CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, February 10, 1997

Appeal Nos. AP-96-025, AP-96-026 and AP-96-027

IN THE MATTER OF appeals heard on November 21, 1996, under section 81.19 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 February 20 and April 4, 1996, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

FRANCON-LAFARGE, DIVISION OF LAFARGE CANADA INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Desmond Hallissey
Desmond Hallissey
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-96-025, AP-96-026 and AP-96-027

FRANCON-LAFARGE, DIVISION OF LAFARGE CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

These are appeals under section 81.19 of the *Excise Tax Act* (the Act) of determinations of the Minister of National Revenue that rejected applications for refunds of federal sales tax pursuant to section 68 of the Act. The issue in Appeal Nos. AP-96-025 and AP-96-027 is whether the appellant is entitled to refunds of federal sales tax paid on the sale of ready-mix concrete, while, in Appeal No. AP-96-026, the Tribunal must determine whether the appellant is entitled to a refund of federal sales tax paid on the sale of asphalt paving mixtures.

HELD: The appeals are dismissed. Part I of Schedule IV to the Act specifically provides that "[r]eady-mix concrete" is taxable under section 50 of the Act. Subsection 51(1) provides that federal sales tax imposed under section 50 does not apply to the sale of the goods mentioned in Schedule III. The evidence shows that the appellant was making and selling ready-mix concrete and not sand, gravel and rock. The Tribunal is of the opinion that Part X of Schedule III exempts sand, gravel and rock from federal sales tax when they are sold separately. Consequently, the respondent was justified in imposing federal sales tax on the sale of ready-mix concrete.

The evidence reveals that the cost of the appellant's construction contracts always included an amount for ready-mix concrete and an amount for asphalt paving mixtures, even if these amounts were not always indicated. In the Tribunal's view, the appellant's contracts were simply construction contracts which included the sale of ready-mix concrete and/or asphalt paving mixtures at a price which included delivery and installation. Consequently, the Tribunal is of the view that the appellant, in fact, sold the ready-mix concrete and the asphalt paving mixtures and that it did not appropriate them for its own use within the meaning of subsection 52(1) of the Act or Excise Memorandum ET 207. The appellant, therefore, would not have had recourse to the method of calculating federal sales tax according to the fair market value outlined in Excise Memorandum ET 207. Having arrived at this conclusion, it is not necessary for the Tribunal to determine whether it has jurisdiction to allow the appellant to recalculate the amount of federal sales tax payable using a different method of calculation.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 21, 1996
Date of Decision:	February 10, 1997
Tribunal Members:	Arthur B. Trudeau, Presiding Member Desmond Hallissey, Member Lyle M. Russell, Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Serge Fournier, for the appellant Guy A. Blouin, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-96-025, AP-96-026 and AP-96-027

FRANCON-LAFARGE, DIVISION OF LAFARGE CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
DESMOND HALLISSEY, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

These are appeals under section 81.19 of the *Excise Tax Act*[1] (the Act) of determinations of the Minister of National Revenue that rejected applications for refunds of federal sales tax (FST) pursuant to section 68 of the Act.

On December 20, 1990, the appellant filed an application for a refund, in the amount of $429,667.05, for FST paid on the sale of ready-mix concrete for the period from June 1, 1989, to November 30, 1990 (Appeal No. AP-96-025) and an application for a refund, in the amount of $740,026.77, for FST paid on the sale of asphalt paving mixtures for the period from June 1, 1989, to November 30, 1990 (Appeal No. AP-96-026). On June 16, 1989, the appellant filed an application for a refund, in the amount of $264,493.25, for FST paid on the sale of ready-mix concrete for the period from June 28, 1987, to May 27, 1989 (Appeal No. AP-96-027). These applications for refunds were rejected by the respondent. The appellant's objections were also rejected.

The issue in Appeal Nos. AP-96-025 and AP-96-027 is whether the appellant is entitled to refunds of FST paid on the sale of ready-mix concrete, while, in Appeal No. AP-96-026, the Tribunal must determine whether the appellant is entitled to a refund of FST paid on the sale of asphalt paving mixtures.

The appellant works in road construction, for both municipalities and other levels of government. It also develops large parking lots, prepares sites and sells aggregates and asphalt. The appellant manufactures asphalt and ready-mix concrete for its own use and for sale.

At the hearing, Mr. Marcel Bouthillier, an appeals officer with the Department of National Revenue (Revenue Canada), appeared on behalf of the appellant. He explained how FST was calculated in the three cases that are the subject of the present appeals.

Mr. Bouthillier explained that the ready-mix concrete sold by the appellant was subject to FST based on the sale price, less a deduction for the cost of transportation in the amount of $19/m^3. This method of calculation, which came into effect on July 1, 1985, was chosen by the appellant pursuant to Excise Communiqué 109-1/TI.[2] It provided that manufacturers of ready-mix concrete had the option of deducting

1. R.S.C. 1985, c. E-15.
2. *Ready-mix Concrete — Transportation Deduction*, Department of National Revenue, Customs and Excise, January 1987.

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this amount instead of the real costs of delivering concrete in agitator trucks and that, once this method was chosen, it had to be used consistently.

Mr. Bouthillier also explained that asphalt paving mixtures were subject to FST based on a determined value of $23/t. This method of calculation, which came into effect on April 1, 1989, was chosen by the appellant pursuant to Excise Communiqué 178/TI.[3] As a manufacturer, the appellant could have chosen to deduct the real costs of transportation and installation from the sale price.

The appellant, being of the opinion that it was using the concrete and asphalt for its own use, recalculated the FST under paragraph 3(*c*) of Excise Memorandum ET 207[4] (Memorandum ET 207). This method focused on the calculation of the value for tax on the fair market value determined by totalling the cost of all materials used, the cost of direct labour, 150 percent of the cost of direct labour for overhead and 15 percent of the accumulated total for administration and profit. Mr. Bouthillier explained that Revenue Canada did not accept that the appellant recalculated the FST under paragraph 3(*c*) of Memorandum ET 207, since the appellant had already chosen to use the method based on the sale price, less a deduction for the cost of transportation in the amount of $19/m^3. Furthermore, Revenue Canada considered that the appellant was not using the concrete and asphalt for its own use, but for sale, even if its activities included mostly the sale of services, such as the building of sidewalks and the repairing of roads.

Mr. Yvan Grisé, Comptroller for the northeast division of Francon-Lafarge, Division of Lafarge Canada Inc., also testified on behalf of the appellant. He explained that the appellant submits tenders and obtains contracts for the construction of roads, sidewalks, sewers and aqueducts and for other types of work. These contracts can include a multitude of items, such as labour, equipment, materials and concrete and/or asphalt. Mr. Grisé explained that clients are not informed of the price of concrete or asphalt unless they ask. He testified that the appellant relied on advice received from representatives of Revenue Canada to calculate FST. In response to questions from the Tribunal, Mr. Grisé explained that the appellant usually acts as the general contractor in projects where it does all the work or as a subcontractor in cases where it only does part of the work. He stated that, in both cases, the appellant is always aware of the cost of the concrete or asphalt. However, he could not state on what price the appellant based its calculations of FST in the cases that are the subject of the present appeals, as he was not the appellant's comptroller when the calculations were made.

Counsel for the appellant contended that the contracts for which the appellant acts as a manufacturer or seller of roads or sidewalks are service contracts where the appellant uses the concrete and asphalt for its own use. According to counsel, the appellant must have a supply of concrete and asphalt in order to fulfill its contracts. He compared this situation to that of a construction contractor that builds a house for a client or a model home intended for sale. In support of this interpretation, he referred to the decision of the Supreme Court of Canada in *Cairns Construction Limited* v. *The Government of Saskatchewan*.[5]

As for asphalt, counsel for the appellant pointed out that, once the Tribunal accepts that the appellant was appropriating the asphalt for its own use and that, therefore, section 52 of the Act applied, the Tribunal must accept that the appellant was justified in recalculating FST according to paragraph 3(*c*) of Memorandum ET 207 and in applying for refunds of the sums of money paid in error. In support of this

3. *Values for Tax on Asphalt Paving Mixtures*, Department of National Revenue, Customs and Excise, February 1989.
4. *Goods Manufactured for Own Use*, Department of National Revenue, Excise, December 1, 1975.
5. [1960] S.C.R. 619.

argument, counsel relied on the Tribunal's decision in *Allan G. Cook Limited* v. *The Minister of National Revenue*.[6]

As for concrete, counsel for the appellant explained that it is a mixture of different materials, some of which are not taxable, in particular, sand, rock and gravel. Counsel, therefore, maintained that the appellant was entitled to a refund of FST paid on these materials. He argued that, as is the case with asphalt, the appellant appropriated the concrete for its own use in the fulfilment of service contracts. Relying on section 52 of the Act, counsel contended that, had the appellant obtained a supply of sand, rock and gravel from a third party instead of producing these materials, it would not have paid FST. The appellant should, therefore, at least benefit from a refund of FST paid on these materials. Alternatively, relying on *Cook*, counsel contended that the appellant should have been able to recalculate the amount of FST payable using the method of the determined value provided for in paragraph 3(*c*) of Memorandum ET 207 because this method was more advantageous to the appellant.

Counsel for the respondent contended that a service contract can include several sales contracts. According to counsel, the appellant, therefore, sold the asphalt and concrete, rather than appropriate them for its own use. There was, therefore, no possibility of recourse to section 52 of the Act or to Memorandum ET 207. Counsel contended that Revenue Canada did not make a mistake. The appellant simply chose a method of calculation and remitted the sales tax that was due. Revenue Canada's representatives, according to counsel, are not obliged to tell manufacturers what method they should choose for calculating FST. They must simply inform the manufacturers of the methods which are available.

Counsel for the respondent contended that FST, in the case of concrete or asphalt, is payable under section 50 of the Act. He relied on the Tribunal's decision in *Lahrmann Construction Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[7] where it was decided that the appellant was the manufacturer of asphalt paving mixtures and that the taxable sale price must include the cost of the asphalt cement purchased by the appellant for the purpose of manufacturing paving mixtures. Lastly, counsel contended that the Tribunal does not have jurisdiction to allow the appellant to recalculate FST using another method. Counsel maintained that allowing such a recourse would lead to administrative chaos.

Paragraph 50(1)(*a*) of the Act provides for FST to be imposed on the sale price of all goods produced or manufactured in Canada. In fact, Part I of Schedule IV to the Act specifically provides that "[r]eady-mix concrete" is taxable under section 50 of the Act. Subsection 51(1) further provides that FST imposed under section 50 does not apply to the sale of the goods mentioned in Schedule III. Sand, gravel and rock are among the goods mentioned in Part X of Schedule III. Given this provision, counsel for the appellant contended that the appellant should not have paid taxes on the goods that were used in the manufacture of concrete. The Tribunal cannot accept this argument. The evidence shows that the appellant manufactured and sold ready-mix concrete and not sand, gravel and rock. The Tribunal is of the view that Part X of Schedule III exempts sand, gravel and rock from FST when they are sold separately. Consequently, the Tribunal concludes that the respondent was justified in imposing FST on the sale of ready-mix concrete.

Being of the opinion that ready-mix concrete and asphalt paving mixtures were appropriated for its own use, the appellant wanted to recalculate the FST using the method of fair market value outlined in Memorandum ET 207, but the respondent refused the request. Memorandum ET 207 provides that, where taxable goods are manufactured or produced for own use, the manufacturer must pay FST on the reasonable sale price of these goods. Under the provisions of subsection 52(1) of the Act, the value for tax is deemed to

6. Appeal No. 3074, August 29, 1989.
7. Appeal No. 3016, July 30, 1990.

be equal to the sale price that would have been reasonable in the circumstances if the goods had been sold to a person with whom the manufacturer or producer was dealing at arm's length.

Counsel for the appellant contended that the appellant's construction contracts were service contracts and that, consequently, the appellant was manufacturing ready-mix concrete and asphalt paving mixtures for its own use or for the purposes of fulfilling its contracts. According to counsel, the appellant was, therefore, justified in recalculating FST on these products, using the calculation method outlined in Memorandum ET 207, and the respondent should have allowed the appellant to do so. In support of his argument, counsel relied on the decision of the Supreme Court of Canada in *Cairns* and the Tribunal's decision in *Cook*.

In *Cairns*, the appellant, a construction contractor, purchased materials which were to be used in the construction of houses on its own property or on properties belonging to third parties and intended for sale to third parties. The Supreme Court of Canada ruled that the appellant was the end user of the materials and that it had to repay the tax imposed on that group of taxpayers. The Tribunal is of the opinion that the facts in *Cairns* are different from the facts in the present appeals.

In the present appeals, no contracts were produced as evidence by the appellant. The evidence, nevertheless, reveals that the cost of the appellant's construction contracts always included an amount for ready-mix concrete and an amount for asphalt paving mixtures, even if these amounts were not always indicated. In fact, FST was calculated based on the sale prices of the concrete and the asphalt that were provided to the respondent by the appellant.

In the Tribunal's opinion, the appellant's contracts were simply construction contracts which included the sale of ready-mix concrete and/or asphalt paving mixtures at a price which included delivery and installation. Consequently, the Tribunal is of the opinion that the appellant, in fact, sold the ready-mix concrete and the asphalt paving mixtures and that it did not appropriate them for its own use within the meaning of subsection 52(1) of the Act or Memorandum ET 207. The appellant, therefore, would not have had recourse to the method of calculating FST according to the fair market value outlined in Memorandum ET 207. Having arrived at this conclusion, it is not necessary for the Tribunal to determine whether it has jurisdiction to allow the appellant to recalculate the amount of FST payable using a different method of calculation.

Accordingly, the appeals are dismissed.

Arthur B. Trudeau
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