

Ottawa, Wednesday, November 2, 1994

Appeal No. AP-93-257

IN THE MATTER OF an appeal heard on April 25, 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 28, 1993, with respect to a notice
of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

TEKNION FURNITURE SYSTEMS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-257

TEKNION FURNITURE SYSTEMS INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act. The issue in this appeal is whether goods described as prefabricated panels, panel fittings and related doors and windows used to construct work stations and offices within buildings qualify for a reduced rate of tax under subsection 50(1.1) of the Excise Tax Act. More particularly, the issue is whether the prefabricated panels and panel fittings are construction materials within the meaning of section 18 of Part I of Schedule IV to the Excise Tax Act or paragraph 2(q) of the Construction Materials Sales Tax Regulations and whether the related doors and windows are construction materials within the meaning of section 3 of Part I of Schedule IV to the Excise Tax Act.

HELD: *The appeal is allowed. The prefabricated panels and panel fittings fall within the description of the goods enumerated in paragraph 2(q) of the Construction Materials Sales Tax Regulations and, as such, qualify for a reduced rate of tax. The related doors and windows qualify for a reduced rate of tax under section 3 of Part I of Schedule IV to the Excise Tax Act, as they clearly fall within the description of the goods enumerated in that section. More specifically, these goods are doors and windows for buildings or other structures.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: April 25, 1994
Date of Decision: November 2, 1994

Tribunal Members: Charles A. Gracey, Presiding Member
Arthur B. Trudeau, Member
Robert C. Coates, Q.C., Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Janet Rumball

Appearances: John M. Campbell, for the appellant
Anne Michaud, for the respondent

Appeal No. AP-93-257

TEKNION FURNITURE SYSTEMS INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ARTHUR B. TRUDEAU, Member
ROBERT C. COATES, Q.C., 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 February 5, 1992, that rejected an application for refund of federal sales tax. The Minister confirmed the determination in a notice of decision dated June 28, 1993.

The issue in this appeal is whether goods described as prefabricated panels, panel fittings² and related doors and windows used to construct work stations and offices within buildings qualify for a reduced rate of tax under subsection 50(1.1) of the Act. More particularly, the issue is whether the prefabricated panels and panel fittings are construction materials within the meaning of section 18 of Part I of Schedule IV to the Act or paragraph 2(q) of the *Construction Materials Sales Tax Regulations*³ (the Regulations) and whether the related doors and windows are construction materials within the meaning of section 3 of Part I of Schedule IV to the Act.

The appellant is a manufacturer of a variety of goods, including the goods in issue. At the hearing, Mr. David A. Bunn, Manager of Customer Satisfaction for Teknion Furniture Systems Inc. and Mr. Thomas Seuberlich, consultant to SFI, an office installation company, testified on behalf of the appellant.

Mr. Bunn described the goods in issue and explained how the appellant's office systems are installed. He explained that the goods in issue are used in the construction of offices and work stations within buildings for the use of employees. The appellant constructs private offices separated by panels that are joined on internal steel frames. The fabricated walls are normally attached to the permanent walls, pillars or ceilings of the building and, in certain instances, extend from floor to ceiling. They are also normally fitted with doors and/or windows. In other instances, although private offices are constructed, the fabricated walls do not extend from floor to ceiling and can vary in height, depending on client specifications. The appellant also assembles panels to form partitions or dividers which sometimes rise only three or four ft. from

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1. R.S.C. 1985, c. E-15.
 2. For the purposes of this appeal, panel fittings include panel end trim, corner covers, panel hinges, slot covers, wall adaptors, panel-to-panel adaptors and adjustable filler panels.
 3. C.R.C. 1978, c. 587.

the floor to construct work stations. Furthermore, these partitions or dividers may be self-supporting, as they are not necessarily attached to the floor. In certain instances, however, they are affixed to power poles which are normally attached to the floor or ceiling.

Mr. Bunn explained that there are basically three types of panels: (1) standard panels that are made of steel and covered with acoustic elements; (2) standard power panels that allow access to internal raceways capable of carrying wiring and communication cables; and (3) modular power panels that have the same properties as the standard power panels and special properties that allow the height of the panels to be adjusted easily. All of the panels have to meet noise reduction standards. The appellant's panels are usually made of steel, aluminum, fiberglass, tempered glass or acrylic and are available in a variety of colours. Mr. Bunn also explained how the wiring of the appellant's panels is done. There are communication cables that allow computers and telephones, for example, to be connected and electrical wiring and outlets that allow the connection of all electrical office equipment. The wiring is usually connected to the ceiling or the walls of the building through the power poles.

Mr. Bunn mentioned that the appellant's office systems are designed to last 20 to 25 years. Once installed, changes can be made, for example, to the internal structures or to the wiring to meet changing client needs. Doors and windows can also be added or removed. Major changes to the floor plan can involve a significant amount of work, such as disassembling the goods, redesigning the floor plan, pulling out the communication cables and electrical wiring, and then combining the new product with the old product and reinstalling the wiring. Mr. Bunn testified, however, that such a reconfiguration is very uncommon. During cross-examination, Mr. Bunn explained that the goods in issue have to meet certain building and electrical standards, such as the flame resistance of the materials used and the non-compatibility of the electrical wiring and the communication cables.

Mr. Seuberlich testified that, as an installer, he is provided with a series of plans, for example, a base building plan that shows the entire layout of the installation, a plan that describes the panels and indicates where they should be placed, a plan that shows where the electrical wiring will run and where, inside the panels, the outlets should be installed and a plan that lists the components that may be attached to the panels. He explained that the installer of the office system takes part in the design meeting, which is a regular occurrence in a construction project of any sort. The design meeting brings together a number of different contractors involved in either the interior construction or the actual construction of the building, i.e. electricians, painters, architects and individuals involved in preparing the work space for a tenant's occupancy. Mr. Seuberlich explained that, as the installer, it is important for him to be part of this meeting so that he can be aware of a number of the issues that are raised, for example, the construction schedule.

Mr. Seuberlich explained that, in certain instances, a wall adapter is used to attach the structural panels securely to the existing column or outside wall of the building. To do this, holes need to be drilled into the wall or column. The adapter is then bolted to the wall or column. The panels are then attached to the adapter. This is done quite frequently to provide rigidity to the installation. Mr. Seuberlich explained that removing the adapter would leave a hole in the wall. The wall would, therefore, have to be replastered and refinished. He also explained that removing a power pole connection from the ceiling would leave a hole in the ceiling.

For the purposes of this appeal, the relevant portions of Part I of Schedule IV to the Act are as follows:

CONSTRUCTION MATERIALS

3. *Doors, windows and shutters for buildings and other structures and associated hardware not including padlocks; door and window screens and awnings.*

18. *Plaster boards, fibreboards, wall panels, building paper and other materials for ceilings and walls and materials for insulation or acoustical purposes, but not including*

(a) carpeting; or

(b) wallpaper and similar coverings for interior walls.

For the purposes of this appeal, the relevant portions of the Regulations are as follows:

2. *The following articles and materials are hereby prescribed for the purposes of Part I of Schedule [IV] to the Excise Tax Act to be construction materials:*

(q) prefabricated wall sections, partitions and dividers for permanent installation in buildings, not including shelving or other assembled or unassembled furniture.

Relying on the Supreme Court of Canada decisions in *Stuart Investments Limited v. Her Majesty the Queen*⁴ and *Johns-Manville Canada Inc. v. Her Majesty the Queen*,⁵ counsel for the appellant argued that taxing statutes should not be interpreted too strictly and that any reasonable uncertainty or factual ambiguity resulting from the lack of explicitness in the statute should be resolved in favour of the taxpayer.

Counsel for the appellant argued that the prefabricated panels and panel fittings are described in section 18 of Part I of Schedule IV to the Act, as they are wall panels, other materials for walls and/or materials for acoustical purposes. Relying on dictionary definitions, counsel argued that a "wall" is simply a flat vertical structure which serves to divide and define space and that, to be considered as such, it does not have to be load-bearing, in the sense that it helps to support the building. He therefore argued that the prefabricated panels and panel fittings are walls or materials for walls, as they are used to construct vertical architectural items which divide space. The fact that they are not attached to the building or do not help support the building should not be determinative. More specifically, counsel argued that they are "wall panels," as they are non-bearing and supported by the building frame. He submitted that the prefabricated panels and panel fittings are acoustical materials, as they are designed to absorb sound.

In the event that the Tribunal finds that the prefabricated panels and panel fittings do not fall within the description of the goods enumerated in section 18 of Part I of Schedule IV to the Act, counsel for the appellant argued that they fall within the description of the goods enumerated in paragraph 2(q) of the Regulations. As such, these goods are "prefabricated wall sections, partitions and dividers for permanent installation in buildings." They are partitions because they separate one space from another. Counsel also argued that there is no requirement in section 18 that the goods be permanently installed to qualify for the reduced rate of tax. In the event that the Tribunal finds that there is such a requirement or that the

4. [1984] 1 S.C.R. 536.

5. [1985] 2 S.C.R. 46.

prefabricated panels and panel fittings are more properly described in paragraph 2(q) of the Regulations, where the permanency requirement is explicit, counsel submitted that these goods meet the requirement, as they are for permanent installation. Relying on previous decisions of the Tribunal, counsel argued that this concept does not require that something remain in place forever, without change. Permanent installation does not mean that, once installed, the goods can never be removed. Rather, the goods must be installed to meet objectives which are not temporary or transitory.

Finally, counsel for the appellant argued that the related doors and windows qualify for a reduced rate of tax under section 3 of Part I of Schedule IV to the Act. In making this argument, counsel simply relied on dictionary definitions of the terms "door" and "window."

Counsel for the respondent submitted that the prefabricated panels and panel fittings are prefabricated walls or partitions and, therefore, that they fall specifically within the description of the goods enumerated in paragraph 2(q) of the Regulations. She argued that they cannot be considered "wall panels" under section 18 of Part I of Schedule IV to the Act because they are specifically described as prefabricated walls or partitions in paragraph 2(q) of the Regulations. Relying on the *ejusdem generis* principle of statutory interpretation, counsel argued that the prefabricated panels and panel fittings cannot be "other materials for ... walls" under section 18 because they are not part of the class or category of goods described as plaster boards, fibreboards or building paper in that section. More specifically, she argued that, to fall within the description of the goods enumerated in section 18, the goods must be used in the construction of walls. In the present case, the prefabricated panels and panel fittings cannot be used in the construction of walls, as the walls have already been built.

According to counsel for the respondent, it is implicit in section 18 of Part I of Schedule IV to the Act that, to qualify for a reduced rate of tax, the goods must be permanently installed. Because the prefabricated panels and panel fittings are not permanently installed, they cannot fall within the description of the goods enumerated in section 18 of Part I of Schedule IV to the Act or in paragraph 2(q) of the Regulations, where the permanency requirement is explicit. Counsel argued that the prefabricated panels and panel fittings are not permanently installed because they can be easily removed, albeit at some expense. Furthermore, once the goods are installed, changes can be made to meet the client's needs. For example, by making a few changes, a client can add or remove offices or work stations. Finally, counsel argued that the prefabricated panels and panel fittings are not permanently installed because they can be removed without undue damage to the realty.

Counsel for the appellant argued that the prefabricated panels and panel fittings qualify for a reduced rate of tax under section 18 of Part I of Schedule IV to the Act. In the alternative, if the Tribunal finds that this section does not adequately describe the prefabricated panels and panel fittings, counsel argued that they qualify for a reduced rate of tax under paragraph 2(q) of the Regulations.

In reaching its decision, the Tribunal considered that the prefabricated panels and panel fittings could potentially qualify for a reduced rate of tax under either section 18 of Part I of Schedule IV to the Act or paragraph 2(q) of the Regulations. The Tribunal does not find that the two are mutually exclusive. The Tribunal is of the view that certain products might fall, for example, within the description of the goods described as "wall panels" in section 18 and, at the same time, fall within the description of the goods described as "prefabricated wall sections" in paragraph 2(q) of the Regulations. The Tribunal, therefore, considered within which of the two descriptions the prefabricated panels and panel fittings would more properly fall.

The Tribunal is of the view that the prefabricated panels and panel fittings in this appeal fall, most obviously, within the description of the goods enumerated in paragraph 2(q) of the Regulations. The evidence shows that these goods are clearly prefabricated partitions or dividers. They are used to divide or separate one space from another to create private offices and work stations for the use of employees.

Having determined that the prefabricated panels and panel fittings are prefabricated partitions or dividers, the Tribunal must then decide whether they are "for permanent installation in buildings." To determine this issue, the Tribunal relied on a decision of the Tariff Board in *Selenia Food Equipment Limited v. The Deputy Minister of National Revenue for Customs and Excise*,⁶ in which it was decided that kitchen cabinets were "for permanent installation in buildings."⁷ The Tariff Board found that the fact that goods may be removed, without damage, from the building in which they are installed is not determinative of whether or not they are for "permanent installation in buildings." Rather, the Tariff Board was concerned with whether the goods were installed to satisfy objectives and needs that were anything but temporary or transitory. The Tariff Board also considered the manner in which the goods were affixed to their respective premises and their expected duration. Because the kitchen cabinets, in that case, were manufactured to satisfy the unique needs and space requirements of their institutional and restaurant purchasers (each unit having been extensively bolted or screwed to the wall partition) and the goods were designed and expected to last approximately 30 to 35 years, the Tariff Board found that they were "for permanent installation in buildings."

In the present case, the evidence shows that, although the panels are prefabricated, they are generally designed to meet client specifications. They are prefabricated in the sense that they are manufactured at the appellant's plant and not at the office construction site. Their dimensions are established in accordance with a particular plan for the construction of an office system or layout. There is also a plan that indicates the exact location or position of the panels. Thus, as in *Selenia Food* in the case of kitchen cabinets, the Tribunal is of the view that the prefabricated panels and panel fittings are manufactured to satisfy the unique needs and space requirements of the clients and finds that this is an important factor in considering whether the prefabricated panels and panel fittings are "for permanent installation in buildings."

The evidence also shows that, in certain instances, the prefabricated panels are attached to the existing column or outside wall of the building with the use of an adapter and that this is done quite frequently to provide rigidity to the installation. In other instances, the prefabricated panels are affixed to power poles that are normally attached to the floor or ceiling. Although there is less evidence of affixation in the present case than there was in *Selenia Food* in the case of kitchen cabinets, the Tribunal considers that this is also an important factor in determining whether the prefabricated panels and panel fittings are "for permanent installation in buildings." Finally, the evidence shows that the goods in issue were designed and are expected to last approximately 20 to 25 years. Upon installation, there is no intention on the part of the client to remove or replace the goods. The evidence also shows that removing the prefabricated panels or certain panel fittings may leave a hole in the wall or ceiling. In light of all of this evidence, the Tribunal finds that the prefabricated panels and panel fittings are "for permanent installation in buildings."

6. (1988), 13 T.B.R. 139.

7. *Ibid.* at 150.

As explained in the *Selenia Food* case, the heading of Part I of Schedule IV to the Act indicates that the listed products, which include those listed in the Regulations, must be used in the construction of any of the projects enumerated in that part, whether they are residential, commercial, industrial or otherwise. In the present case, the evidence clearly shows that the prefabricated panels and panel fittings are custom designed and used in the construction of office systems, whether the final product is a private office, where the fabricated walls extend from the floor to the ceiling and where the only access is through a door, or simply a work station separating one employee from the other. The installer of the prefabricated panels receives a series of plans, usually conceived by the appellant with the assistance of an architect or a designer to show the layout of the installation; a description of the panels and where they should be placed; the layout of the electrical wiring; the installation diagram of the outlets inside the panels; and a list of the components that may be attached to the panels. This exercise is clearly part of a construction project. In view of this analysis, the Tribunal concludes that the prefabricated panels and panel fittings are construction materials.

In light of the above analysis, the Tribunal finds that the prefabricated panels and panel fittings fall within the description of the goods enumerated in paragraph 2(q) of the Regulations and that, as such, they qualify for a reduced rate of tax.

Finally, the Tribunal is of the view that the related doors and windows qualify for a reduced rate of tax under section 3 of Part I of Schedule IV to the Act, as they clearly fall within the description of the goods enumerated in that section. More specifically, the Tribunal is of the view that these goods are doors and windows for buildings or other structures.

Accordingly, the appeal is allowed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member