CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, December 19, 1996

Appeal No. AP-94-148

IN THE MATTER OF an appeal heard on March 6, 1996, 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 April 22, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

SUNCOR INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

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

Desmond Hallissey
Desmond Hallissey
Member

Anita Szlazak
Anita Szlazak
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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UNOFFICIAL SUMMARY

Appeal No. AP-94-148

SUNCOR INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant operates a synthetic crude oil facility located north of Fort McMurray, Alberta. The appellant mines oil sands, from which it extracts bitumen using a hot-water process, and upgrades the bitumen into synthetic crude oil. The appellant uses the open-pit or strip mining method to mine the oil sands. With respect to the activities at issue, the appellant generally uses trucks and other machinery to gather and move soil materials which are used to build dikes and fill in previously mined areas. This appeal raises the issue of whether the activities at issue fall within the definition of "mining" in subsection 69(1) of the *Excise Tax Act* so as to entitle the appellant to a fuel tax rebate for fuel consumed in the activities at issue. More specifically, the Tribunal must decide if these activities constitute "the restoration of strip-mined land to a usable condition."

HELD: The appeal is allowed in part. The Tribunal returns the matter to the respondent to determine what portion of the remaining claim relates to fuel costs incurred beyond the minimum dumping point in respect of building the dikes.

Place of Hearing:	Edmonton, Alberta
Date of Hearing:	March 6, 1996
Date of Decision:	December 19, 1996
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Desmond Hallissey, Member Anita Szlazak, Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Frans F. Slatter and Douglas R. Densmore, for the appellant Frederick B. Woyiwada, for the respondent

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

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Ottawa (Ontario) K1A 0G7
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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-148

SUNCOR INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
DESMOND HALLISSEY, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of a decision of the Minister of National Revenue dated April 22, 1994.

The appellant operates a synthetic crude oil facility located north of Fort McMurray, Alberta. The appellant mines oil sands, from which it extracts bitumen using a hot-water process, and upgrades the bitumen into synthetic crude oil. The appellant uses the open-pit or strip mining method to mine the oil sands. With respect to the activities at issue, the appellant generally uses trucks and other machinery to gather and move soil materials which are used to build dikes and fill in previously mined areas.

On July 30, 1991, the appellant filed a fuel tax rebate application in the amount of $200,000.00 in respect of fuel used during the period from June 1, 1989, to December 31, 1990. By notice of determination dated December 10, 1991, the appellant's rebate claim was disallowed on the basis that oil sands were not a "mineral resource" within the meaning of the Act. By notice of objection dated January 22, 1992, the appellant objected to the determination. By notice of decision dated April 22, 1994, the respondent allowed the appellant's objection in part. The amount of the claim allowed by the respondent was $138, 010.02. This appeal deals with the portion of the appellant's rebate claim that was disallowed.

This appeal raises the issue of whether the activities at issue fall within the definition of "mining" in subsection 69(1) of the Act so as to entitle the appellant to a fuel tax rebate for fuel consumed in the activities at issue. More specifically, the Tribunal must decide if the activities constitute "the restoration of strip-mined land to a usable condition."

Section 69 of the Act provides for qualified persons to claim a rebate in respect of gasoline or diesel fuel consumed in certain end uses, including fuel for use in mining. Subsection 69(1) of the Act defines "mining" as follows:

> "mining" means the extracting of minerals from a mineral resource, the processing of ore, other than iron ore, from a mineral resource to the prime metal stage or its equivalent, the processing of iron ore from a mineral resource to the pellet stage or its equivalent and the restoration of strip-mined land to a usable condition, but does not include activities related to the exploration for or development of a mineral resource.

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

333 Laurier Avenue West
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(613) 990-2452 Fax (613) 990-2439

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Counsel for the appellant called two witnesses. The first witness was Ms. Susan C. Lowell, a staff engineer with Suncor Inc. Ms. Lowell has held various positions within Suncor Inc. since 1980. Her current responsibilities include co-ordinating activities required to complete an environmental impact assessment for the development of a new mine. She also has been involved in developing plans for the appellant's reclamation[2] activities. Ms. Lowell indicated that the appellant began mining the oil sands in 1967 and concurrently began its reclamation activities. The appellant's operation extends about five miles in a north-south axis and about two and a half miles in an east-west axis. The pit itself has a depth of about 300 feet, approximately equivalent to a 20-storey building.

Ms. Lowell explained that the appellant's basic approach to restoration involves gathering and moving muskeg and overburden which are used to construct dikes and fill in previously mined areas. To do this, the appellant first removes the muskeg from the surface of the land and either stockpiles it or hauls it by truck directly to a refill or reclamation site. The appellant then removes the overburden or inorganic layers to reach the oil sands. The overburden also is hauled by truck to various dump sites for use primarily in constructing dikes, which are used to hold tailings in ponds. Tailings are a slurry of water and sand which results from the processing of the oil sands. The tailings ponds are used as a source of water for the processing plant, and the recycling of the tailings results in their being "dewatered' over time. This, in turn, leads to the ponds being filled in and eventually contributes to that portion of the land being reclaimed.

Ms. Lowell emphasized that the reclamation activity was done in accordance with the development of a reclamation plan required under provincial legislation and filed with the government of Alberta. Ms. Lowell was of the view that the provincial government would not approve reclamation plans that either failed to commit to restoring the land to a usable condition or provided for the tailings to be dumped into the Athabasca River, which adjoins the appellant's mining site. Furthermore, she indicated that, in general, the restoration process at this site begins with the development of a reclamation plan, while physically it starts with the removal of muskeg. Ms. Lowell also agreed that, while the removal of muskeg and overburden is necessary to mine the resource, their removal is also necessary to restoration, as these materials are needed to create a landscape similar to that prior to the land being mined.

In cross-examination, Ms. Lowell indicated that the largest tailings pond would be about two miles long and two miles wide, i.e. equivalent to a good-sized lake. She stated that, although legislatively mandated reclamation may not have existed in 1967, the appellant has always operated as described above because the only alternative was to dump the tailings in the Athabasca River, which was not an acceptable alternative. Ms. Lowell estimated that about 25 to 30 percent of the muskeg is placed directly on a site, and the rest is stockpiled. She also indicated that fuel is a major cost in the overburden/muskeg operation and that efforts are made to minimize hauling distances.

The appellant's second witness was Mr. Leonard J. Knapik. Mr. Knapik is President of Pedocan Land Evaluation Ltd., which does consulting work with respect to various aspects of reclamation activities of mining, oil and gas and other companies. Mr. Knapik started the company in 1967 and has extensive practical and educational experience in this area. Mr. Knapik was accepted as an expert in the restoration of strip-mined land.

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2. The word "reclamation" is used in the Alberta environmental legislation for the activities discussed in this case. "Reclamation" and "restoration" are considered synonymous in these reasons.

Mr. Knapik explained that there has been a legal requirement in Alberta to reclaim mined land, including oil sands, since the early 1970s. In general, the legislation provides that such lands, after restoration, must achieve equivalent land capability. As the oil sands originally were covered with muskeg or peat soil, which no one wants to restore, the parties involved are developing interim guidelines about eventual use which are directed at achieving forestry and wildlife uses. Mr. Knapik described the appellant's plans for this land as a variation of progressive reclamation or reclamation of mined-out land behind the mine being developed. In Mr. Knapik's view, reclamation begins, in this case, with the planning and approval process for the mine. In a physical sense, reclamation begins with the identification and salvage of suitable topsoil materials, i.e. the muskeg or peat soil.

In cross-examination, Mr. Knapik agreed that overburden has to be removed before the resource to be mined can be accessed and that the overburden has to be carried or moved some distance so as to be out of the way of the mining operation.

In argument, counsel for the appellant first explained that the respondent's decision in this case is different from the respondent's decision in *Double N Earth Movers Ltd.* v. *The Minister of National Revenue*.[3] In both cases, the respondent did not allow a rebate for fuel used to move material to a minimum dumping point (MDP), as the overburden would need to be hauled a certain distance so as not to hinder the ongoing mining operation. However, in *Double N Earth*, the respondent allowed a rebate for all fuel used to move material beyond the MDP, while, in this case, the respondent allowed a rebate for only 50 percent of the fuel used to move material beyond the MDP, on the basis that the dikes made by the appellant are partly for development and partly for reclamation.

Counsel for the appellant submitted that the appellant's mining operation should be considered a dual-purpose operation. The testimony of the witnesses shows that it is artificial to say that moving overburden is only mining and has nothing to do with reclamation. Rather, the evidence is that there is a continuous integrated process that is both mining and reclamation and, with respect to the dikes, is both processing and reclamation. Counsel submitted that the respondent is, in effect, assessing the appellant on the basis of a theoretical concept of mining which does not exist and, if it did, would be unlawful.

Counsel for the appellant drew the Tribunal's attention to the words of Justice Estey in *Johns-Manville Canada Inc.* v. *Her Majesty the Queen*,[4] in which he states that, "where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer.[5]" Counsel submitted that, while the Act mentions restoration, it does not address the fact that the mining process in this case is an integrated process in which mining and reclamation occur at the same time. This, they submitted, was just the type of "factual ambiguity" to which Justice Estey was referring and, therefore, the appellant is entitled to the benefit of the doubt.

Turning to the Tariff Board's decision in *Denison Mines Limited* v. *The Minister of National Revenue for Customs and Excise*,[6] counsel for the appellant submitted that this case can be distinguished from *Denison Mines* in a number of ways. First, the ponds built in *Denison Mines* were not built to assist in

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3. Canadian International Trade Tribunal, Appeal No. AP-94-327, December 19, 1996.
4. [1985] 2 S.C.R. 46.
5. *Ibid.* at 72.
6. (1989), 1 Can. S.T.R. 8657, Appeal Nos. 2972 and 2973, December 9, 1988.

reclaiming anything. They were built to store the problem tailings produced by the uranium mine and, as such, dealt with processing only. Second, counsel submitted that the primary passage in which the Tariff Board discussed the "development" phase of the operation in question was *obiter*.

In addition, counsel for the appellant submitted that the Tariff Board's views were inconsistent with the Department of National Revenue Ruling 10130/22-1[7] (the Ruling), which is relevant. The questions in the Ruling ask whether certain activities are considered to fall within the definition of "mining" for purposes of the fuel tax rebate. The two activities are described as follows:

1) The removal of overburden to gain initial access to a mine.

2) The removal of intermitting layers of overburden in following the ore body in a producing mine.

The answers given are as follows:

1) No. The removal of overburden to gain initial access to a mine is regarded as a "development" activity and therefore does not qualify for the fuel tax rebate.

2) Yes. In a producing mine, all extraction activities, including extracting the mineral and removing the intermittent layers of overburden or waste material in following the ore body, are considered to come within the definition of "mining" for purposes of the fuel tax rebate.

Counsel submitted that these answers reflected the government's own acceptance that, although the initial removal of overburden may be development, following the ore body is considered to be "mining" for purposes of the fuel tax rebate. Counsel suggested that another problem with the *Denison Mines* decision is that it appears that a very weak factual case seems to have been put before the Tariff Board about the mining operation in that case.

Finally, counsel for the appellant submitted that, even if the decision in *Denison Mines* is correct, it can be distinguished on the basis that it dealt with a mineral resource, whereas this case does not. In other words, the concluding words of the definition of "mining," i.e. that mining does not relate to the "development of a mineral resource," should not be applied in this case, and the respondent should not be allowed, in effect, to add the words "for a non-mineral resource" to the end of the definition.

Counsel for the appellant referred to the concept of "dual purpose" and a series of cases[8] which, they submitted, support the view that, if a taxpayer establishes that one is dealing with a dual-purpose activity and one of those activities is exempt, then no taxes flow from that activity. Counsel specifically compared this case to the factual situation in *Coca-Cola*, which dealt with soft drink containers which were moved through the manufacturer's production process on conveyors to the warehouse, from which the final product was distributed. Counsel submitted that this reflects an integrated process similar to the appellant's mining operation. Just as the Federal Court of Appeal in that case decided that it could not draw a line and say where

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7. *Fuel Tax Rebate: Whether "Mining" — Removal of Overburden*, May 1, 1986.

8. *Coca-Cola Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*, [1984] 1 F.C. 447; *The Deputy Minister of National Revenue for Customs and Excise* v. *Steel Company of Canada Limited* (1983), 5 C.E.R. 438, Federal Court of Appeal, Appeal No. A-239-82, June 13, 1983; *Amoco Canada Petroleum Company Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise* (1983), 8 T.B.R. 696; and *Firwin Corp.* v. *The Deputy Minister of National Revenue for Customs and Excise* (1985), 10 T.B.R. 104.

manufacture stops and warehousing begins, in this case, the removal of overburden to get at the resource is the first step in the reclamation process, and the Tribunal cannot draw a line between them.

With respect to the issue of apportioning part of the fuel costs, counsel for the appellant referred to the decision of the Supreme Court of Canada in *Irving Oil Limited, Foster Wheeler Limited and Canaport Limited* v. *The Provincial Secretary of the Province of New Brunswick*.[9] The Supreme Court of Canada stated, with respect to the requirement of "direct use" in Schedule III to the Act, that this requirement "is fulfilled irrespective of the percentage of use that may be ascribed to the process of manufacture as opposed to other processes such as storage and distribution.[10]" Counsel submitted that, by analogy, the respondent should not be allowed to apportion fuel costs between restoration and development.

Counsel for the respondent submitted that, in effect, the appellant's position is that all fuel costs used in this operation should be considered to be used for restoration and, therefore, be exempt. The respondent's decision is premised on the view that it is impossible to suggest that all fuel costs could have been used in restoration, as the removal of overburden is an integral part of mining. Counsel suggested that the respondent's decision contains two key considerations. First, a resource has to be exposed in order to be mined at all, and the overburden has to be moved some distance in order to allow the mining operation to proceed. The respondent took the position that fuel used for this purpose was not being used for restoration and, therefore, should not be treated as being exempt. Second, the dikes play a key role in the processing part of the appellant's mining operation and, therefore, cannot be considered to be solely related to restoration, thus the decision to treat only 50 percent of the fuel used beyond the MDP as being exempt. In this regard, counsel referred to the evidence of both witnesses which, he submitted, shows how essential the tailings ponds are to the appellant's mining operation. Counsel compared the importance of the ponds in this case to the ponds in *Denison Mines* and submitted that, in both cases, it is clear that mining operations would cease without access to the ponds.

Counsel for the respondent reminded the Tribunal that the word "used" in the definition of "mining" is written in the past tense. He argued that land cannot be restored to a condition until that condition has been changed and that something done to change the land clearly is not part of the restoration process.

With respect to the cases which counsel for the appellant submitted stood for a "dual-purpose" principle or test, counsel for the respondent submitted that no such principle is articulated in these cases. Counsel also submitted that, unlike this case which deals with a consumable item, fuel, those cases dealt with capital goods.

In arriving at its decision, the Tribunal notes that there is a possible issue as to whether oil sands are actually minerals or a mineral resource. However, in light of counsel for the respondent's instructions not to contest this point, which the Tribunal interprets to mean that the respondent has conceded this point, the Tribunal will consider the case on the basis that it is dealing with a mineral resource. Having said this, the Tribunal is of the view that the appellant cannot subsequently argue that, as the oil sands are not really a mineral resource, the phrase "activities related to the ... development of a mineral resource" in the definition of "mining" cannot be applied in this case. The case can only proceed if the Tribunal is dealing with a

9. [1980] 1 S.C.R. 787.
10. *Ibid.* at 796.

mineral resource and, if it is, the entitlement to the rebate must be decided in the context of the full definition of "mining."

The Tribunal is of the view that, in light of the definition of "mining," the issue before it is rather straightforward. The definition clearly indicates that activities relating to the development of a mineral resource do not qualify for the rebate, and some portion of the appellant's activities must be considered to be "development" of the mine; otherwise, there would be no resource to process. In other words, a line must be drawn at some point in the process between development and other activities. In this regard, the Tribunal agrees with the Tariff Board's comments in *Denison Mines* that the definition of "mining" reflects an intention on the part of Parliament to carve off or exclude from qualification for the rebate certain activities, such as activities relating to the development of a mineral resource, which otherwise would be considered mining activities.[11]

Counsel for the appellant's submissions regarding what they called the "dual-purpose" principle suggest that the Tribunal does not have to "draw a line" in interpreting the definition of "mining." Except for the Tariff Board's decision in *Firwin*, the Tribunal agrees with counsel for the respondent that the cases to which counsel for the appellant referred do not stand for the proposition put forward by them. First, the Tribunal notes that those cases consider a different provision of the Act than that at issue. Second, the Tribunal is of the view that the issue in those cases was not whether one or another activity of the taxpayer was exempt, but rather whether the goods in issue used by the taxpayer were machinery or apparatus for use by a manufacturer directly in the manufacture or production of goods. This is a long way from whether the fuel costs incurred by the appellant are exempt in the context of the definition of "mining" in the Act.

The Tribunal is cognizant that, in *Firwin*, the Tariff Board does discuss a dual-function concept. However, in this appeal, the Tribunal again finds itself at a loss to understand how the definition of "mining" can be read in a manner which would have the effect of making all fuel costs used in a mining operation qualify for a rebate when the definition, on its face, provides that development activities are not included. The Tribunal notes that this distinction or, put differently, this "line" between activities provided for in the definition of "mining" is reflected in the answers given to the questions in the Ruling to which counsel for the appellant referred. These answers are consistent with the Tribunal's view of a plain reading of the definition of "mining," which leads to the conclusion that fuel costs incurred in the development stage of the mine do not qualify for the fuel tax rebate, even if they also relate to eligible aspects of the operation. Furthermore, while conscious of the statements of the Supreme Court of Canada in *Irving Oil*, the Tribunal concludes that they are not applicable to this case, as the definition of "mining" shows that Parliament contemplated that apportionment of the costs would be possible by virtue of the words "but does not include."

Having decided that it is appropriate to distinguish between development and, in this case, restoration, once past the development stage, it is open to the appellant to persuade the Tribunal that the evidence shows that a particular use, in this case, restoration, is an eligible use. The appellant has so persuaded the Tribunal. Although it is true that the dikes play an important role in the development of the mine, the evidence shows that they play a more significant role in both the restoration and processing activities of the appellant, and these are both eligible activities. Furthermore, the Tribunal notes that, although the definition of "mining" distinguishes between development and eligible activities, as in *Irving Oil* and *Stelco*, it does not contain language that can be interpreted as contemplating the apportionment of costs once

11. *Supra* note 6 at 8663-64.

these stages of the mining operation are reached. Therefore, the respondent should not have apportioned costs with respect to overburden moved beyond the MDP.

Accordingly, the appeal is allowed in part. The Tribunal returns the matter to the respondent to determine what portion of the remaining claim relates to fuel costs incurred beyond the MDP in respect of building the dikes.

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