CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, December 19, 1996

Appeal No. AP-94-327

IN THE MATTER OF an appeal heard on March 4, 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 September 10, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

DOUBLE N EARTH MOVERS LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-94-327

DOUBLE N EARTH MOVERS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant operates an earthmoving construction company, primarily engaged in the construction of roads and the stripping and replacement of soil for owners or operators of gravel pits. With respect to the activities at issue, the appellant operates a fleet of motor scrapers which gather topsoil and overburden to move and place them onto areas that previously have been surface mined. The primary issue raised by this appeal is 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 dismissed. In the Tribunal's view, a plain reading of the definition of "mining" in the *Excise Tax Act* 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 relate to eligible aspects of the operation.

Place of Hearing:	Edmonton, Alberta
Date of Hearing:	March 4, 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

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-327

DOUBLE N EARTH MOVERS LTD. **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 September 10, 1993.

The appellant operates an earthmoving construction company, primarily engaged in the construction of roads and the stripping and replacement of soil for owners or operators of gravel pits. With respect to the activities at issue, the appellant operates a fleet of motor scrapers which gather topsoil and overburden to move and place them onto areas that previously have been surface mined.

On November 17, 1988, the appellant filed a fuel tax rebate application in the amount of $5,000.00 in respect of fuel used during the period from November 17, 1984, to November 17, 1988. The appellant indicated, at that time, that it was making a progress claim and that its main rebate claim would follow. The second claim apparently was never filed. By notice of determination dated August 14, 1990, the appellant's rebate claim was disallowed on the basis of a number of reasons, including the view that gravel was not a "mineral resource" and that the activities in which the appellant was involved were not "mining" activities. By notice of objection dated October 12, 1990, the appellant objected to the determination and indicated that the amount in dispute was $83,629.48. By notice of decision dated September 10, 1993, the respondent allowed the appellant's objection in part and vacated the notice of determination. In doing so, the respondent disallowed, among other things, that portion of the appellant's objection relating to stripping overburden at gravel pits and allowed that portion of the objection relating to replacing overburden back onto "mined" pits. The amount allowed was $13,213.91.

The primary issue raised by this appeal is 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 these 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
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

As a preliminary matter, counsel for the respondent raised the issue of whether the Tribunal has jurisdiction to hear this appeal. The Tribunal stated that it would hear submissions of the parties on this matter, reserve its decision until its reasons were issued and proceed to hear evidence and argument on the balance of the issues in this appeal. The parties agreed to proceed on this basis.

Counsel for the respondent submitted that, under section 81.19 of the Act, an appellant may only appeal from a determination of the respondent made under subsection 72(4) of the Act. In this regard, counsel cited the following passage from the Tribunal's decision in *Essex Topcrop Sales Limited* v. *The Minister of National Revenue*:[2]

> As it was the determination of the Minister, made under subsection 72(4) of the Act, that was appealed under section 81.19 of the Act, the appellant's claim is limited to those moneys actually paid in error for which it applied for a refund.[3]

Counsel submitted that, since the respondent allowed a refund in excess of the amount of the appellant's refund claim and the determination was vacated by the decision, there is nothing further for the Tribunal to consider.

Counsel for the appellant submitted that subsections 81.17(5) and (6) and section 81.18 of the Act, taken together, provide that an appeal under section 81.19 relates to the issue of the "amount payable," if any, to the taxpayer who is appealing the respondent's decision. In this case, that issue specifically relates to the question of the appellant's entitlement to a rebate or, put differently, to the question of whether the activities at issue are exempt from tax and, therefore, of the "amount payable" to the appellant with respect to those activities. Furthermore, the amount of the rebate claimed in the application is not relevant to the determination of the issue before the Tribunal. The respondent's conduct reflects this fact. Although the rebate application was for $5,000, the respondent paid the appellant over $13,000. Counsel submitted that this reflected the respondent's recognition that his duty under the Act is to determine the amount payable and to pay it, even if it is more than the amount claimed.

The Tribunal notes that the facts show that the rebate application was for $5,000.00. However, it is also clear to the Tribunal that the respondent's decision reflects an understanding that the amount in issue is far more than $5,000.00. The Tribunal fails to understand how the respondent can acknowledge this by determining that the amount payable in respect of the appellant's objection was greater than the amount claimed and then say that the decision cannot be appealed because the amount claimed was less, particularly when the determination did not consider the issue of quantum. At issue before the Tribunal is the determination leading to the appellant's objection and the respondent's decision with regard to the appellant's objection to that determination. That decision was that the "amount payable" under the Act was $13, 213.91. The appellant questions how the respondent arrived at this amount and appealed this decision to the Tribunal under section 81.19 of the Act. As such, the Tribunal is of the view that it has jurisdiction to consider this matter.

Counsel for the appellant called three witnesses. The first witness was Mr. Robert J. Tochor. Mr. Tochor is Contracts Manager at Selene Contractors Ltd., which is the name under which the appellant is now carrying on business. Mr. Tochor explained that the appellant is an earthmoving contractor which does a

---

2. Appeal No. AP-91-121, April 6, 1992.
3. *Ibid.* at 6.

significant amount of gravel pit or overburden stripping in the Edmonton, Alberta, area. He also explained how the appellant usually competes for overburden stripping business by submitting tenders for what are usually seasonal contracts. Turning to how the appellant actually performs this work, he stated that a gravel pit site usually has different layers of material or overburden above or on top of the gravel deposit, which have to be stripped off so the gravel can be removed. There are generally three layers of overburden: (1) the top layer or topsoil; (2) the root zone; and (3) the clay material, which is just above the gravel.

Mr. Tochor indicated that contractors, like the appellant, are directed by the pit owner to remove the various layers in a particular manner so that the stripped land eventually can be returned to a usable form. This means that the three layers have to be kept separate so that they eventually can be replaced on top of each other. He also explained that it was his understanding that the government of Alberta required that stripped land be reclaimed to a usable condition. The manner by which this is done is progressive stripping, which allows previously stripped parts of the pit to be refilled as the pit "crawls" forward. Mr. Tochor stated that, in his view, the removal of one layer of overburden in one part of the pit and the placement of that overburden in a previously stripped part of the pit did not constitute two separate operations, but one operation.

In cross-examination, Mr. Tochor explained that, in opening a new pit, the first layers of overburden have to be stockpiled until there is a stripped area in which to place them. He also agreed that overburden is not being removed for restoration purposes, but to get at the gravel deposit.

The appellant's second witness was Mr. Dan C. Fouts. Mr. Fouts is District Manager at Twin Bridge Gravel Contracting Ltd. (TBG Contracting), a position he has held since 1981. Mr. Fouts stated that TBG Contracting was in the business of developing and producing aggregates, including gravel and sand. TBG Contracting was one of the pit owners that let contracts on which the appellant tendered bids and, from time to time, was a successful bidder with respect thereto.

Mr. Fouts stated that the provincial environmental legislation in force during the period covered by the rebate claim required that land be returned to a condition equal to that prior to the land being disturbed. In this regard, pit owners would file a reclamation plan with the provincial government. The plan would provide for the progressive restoration of the pit site as the gravel was removed. Mr. Fouts was of the view that reclamation of a particular site starts from the time that the ground is broken and that the process of progressive reclamation reflects one operation, not two.

In cross-examination, Mr. Fouts indicated that, while the removal of the overburden did facilitate the removal of the gravel, it was unlikely that TBG Contracting would be allowed to remove gravel unless it reclaimed the gravel pit. Thus, the two activities facilitate each other, in one ongoing process.

The appellant's third 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.

Mr. Knapik first discussed the use of the terms "restoration," "reclamation" and "rehabilitation," which, he said, had different technical meanings. Mr. Knapik was of the view that the definition of "mining"

in the Act was a mixed or confused use of the term "restoration," as it really reflected "reclamation." Mr. Knapik explained the nature of the legal requirement in Alberta to reclaim gravel pits. In general, the legislation provides that such lands, after restoration, must achieve equivalent land capability, which can be done by replacing overburden in a progressive reclamation process. In Mr. Knapik's view, in this case, reclamation begins with the planning of the pit, while, in terms of actual work, it begins with the removal of the first level of topsoil. Mr. Knapik also agreed with the following statement in a letter written by Mr. John M. King, former Chairman of the Land Conservation and Reclamation Council, relating to the policy of the Alberta Department of Environment:

> In conclusion, the Department considers salvage and replacement of topsoil, subsoil and overburden as an integral part of reclamation.[4]

In cross-examination, Mr. Knapik agreed that overburden is removed in a gravel pit to get at the gravel and not removed just to be replaced. He also agreed that there was a difference between site preparation and reclamation, as well as between pit development and operation.

In argument, counsel for the appellant submitted that the appellant's mining operation should be considered a dual-purpose operation. They stated that the appellant does not dispute that overburden has to be removed to get at the resource, but that this removal is also the first step in the reclamation process. This process is a continuous integrated process whereby the overburden is lifted and moved in one movement, as the gravel pit slowly creeps forward. Counsel submitted that the case law which they would discuss later supports the view that, if there are two activities, one of which is exempt and one which is not, the taxpayer is entitled to be exempt from tax. They contrasted this with what they submitted was the respondent's view that, in effect, gathering the overburden and moving it to some mythical point was mining and that moving it the rest of the way and placing it was restoration. Counsel submitted that there was no evidence that supported the respondent's theory of the case.

Counsel for the appellant noted that the reference in the Act to the restoration of strip-mined land does not mention the manner in which this process is performed. However, they submitted, the Tribunal must assume that Parliament knew how strip-mining occurred when it drafted the definition of "mining." Counsel then referred to the Supreme Court of Canada's decision in *Johns-Manville Canada Inc.* v. *Her Majesty the Queen*[5] and, specifically, to the passage from the reasons of Justice Estey, 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.[6]" 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. Counsel added that, if Parliament had wished to use limiting words or words that deemed only a certain percentage of fuel would be allowed for a rebate, it could have done so, but it did not.

---

4. Appellant's brief, Tab 13 at 2.
5. [1985] 2 S.C.R. 46.
6. *Ibid.* at 72.

Counsel for the appellant returned to the concept of "dual purpose" and a series of cases[7] 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 referred extensively to the judgment of the Federal Court of Appeal in *Coca-Cola*. This case 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 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. They continued that, just as the containers in *Coca Cola* which were subsequently used in warehousing were irrelevant, in this appeal, the fact that removing overburden exposes the resource should also be seen as irrelevant. The issue is whether the fuel is used for the restoration of strip-mined land to a usable condition, and the answer is that it is.

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*.[8] 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.[9]" 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 the issue in this case is whether one would consider all of the earthmoving activities done in the strip mining process to be restoration. He submitted that the appellant's position appears to be that the entire operation relating to earthmoving should be considered to be a restoration activity and, therefore, be exempt. The respondent's position is that only part of that operation should be considered to be restoration.

Turning to the definition of "mining" and the Tariff Board's decision in *Denison Mines Limited* v. *The Minister of National Revenue for Customs and Excise*,[10] counsel for the respondent suggested that the definition sets out the four activities considered to be mining. With specific reference to the restoration of strip-mined land, counsel submitted that the word "restoration" has to refer to something that is done after something else has already been done. In addition, the verbs are in the past tense and, thus, relate to land that has already been stripped. Therefore, the process involved must be at least a two-stage process: one where the land is strip-mined, i.e. the overburden is removed, and the other where the land is restored, i.e. the

---

7. *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.
8. [1980] 1 S.C.R. 787.
9. *Ibid.* at 796.
10. (1989), 1 Can. S.T.R. 8657, Appeal Nos. 2972 and 2973, December 9, 1988.

overburden is put somewhere else. Counsel submitted that the evidence, in particular the testimony to the effect that one of the activities facilitates the other, supports this conclusion.

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. He stated that each of these cases involved the determination of a primary purpose relating to the goods involved, and not the determination that one activity has two purposes and that the exempt purpose is preferred.

In reply, counsel for the appellant submitted that the "dual-purpose" cases do not distinguish between a primary and secondary purpose.

At the outset of its reasons, the Tribunal notes that there is a possible issue as to whether gravel is actually a mineral or a mineral resource, as defined. However, in light of counsel for the respondent's instructions not to contest this point and to consider the restoration of strip-mined land to be mining, 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 and, thus, mining. In doing so, the Tribunal must accept that, in this appeal, it is dealing with a mineral resource and that 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 does not agree with counsel that the cases to which they referred stand for the proposition that they put forward. 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.

---

11. *Ibid.* at 8663-64.

Thus, in the Tribunal's view, a plain reading of the definition of "mining" in the Act 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 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 may be possible by virtue of the words "but does not include."

Accordingly, the appeal is dismissed.

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

Desmond Hallissey
Desmond Hallissey
Member

Anita Szlazak
Anita Szlazak
Member