-254

IN THE MATTER OF an appeal heard on May 19, 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 June 24, 1993, with respect to a notice
of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BARTON TUBES LIMITED

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

Raynald Guay

Raynald Guay

Member

Charles A. Gracey

Charles A. Gracey

Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-254

BARTON TUBES LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue dated June 16, 1989, rejecting an application for a refund of federal sales tax in the amount of \$82,134.97 paid on sales of goods described as plain carbon and low-alloy-resistance welded steel tubing. The issue in this appeal is whether the steel tubing qualifies as construction materials under Schedule IV to the Excise Tax Act and is, therefore, taxable at a lower rate of federal sales tax under paragraph 50(1.1)(b) of the Excise Tax Act. If the steel tubing qualifies as construction materials, then it must be determined whether the appellant is entitled, under section 68 of the Excise Tax Act, to a refund of the difference between the amount of federal sales tax that it paid and the amount that it would have paid had it applied the lower rate applicable to construction materials.

HELD: *The appeal is allowed. In the Tribunal's view, the steel tubing in issue qualifies as construction materials under section 16 of Part I of Schedule IV to the Excise Tax Act as tubing designed for use in other construction and is, therefore, taxable at a lower rate under paragraph 50(1.1)(b) of the Excise Tax Act.*

The Tribunal believes that the appellant intended to produce the steel tubing in issue for particular uses, that is, for constructing fences, greenhouses, irrigation systems in greenhouses or TV towers. Further, the Tribunal considers that these uses are included within the scope of the phrase "other construction" in section 16 of Part I of Schedule IV to the Excise Tax Act. Since the steel tubing qualifies as construction materials and since the appellant should therefore have paid federal sales tax at a lower rate, the Tribunal is of the view that the federal sales tax paid by the appellant at the general rate applicable to all goods was paid in error. Therefore, the appellant is entitled, under section 68 of the Excise Tax Act, to a refund of the difference between the amount of federal sales tax that it paid and the amount that it would have paid had it applied the lower rate applicable to construction materials.

Although the Tribunal is convinced that the steel tubing in issue qualifies as construction materials under section 16 of Part I of Schedule IV to the Excise Tax Act, it finds that the steel tubing also qualifies as construction materials under section 21 of Part I of Schedule IV to the Excise Tax Act since it is fabricated metal for structures.

As the appellant's representative and counsel for the respondent were unable to confirm that the appellant's refund application relates only to federal sales tax paid in the two-year period prior to the filing of its application, the Tribunal refers the matter back to the Minister of National Revenue for confirmation of the amount of the refund.

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 19, 1994
Date of Decision: September 20, 1994

Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Raynald Guay, Member
Charles A. Gracey, Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Janet Rumball

Appearances: Bart Singh, for the appellant
Cathy Doolan, for the respondent

Appeal No. AP-93-254

BARTON TUBES LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, 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 a determination of the Minister of National Revenue (the Minister) dated June 16, 1989, rejecting an application for a refund of federal sales tax (FST) in the amount of \$82,134.97 paid on sales of goods described as plain carbon and low-alloy-resistance welded steel tubing. The issue in this appeal is whether the steel tubing qualifies as construction materials under Schedule IV to the Act and is, therefore, taxable at a lower rate of FST under paragraph 50(1.1)(b) of the Act. If the steel tubing qualifies as construction materials, then it must be determined whether the appellant is entitled, under section 68 of the Act, to a refund of the difference between the amount of FST that it paid and the amount that it would have paid had it applied the lower rate applicable to construction materials.

Mr. John Paulino, Accounting Manager, since 1986, for Bull Moose Tube Limited, successor to Barton Tubes Limited, a licensed manufacturer of the steel tubing in issue, testified on behalf of the appellant. According to Mr. Paulino, the steel tubing in issue is produced from strips of steel in varying widths, which are rolled to form a tube shape and then welded. He explained that the appellant produces steel tubing to the exact specifications required for its intended use and that the appellant does not keep any steel tubing in its inventory. All steel tubing in the appellant's warehouse is produced for a specific order from a particular customer and is not produced to stock inventory. A customer orders steel tubing for a particular application and specifies the particular processes which the steel tubing must undergo to be fit for that particular application. To illustrate this point, Mr. Paulino introduced four specification sheets as exhibits.

The first specification sheet indicates that the end use of the steel tubing is "fencing material" and that it is necessary for the steel tubing to undergo a finger die process and remetalization. The finger die process involves crimping one of the ends of the steel tubing so that it fits into another tube. The marketing note provides as follows:

*USE PRE-GALV STRAPPING
SWAGE 1 END 3" PARALLEL TO FIT SELF*

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

The second specification sheet indicates that the end use of the steel tubing is a "greenhouse." The marketing note provides as follows:

WELD MUST BE IN THE CENTER OF THE 1" SIDE +/-1/8". WELD CANNOT FLUCTUATE MORE BECAUSE IT CAUSES PROBLEMS ON CUSTOMER'S BENDING EQUIPMENT. WELD AREA MUST BE REMETALIZED WITH GALVALUME SPRAYBACK.

The third specification sheet also indicates that the end use of the steel tubing is a "greenhouse," but, as pointed out by Mr. Paulino, there are no welding specifications since the steel tubing is to be used in the irrigation process within the greenhouse and not in the building of the greenhouse itself.

The fourth specification sheet indicates that the end use of the steel tubing is "TV towers."

Mr. Paulino also submitted examples of invoices for steel tubing. These invoices identify the goods sold as being for commercial use, but do not contain details regarding specifications and use similar to those set out in the specification sheets.

The appellant's representative argued that the steel tubing is construction materials as described under either section 16 or 21 of Part I of Schedule IV to the Act. Section 16 states the following:

Pipe, conduit and tubing designed for use in buildings, sewers, irrigation or drainage systems, pipelines and other construction; valves and fittings therefor.

Section 21 of Part I of Schedule IV to the Act states the following:

Structural metal and fabricated metal for buildings and other structures.

In discussing the applicability of section 16 of Part I of Schedule IV to the Act, the appellant's representative referred to the Tariff Board's decisions in *Walkem & Wing Machinery Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*² and *Northern Alberta Institute of Technology v. The Deputy Minister of National Revenue for Customs and Excise*,³ in which the Tariff Board interpreted the phrase "designed for use." He also referred to the Tribunal's decision in *Unisys Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*⁴ that the word "directly" does not mean "solely" or "exclusively." The representative stated that it may be that the steel tubing in issue could be used for other purposes. However, he submitted that the possibility that the steel tubing may be used for alternative purposes does not change the fact that the steel tubing is designed with an end use in mind. As a result, he submitted that the steel tubing in issue meets the description, under section 16, of tubing designed for use in other construction.

The appellant's representative distinguished the steel tubing in issue from the tubing found not to be construction materials in the Tribunal's decision in *Perma Tubes Ltd. v. The*

2. (1983), 8 T.B.R. 724.

3. (1984), 9 T.B.R. 367.

4. Appeal No. 2566, June 3, 1992, 8 T.T.R. 340.

Minister of National Revenue.⁵ In that decision, the Tribunal found that paper cylinders or tubes used as forms to hold liquid to make solid concrete columns did not qualify as construction materials under section 16 of Part I of Schedule IV to the Act since they were not incorporated into the building or structure and did not form a component part of the building or structure. The representative submitted that the steel tubing in issue is permanently incorporated into the structures produced using the tubing and becomes a component part thereof.

With respect to the applicability of section 21 of Part I of Schedule IV to the Act and, more particularly, to the question of whether the steel tubing was used for structures, the appellant's representative referred to the Tribunal's decision in *Structural Tech Corporation Ltd. v. The Minister of National Revenue*⁶ that scaffolding was a structure. The representative submitted that, if scaffolding was a structure and could be considered as such, a TV tower, a greenhouse and a fence could also be considered to be structures.

Counsel for the respondent submitted that, in order for the steel tubing in issue to be exempt from FST under subsection 50(1.1) of the Act, the appellant must prove that the steel tubing is construction materials under Part I of Schedule IV to the Act or pursuant to the *Construction Materials Sales Tax Regulations*.⁷

Counsel for the respondent submitted that the steel tubing in issue is not used for the type of construction activities contemplated in section 16 of Part I of Schedule IV to the Act. In particular, she focused on the words "designed for use in buildings, sewers, irrigation or drainage systems, pipelines and other construction; valves and fittings therefor." She submitted that the phrase "other construction" had to be read within the context of the listed applications and that, read in that way, only tubing designed to have a liquid flow through it would be included under section 16.

In the alternative, counsel for the respondent submitted that the appellant had not produced sufficient evidence to show that it designs the steel tubing in issue for use in the applications listed in section 16 of Part I of Schedule IV to the Act. She submitted that the steel tubing is marketed as general-use tubing for a variety of applications and that the invoices do not indicate that a special product, such as irrigation pipe, conduit pipe or structural pipe, is being sold; rather, the steel tubing in issue is described simply as commercial tubing.

With respect to the applicability of section 21 of Part I of Schedule IV to the Act, counsel for the respondent submitted that the steel tubing in issue cannot be considered to be structural or fabricated metal. She referred to the letter from the Department of National Revenue (Revenue Canada) to the appellant dated June 22, 1990. This letter provides that structural metal must be produced to the construction industry's standards, that is, in accordance with the Canadian Institute of Steel Construction-"defined 'Hollow Structural Sections'." The letter also states that fabricated metal must be intended to be permanently incorporated into a building or structure and that, if the metal is "cut, bent or otherwise shaped to fit a custom application, it is, in all likelihood, intended to be permanently incorporated."

5. Appeal No. AP-89-267, August 19, 1991.

6. Appeal No. AP-92-190, October 5, 1993.

7. C.R.C. 1978, c. 587.

Counsel for the respondent submitted that the fact that the steel tubing in issue can be used for a number of purposes, including greenhouses, scaffolding, fences, TV towers and awnings, indicates that the steel tubing is a general-purpose type of product.

Finally, counsel for the respondent contended that Revenue Canada cannot be bound by an incorrect interpretation of the law by its officials.

In the Tribunal's view, the steel tubing in issue qualifies as construction materials under section 16 of Part I of Schedule IV to the Act as tubing designed for use in other construction and is, therefore, taxable at a lower rate of FST under paragraph 50(1.1)(b) of the Act.

It has been consistently held by the Tribunal and the Tariff Board that goods are designed for a particular use if there is a deliberate intention in the mind of the producer of these goods as to the nature of their ultimate use.⁸ The testimony of Mr. Paulino and the specification sheets indicate, in the Tribunal's view, that, when the appellant produced the steel tubing in issue, it knew what the ultimate use for the tubing would be and produced the tubing according to specifications required for that particular use. The Tribunal is, therefore, persuaded that the appellant intended to produce the steel tubing in issue for a number of particular uses, that is, for the construction of fences, greenhouses, irrigation systems in greenhouses or TV towers.

Having found that the steel tubing in issue is designed for particular uses, the Tribunal must further determine if the uses for which that tubing is designed, namely, fences, greenhouses, irrigation systems in greenhouses or TV towers, are included under section 16 of Part I of Schedule IV to the Act. Counsel for the respondent submitted that the construction of fences, greenhouses and TV towers could not be considered to be included in the phrase "other construction" since those uses do not involve the flow of a liquid as do sewers, irrigation or drainage systems and pipelines, which are enumerated in section 16.

However, the Tribunal observes that section 16 of Part I of Schedule IV to the Act also refers to tubing designed for use in buildings. Therefore, the Tribunal cannot accept the narrow interpretation suggested by counsel for the respondent. Rather, the Tribunal is of the view that the phrase "other construction" is to be interpreted more broadly to include the construction of fences, greenhouses and TV towers. The *ejusdem generis* rule of statutory interpretation, upon which counsel for the respondent relied, requires that general words be restricted to the same genus or category as the specific words that precede them. However, to invoke the application of the *ejusdem generis* rule, there must be a distinct genus, class or category of objects.⁹ In the Tribunal's view, not all of the uses enumerated in section 16 of Part I of Schedule IV to the Act fit into a class or category of goods used to facilitate the flow of a liquid as suggested by counsel. In particular, the Tribunal considers that tubing designed for use in buildings is not necessarily limited to a use involving the flow of a liquid.

8. See *Union Tractor Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-92-213, September 8, 1993, at 3; *Walkem & Wing Machinery Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, (1983), 8 T.B.R. 724 at 728; *Northern Alberta Institute of Technology v. The Deputy Minister of National for Customs and Excise* (1984), 9 T.B.R. 367 at 370.

9. E.A. Driedger, *Construction of Statutes*, 2nd ed., (Toronto: Butterworths, 1983) at 111-12.

Although the Tribunal is convinced that the steel tubing in issue qualifies as construction materials under section 16 of Part I of Schedule IV to the Act, it finds that the steel tubing also qualifies as construction materials under section 21 since it is fabricated metal for structures.

In determining that the steel tubing in issue is fabricated metal, the Tribunal referred to the Tariff Board's decision in *Alcan Canada Products Limited v. The Deputy Minister of National Revenue for Customs and Excise*.¹⁰ In the *Alcan* case, it was found that coiled flat aluminum stock, which was cut into lengths, wrapped and coiled for final processing or sold to contractors who install it on buildings, was fabricated metal, although the aluminum required cutting and bending before being permanently incorporated into a building. The facts in the *Alcan* case are similar to those in this appeal because the steel tubing in issue is produced from strips of steel in varying widths, which are rolled to form a tube shape and then welded. The steel tubing may be produced to various specifications, such as crimping the ends of the steel tubing or remetallizing, or may require special welding to make it suitable for a particular use, namely, fences, greenhouses and TV towers, although it may require some bending or cutting before being used. As was determined in the *Alcan* decision, the Tribunal is of the view that the strips of steel have undergone a number of changes from their original state to that of a fabricated metal.

In interpreting what is meant by the term "structure" under section 21 of Part I of Schedule IV to the Act, the Tribunal found it helpful to refer to its previous decision in *Hussmann Store Equipment Limited v. The Minister of National Revenue*.¹¹ In that decision, the Tribunal found that shelving did not qualify as structural or fabricated metal for buildings and other structures since it considered the shelving to be equipment or fixtures as opposed to structures. In considering what constituted a structure, the Tribunal referred to the following criteria for a structure found to be relevant by the Supreme Court of Canada in *Superior Pre-Kast Septic Tanks Ltd. and Lloydminster Pre-Kast Septic Tanks Ltd. v. Her Majesty the Queen*:¹² (1) the goods are built or constructed; (2) the goods are designed to be placed underground and become a part of the land in which they are installed; and (3) the goods are not part of a building or another structure.

Applying these criteria to the facts of this appeal, the Tribunal is of the view that fences, greenhouses and TV towers meet all of the criteria in the *Superior* case and are, therefore, structures within the meaning of section 21 of Part I of Schedule IV to the Act.

Since the tubing qualifies as construction materials and since the appellant should therefore have paid FST at a lower rate under paragraph 50(1.1)(b) of the Act, the Tribunal is of the view that the FST paid by the appellant at the general rate applicable to all goods was paid in error. As a result, the appellant is entitled, under section 68 of the Act, to a refund of the difference between the amount of FST that it paid and the amount that it would have paid had it applied the lower rate applicable to construction materials.

The Tribunal observes that the time limit for applying for a refund under section 68 of the Act (formerly section 44) was reduced from four years to two years in 1986 by an amendment to the Act which was deemed to have come into force on May 24, 1985.¹³

10. (1980), 7 T.B.R. 40.

11. Appeal No. AP-89-027, June 7, 1990.

12. [1978] 2 S.C.R. 612 at 620.

13. S.C. 1986, c. 9, s. 23(3).

Section 68 of the Act states that a person is entitled to a refund if he applies "within two years after the payment of the moneys." The appellant's application for refund is dated April 6, 1989. Therefore, the appellant is only entitled to a refund of FST paid in the two-year period prior to April 6, 1989.

The appeal is allowed. As the appellant's representative and counsel for the respondent were unable to confirm that the appellant's refund application relates only to FST paid in the two-year period prior to the filing of its application, the Tribunal refers the matter back to the Minister for confirmation of the amount of the refund.

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

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member