

Ottawa, Wednesday, October 5, 1994

Appeal No. AP-93-381

IN THE MATTER OF an appeal heard on May 3, 1994, under sections 81.19 and 81.22 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 March 12, 1993, with respect to notices of objection served under sections 81.15 and 81.17 of the *Excise Tax Act*;

AND IN THE MATTER OF a determination of the Minister of National Revenue dated December 27, 1991, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

KONÉ INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Lise Bergeron
Lise Bergeron
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-381

KONÉ INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

On January 25, 1994, the appellant filed two notices of appeal with the Tribunal. The first was filed under section 81.19 of the Excise Tax Act with respect to a determination of the Minister of National Revenue dated September 13, 1991, and an assessment dated September 25, 1991. The second was filed under section 81.22 of the Excise Tax Act with respect to a determination of the Minister of National Revenue dated December 27, 1991. Since the issue in both notices of appeal was the same, the Tribunal combined the two appeals for the purposes of rendering a single decision. The issue in this appeal is whether the four overhead travelling cranes sold by the appellant to Aluminerie Luralco Inc. are cranes designed for construction or demolition purposes and, consequently, are goods that qualify for an exemption from federal sales tax under paragraph 1(a) of Part XVI of Schedule III to the Excise Tax Act.

HELD: *The appeal is allowed. The Tribunal is of the opinion that it must consider the specific design of a product to determine whether it was designed for construction purposes. In this instance, the Tribunal finds that the four overhead travelling cranes manufactured by the appellant and sold to Aluminerie Luralco Inc. are cranes that were designed for construction purposes. Therefore, the overhead travelling cranes are goods that qualify for an exemption from federal sales tax under paragraph 1(a) of Part XVI of Schedule III to the Excise Tax Act.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: May 3, 1994

Date of Decision: October 5, 1994

Tribunal Members: Lise Bergeron, Presiding Member

Michèle Blouin, Member

Desmond Hallissey, Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

Appearances: Pierre Lesage and Raymond Lacroix, for the appellant
Stéphane Lilkoff, for the respondent

Appeal No. AP-93-381

KONÉ INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member
MICHÈLE BLOUIN, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

On January 25, 1994, the appellant filed two notices of appeal with the Tribunal. The first was filed under section 81.19 of the *Excise Tax Act*¹ (the Act) with respect to a determination of the Minister of National Revenue (the Minister) dated September 13, 1991, and an assessment dated September 25, 1991. The second was filed under section 81.22 of the Act with respect to a determination of the Minister dated December 27, 1991. Since the issue in both notices of appeal was the same, the Tribunal combined the two appeals for the purposes of rendering a single decision.

The appellant manufactures, among other products, overhead travelling cranes designed to assist in the handling of equipment. These cranes are sold, for example, to municipalities, purification and filtration plants and pumping stations. The appellant also manufactures overhead travelling cranes used, for example, in the construction of pulp and paper mills and hydro-electric, nuclear and thermal power plants. Each crane is equipped with a travelling hoisting mechanism which enables it to move objects from one place to another.

Mr. Gilles Lafleur, Technical Advisor at Koné Inc. and Mr. Martin Gaudreault, Project Engineer at Aluminerie Luralco Inc. (Aluminerie Luralco) testified on behalf of the appellant. Mr. Lafleur explained that the appellant responded to a call for tenders from Bechtel-Lavalin to supply equipment to Aluminerie Luralco with respect to the construction of an aluminum plant. Bechtel-Lavalin managed the construction project. The contract was awarded to the appellant for the manufacture, delivery and installation of two 40-ton overhead travelling cranes to be used in the construction of cell rooms and two 5-ton overhead travelling cranes to be used in the construction of the anode furnaces.

Mr. Lafleur explained the differences between the overhead travelling cranes that the appellant supplied to Aluminerie Luralco and the modular or standard overhead travelling cranes that it normally manufactures. The overhead travelling cranes supplied to Aluminerie Luralco were specifically designed for construction work and to operate at much higher rates of horizontal displacement than standard overhead travelling cranes, in order to accommodate the transportation of construction materials over great distances at the construction site. Because

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

of the high operating speeds, the 40-ton overhead travelling cranes had to be equipped with an operator's cabin, which is very rare.

Mr. Lafleur also explained that one of the objectives in manufacturing standard overhead travelling cranes is to reduce the wasted space between the travelling structure and the roof of the building. The contract at issue required the appellant to supply overhead travelling cranes with an elevated travelling structure in order to meet the special construction requirements for the aluminum plant. Mr. Lafleur mentioned that the special design of the overhead travelling cranes supplied to Aluminerie Luralco meant that they had a useful life of approximately 2 years, much less than the 10 to 15 years for standard overhead travelling cranes. During cross-examination, Mr. Lafleur explained that the overhead travelling cranes supplied to Aluminerie Luralco were equipped with additional safety devices to improve worker safety during construction.

Mr. Gaudreault explained that the 40-ton overhead travelling cranes had been used during construction for such activities as transporting concrete forms, raw materials, aluminum structures, cathodes and tools, as well as materials used by workers. When construction was complete, three of the overhead travelling cranes were dismantled, removed from the construction site and stored away and have not been used since that time. However, he added that Aluminerie Luralco is now using one of the 40-ton overhead travelling cranes for the handling of hazardous material and is looking into the possibility of using all four cranes on another construction project. Mr. Gaudreault further explained that the four overhead travelling cranes used during construction were replaced by cranes designed specifically for materials handling.

The issue in this appeal is whether the four overhead travelling cranes sold by the appellant to Aluminerie Luralco are cranes designed for construction or demolition purposes and, consequently, are goods that qualify for an exemption from federal sales tax (FST) under paragraph 1(a) of Part XVI of Schedule III to the Act.

The relevant provisions of paragraph 1(a) of Part XVI of Schedule III to the Act are as follows:

1. *The following goods ... where the sale price by the Canadian manufacturer ... exceeds two thousand dollars per unit:*
 - (a) ... cranes; ... attachments for the foregoing; all designed for construction or demolition purposes.

Counsel for the appellant argued that the four overhead travelling cranes are cranes designed for construction purposes, given that the call for tenders and the purchase order clearly indicated that Aluminerie Luralco wanted to purchase cranes designed for construction purposes. Furthermore, the appellant knew that Aluminerie Luralco intended to use the overhead travelling cranes for construction purposes and manufactured them to meet the specific needs of that company. When construction was complete, the overhead travelling cranes were dismantled, removed from the construction site and stored away, and only one of the 40-ton overhead travelling cranes has been used since that time. Counsel pointed out that a distinction must be made between the generic design and the specific design of overhead travelling cranes and that it is the specific design that must be used in determining the reason for which the overhead travelling cranes have been designed. Counsel, therefore, argued that the Tribunal, in rendering its decision, must take into account the specific intent of both the client and the manufacturer at the time that the product was designed.

Counsel for the respondent admitted that the overhead travelling cranes manufactured by the appellant and sold to Aluminerie Luralco are a type of crane. However, he claimed that they are not cranes designed specifically for construction or demolition purposes within the meaning of paragraph 1(a) of Part XVI of Schedule III to the Act, but that they are generic or standard pieces of equipment that can meet various needs, such as the construction work for Aluminerie Luralco. He stated that the evidence showed that the goods in issue were not designed to meet the client's specific construction needs, but were designed in accordance with general standards applicable to all cranes. He argued that the end purpose of the overhead travelling cranes was the hoisting and handling of objects. He did, however, admit that it is possible for the hoisting and handling of objects by overhead travelling cranes to take place as part of construction or demolition projects, but that this use did not change their end purpose. Counsel argued that the Tribunal must consider the generic design of a product and not its specific design when determining the reason for which the product was designed.

Counsel for the appellant and for the respondent agreed that the overhead travelling cranes manufactured by the appellant and sold to Aluminerie Luralco are cranes. The Tribunal shares this opinion. The only issue, therefore, is to determine whether these cranes were designed for construction purposes and, consequently, are goods that qualify for an exemption from FST under paragraph 1(a) of Part XVI of Schedule III of the Act.

In *Sturdy Truck Body (1972) Limited v. The Minister of National Revenue*,² the Tribunal determined that, when a client ordered a body for installation on a light truck, the appellant definitely intended to produce one designed for that particular truck when manufacturing the body in issue. Similarly, the Tribunal holds that the appellant in this case intended to manufacture overhead travelling cranes to meet the specific construction needs of its client, Aluminerie Luralco. When the appellant designed or built the cranes, it knew that they would be used by Aluminerie Luralco in a construction project. Indeed, during negotiations, representatives of that company had specified that the overhead travelling cranes must have certain special features so that they could be used by Aluminerie Luralco during the construction of an aluminum plant. The Tribunal, therefore, is of the opinion that it must consider the specific design of a product in order to determine whether the product was designed for construction purposes.

In *Armand Guay Inc. v. Her Majesty the Queen*,³ the Federal Court of Canada ruled that when a crane "has on it the required accessory equipment to be used for excavation, ... it must be regarded as machinery 'designed for the purpose of excavating'." In this instance, the Tribunal is convinced that the evidence clearly shows that the four overhead travelling cranes manufactured by the appellant and sold to Aluminerie Luralco are cranes that were equipped with the required accessory equipment to be used in the construction of an aluminum plant. The Tribunal is, therefore, convinced that the overhead travelling cranes were designed to carry out work other than normal materials handling. Therefore, the overhead travelling cranes are goods that qualify for an exemption from FST under paragraph 1(a) of Part XVI of Schedule III to the Act.

2. Canadian International Trade Tribunal, Appeal No. 2979, June 23, 1989.

3. 74 D.T.C. 6328, Federal Court of Canada, Trial Division, Court File No. T-2939-72, December 11, 1973.

For these reasons, the appeal is allowed.

Lise Bergeron
Lise Bergeron
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Desmond Hallissey
Desmond Hallissey
Member