

Ottawa, Friday, September 19, 1997

Appeal No. AP-94-083

IN THE MATTER OF an appeal heard on March 13, 1997, 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 March 30, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

PERMANENT LAFARGE (A DIVISION OF LAFARGE CANADA INC.) Appellant

AND

THE MINISTER OF NATIONAL REVENUE Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Dr. Patricia M. Close

Dr. Patricia M. Close
Member

Lyle M. Russell

Lyle M. Russell
Member

Susanne Grimes

Susanne Grimes
Acting Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-083

PERMANENT LAFARGE (A DIVISION OF LAFARGE CANADA INC.) Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the *Excise Tax Act* of a decision of the Minister of National Revenue that rejected the appellant's application for a refund of federal sales tax allegedly paid in error. The appellant's invoices to its customers provided an all-in price and did not break out the various elements, including transportation costs, that went into making up that price.

The *Excise Tax Act* imposes a "consumption or sales tax ... on the sale price or on the volume sold of all goods ... produced or manufactured in Canada." However, in order to determine the amount of federal sales tax payable on any given goods, including ready-mix concrete, the sale price of those goods must first be determined. The *Excise Tax Act* provides that the cost of transportation of goods, in this case concrete, incurred by the producer in delivering the goods from its premises to the purchaser, where the goods are sold at a price that includes those transportation costs, may be excluded from the sale price. The issues in this appeal are whether the appellant mistakenly remitted federal sales tax on certain transportation costs which it incurred in connection with the transportation of ready-mix concrete which it sold to its customers and whether the appellant used the proper methodology to calculate the amount of federal sales tax included therein.

HELD: The appeal is dismissed. The appellant and the respondent presented the Tribunal with differing methodologies to calculate how to extract the transportation costs from the appellant's all-in invoice price in order to arrive at a sale price for purposes of the *Excise Tax Act*. The Tribunal finds the methodology proposed by the appellant to be mathematically flawed and, thus, understates federal sales tax payable by the appellant in respect of the sales at issue. When an amount in respect of transportation is included in an all-in sale price upon which federal sales tax is calculated and then a refund is requested, as in the present case, the calculation to extract the federal sales tax included from the all-in sale price first requires that the transportation costs be subtracted from that price. The remaining amount must then be multiplied by a factor equal to the applicable tax rate divided by that rate plus one.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 13, 1997
Date of Decision: September 19, 1997

Tribunal Members: Arthur B. Trudeau, Presiding Member
Dr. Patricia M. Close, Member
Lyle M. Russell, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael Kaylor, for the appellant
Stéphane Lilkoff, for the respondent

Appeal No. AP-94-083

PERMANENT LAFARGE (A DIVISION OF LAFARGE CANADA INC.) Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
DR. PATRICIA M. CLOSE, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of *Excise Tax Act*¹ (the Act) of a decision of the Minister of National Revenue dated March 30, 1994, that rejected the appellant's application for a refund of federal sales tax (FST) allegedly paid in error. The issues in this appeal are whether the appellant mistakenly remitted FST on certain transportation costs which it incurred in connection with the transportation of ready-mix concrete which it sold to its customers and whether the appellant used the proper methodology to calculate the amount of FST included therein.²

Subject to a number of exceptions, none of which are relevant to this appeal, subsection 50(1) of the Act imposes a "consumption or sales tax ... on the sale price or on the volume sold of all goods ... produced or manufactured in Canada." Pursuant to subsection 50(1) of the Act, FST is payable on sales of ready-mix concrete. However, in order to determine the amount of FST payable on any given goods, including ready-mix concrete, the sale price of those goods must first be determined.

Section 42 of the Act provides, in part, that "sale price" means, the aggregate of:

- (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,
- (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and
- (iii) the amount of the excise duties payable under the *Excise Act* whether the goods are sold in bond or not.

Section 46 of the Act provides, in part:

- (c) in calculating the sale price of goods manufactured or produced in Canada, there may be excluded

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

2. This appeal was heard together with Appeal No. AP-94-006, *Humpty Dumpty Foods Limited v. The Minister of National Revenue*. The appellant in this appeal was represented by the same counsel as the appellant in Appeal No. AP-94-006. In addition, Appeal No. AP-93-137, *Asphalte Desjardins Inc. v. The Minister of National Revenue*, and Appeal No. AP-93-316, *International Paints (Canada) Ltd. v. The Minister of National Revenue*, were scheduled to be heard with this appeal and Appeal No. AP-94-006. However, upon the request of counsel for the appellants and counsel for the respondent to adjourn *Asphalte Desjardins* and *International Paints* and following a pre-hearing conference to consider that request, those two appeals were adjourned *sine die* on the understanding that the decisions in this case and in *Humpty Dumpty* would be determinative of the matters at issue in *Asphalte Desjardins* and *International Paints*.

(ii) under such circumstances as the Governor in Council may, by regulation, prescribe, an amount representing

(B) the cost of transportation of the goods incurred by the manufacturer or producer in transporting the goods between premises of the manufacturer or producer in Canada, or in delivering the goods from the premises of the manufacturer or producer in Canada to the purchaser, where the goods are sold at a price that includes those costs of transportation, determined in such manner as the Governor in Council may, by regulation, prescribe.³

Counsel for the appellant called Mr. Rick Rabideau, Tax Manager of Lafarge Canada Inc., as the appellant's first witness. Lafarge Canada Inc. is the appellant's parent company. Mr. Rabideau testified that the appellant produces ready-mix concrete at a number of locations in the province of Ontario. The appellant sells its concrete to the construction trade. The concrete is transported from the appellant's production locations to purchasers' construction sites in agitator trucks operated by the appellant. In the transactions which gave rise to this appeal, the concrete was sold free on board at the purchasers' sites on a tax-included basis. The appellant's invoices to its customers provided only a total or all-in price. In other words, invoices did not separate the various components which made up the total price, such as materials, transportation or FST. As such, the invoices did not indicate the sale price of the concrete, within the meaning in the Act, as it included the cost of transporting the concrete, an amount which, pursuant to clause 46(c)(ii)(B) of the Act, could be excluded in the determination of the sale price. Mr. Rabideau testified that this all-in pricing strategy had been adopted by the appellant and others in the ready-mix concrete business for competitive reasons.

In January 1987, the Department of National Revenue (Revenue Canada) issued an excise communiqué advising the ready-mix concrete industry that, on July 1, 1985, it had authorized an "interim standard transportation deduction of \$19 per cubic metre in lieu of actual costs of delivery of ready-mix concrete" for purposes of calculating FST liability. During 1990, the appellant calculated its monthly FST remittance using the following formula:

$$(A - B - C - D) \times r / 1 + r$$

where:

A = total monthly sales (i.e. the sum of all invoices)

B = non-taxable sales

C = cash discounts taken by purchasers

D = transportation expense (i.e. \$19)

r = the applicable rate of FST⁴

3. In 1983, the Governor in Council enacted the *Sales Tax Transportation Allowance Regulations*, SOR/83-95, January 21, 1983, *Canada Gazette* Part II, Vol. 117, No. 3 at 497; however, they did not factor into this matter.

4. When goods are sold on a tax-included basis, to extract the tax component from the total all-in price, that price must be multiplied by the tax rate divided by one plus that rate. In the following, example the all-in price is \$87,011.93 and the tax rate is assumed to be 9 percent.

Item	Amount	Algebraic Representation
tax-included sales (i.e. all-in price)	\$87,011.93	B
tax rate	9 percent	r
sale price	?	X
FST	?	Y
Sale Price Calculation	FST Calculation	Formula for Extracting FST from Tax-Included Sales
X = B - 0.09X	Y = 0.09X	B(r/1 + r)
X + 0.09X = B	Y = 0.09(\$79,827.46)	\$87,011.93 × (0.09/1 + 0.09)
X = B/1.09	Y = \$7,184.47	\$87,011.93 × (0.09/1.09)
X = \$79,827.46		\$7,184.47

For example, the following represents the appellant's calculation of its FST liability in December 1990 for sales from its Belleville, Ontario, location:

Total sales			\$109,187.78
less	non-taxable sales	\$332.93	
	cash discounts taken	\$3,089.92	
	transportation expense ($\$19.00/\text{m}^3 \times 987 \text{ m}^3$)	<u>\$18,753.00</u>	<u>\$22,175.85</u>
equals	total taxable sales (including FST)		<u>\$87,011.93</u>
Amount of FST	equals $\$87,011.93 \times 9/109$		\$7,184.93

Mr. Rabideau testified that the appellant subsequently determined that its actual cost of delivering ready-mix concrete was $\$24.72/\text{m}^3$ and not $\$19.00/\text{m}^3$, as set out in Revenue Canada's excise communiqué. Changing the appellant's transportation expense per cubic metre from $\$19.00$ to $\$24.72$ had the effect of increasing the appellant's delivery expense deduction from total sales. This, in turn, reduced the appellant's total taxable sales. The appellant applied for a refund of the FST which it had paid on the $\$5.72$ difference between these two figures. The respondent accepted the $\$24.72$ figure as correct and refunded the appellant an amount calculated in accordance with the following formula:

$$(\text{total cubic metres of ready-mix concrete sold} \times \$5.72) \times 9/109$$

Mr. Rabideau testified that the appellant subsequently discovered that the methodology set out above did not accurately calculate the appellant's FST liability. Using a spreadsheet prepared by Mr. Georges Dufresne, the appellant's second witness, Mr. Rabideau led the Tribunal through the Belleville/December 1990 example to illustrate how the appellant believed its FST liability should have been calculated.

At all times relevant to this appeal, Mr. Dufresne acted as the appellant's tax consultant. Mr. Dufresne testified that the difference between the methodology which the appellant used when it made its FST remittances (methodology A) and the alternate methodology which was used in the spreadsheet that he prepared (methodology B) related to the timing within the sequence of calculations at which the amount for transportation was deducted from the total invoice amount. The differences in the two methodologies are illustrated in the following table which employs the Belleville/December 1990 figures:

Methodology A (appellant's remittances calculated on this basis)		Methodology B (appellant's view as to how remittances should have been calculated)	
total sales	\$109,187.28	total sales	\$109,187.28
less non-taxable sales	\$332.93	less non-taxable sales	\$332.93
cash discounts taken	\$3,089.92	cash discounts taken	<u>\$3,089.92</u>
transportation expense	<u>\$18,753.00</u>	total sales excluding non-taxable items	<u>\$105,764.93</u>
total taxable sales (including FST)	<u>\$87,011.93</u>		
		calculation to extract FST	\$105,764.93
		$\$105,764.93 \times 9/109 = \$8,732.88$	- <u>\$8,732.88</u>
FST $\$87,011.93 \times 9/109$	\$7,184.47	total sales (excluding FST)	\$97,032.05
		less transportation expense	<u>\$18,753.00</u>
total taxable sales	\$87,011.93	total taxable sales	\$78,279.05
less FST	<u>\$7,184.47</u>	FST $\$78,279.05 \times 9/100$	\$7,045.11
sale price	\$79,827.46		

Mr. Dufresne testified that, under methodology B, “non-taxable sales” and “cash discounts taken” were deducted from total sales before the factor of 9/109 was applied to that figure. He explained that these deductions were made because “non-taxable sales” and “cash discounts taken” are non-taxable items. In cross-examination regarding methodology B, when asked why the transportation expense, which he agreed was also a non-taxable item, was not similarly deducted from total sales at the same point within the sequence of calculations, Mr. Dufresne responded that, unlike the amounts for non-taxable items and discounts, the transportation expense was separately identified on the appellant’s invoices.

Counsel for the respondent called Ms. Norma-Jean Woolley, an appeals officer at Revenue Canada, as a witness for the respondent. Ms. Woolley was the officer in charge of the appellant’s file as it made its way through the objection/notice of decision phase of the respondent’s process. Like Mr. Rabideau, Ms. Woolley took the Tribunal through a number of examples to illustrate the points at which the appellant’s and the respondent’s positions in this matter differ.

Ms. Woolley testified using an example transaction in which the total invoice amount was \$100. She pointed out that that amount would include unspecified amounts for labour, materials, profit and, using the excise communiqué value for simplicity, \$19/m³ for transportation. Ms. Woolley testified that, in theory, all of those amounts would have some value of FST associated with them. However, she indicated that methodology B, by deducting the transportation expense after the total invoice price had been multiplied by 9/109, failed to account for the FST associated with the transportation expense. In order to take account of that amount, Ms. Woolley testified that the transportation expense of \$19/m³ in methodology B would have to be adjusted by multiplying it by a factor of 9/109.

“Sale price” under the Act means the amount charged by the appellant as price before any amount payable in respect of any other tax under the Act is added thereto. However, in calculating the sale price, pursuant to clause 46(c)(ii)(B) of the Act, there may be excluded, from the invoice amount, the cost of transporting the goods incurred by the manufacturer (i.e. the appellant) in delivering the goods to its customers.

In the Tribunal’s view, this appeal comes down to a question of mathematics. With all-in invoicing, such as was employed by the appellant, there are certain values which make up the appellant’s total invoice amount which are known and others which are unknown. These values are as follows:

Known Values	Unknown Values
total invoice amount (tax included)	sale price
transportation expense	tax payable
tax rate	

The Tribunal is of the view that the appellant’s total invoice amount or all-in price was equal to the sale price plus the transportation expense and tax payable. Expressed algebraically, that same equation would be:

$$B = X + A + Y$$

where:

B = total invoice amount

X = sales price (excluding FST and transportation expense)

A = transportation expense

Y = tax payable

Moreover, under the Act, sale price multiplied by the applicable tax rate would equal the amount of FST owing. Expressed algebraically, that same equation would be:

$$Y = X(r)$$

where:

X = sale price

r = applicable tax rate

Y = tax payable

If values are assigned to the variables which are known, the two foregoing equations may be solved to determine sale price and tax payable. If the total invoice amount is \$100, the transportation expense is \$40 and the tax rate is 20 percent, using the formulae set out above, the calculation would be as follows:

$$\begin{aligned} X + Y + \$40 &= \$100 \\ X + Y &= \$60 \\ Y = X(.2) \text{ therefore } X + X(.2) &= \$60 \\ 1.2X &= \$60 \\ X &= \$60/1.2 \\ X &= \$50 \end{aligned}$$

tax payable calculation

$$\begin{aligned} Y &= \$50 \times 0.2 \\ Y &= \$10 \end{aligned}$$

Using the same numerical example and applying the appellant's and the respondent's methodologies reveals that the respondent's methodology arrives at the correct values for sale price and tax payable, whereas the appellant's methodology does not.

Respondent	Value	Appellant	Value
total invoice amount	\$100.00	total invoice amount	\$100.00
less transportation expense	\$40.00	less tax $20/120 \times 100$	\$16.66
net	\$60.00	net	\$83.33
less FST $\$60.00 \times 20/120$	\$10.00	less transportation expense	\$40.00
sale price (excluding tax and transportation)	\$50.00	sale price	\$43.33
sale price \times applicable tax rate or 0.2	\$10.00	tax $0.2 \times \$43.33$	\$8.66

The same is true if the foregoing methodologies are employed using the Belleville/December 1990 example.

In the Tribunal's view, the methodology proposed by the appellant understates the sale price and, therefore, understates the amount of FST payable. This is due to the fact that that methodology is internally inconsistent in its treatment of transportation costs. Since the calculation used to extract FST from the appellant's all-in sale price wrongly assumes transportation to be taxable, it results in a reduction from that all-in price which is greater than that amount which is actually payable. While the methodology utilized by the respondent differs from that employed by the Tribunal above, in the Tribunal's view, the respondent's

methodology is not incorrect and, in fact, does determine a correct value for sale price and, thus, tax payable. The Tribunal is not persuaded that the appellant remitted more tax than was properly due under the Act and, accordingly, the appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Dr. Patricia M. Close

Dr. Patricia M. Close
Member

Lyle M. Russell

Lyle M. Russell
Member