C.A. No. 105494

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Matthews and Roscoe, JJ.A.

Cite as: Nova Scotia (Finance) v. Joint Truss Ltd., 1994 NSCA 192

BETWEEN:		
MINISTER OF FINANCE		John D. Wood for the Appellant
	Appellant	
- and -		
JOINT TRUSS LIMITED		Steven Barr for the Respondent
	Respondent	
		Appeal Heard: October 7, 1994
		Judgment Delivered: October 18, 1994

THE COURT: The first ground of appeal is dismissed, the second ground of appeal is allowed and the order of the Board waiving the penalty charges is rescinded as per reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Matthews, J.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision of the Nova Scotia Utility and Review Board which allowed an appeal from the Provincial Tax Commissioner regarding the respondent's assessment pursuant to the **Health Services Tax Act**, R.S.N.S. 1989, c. 198.

The respondent company manufactures and sells roof trusses. When it purchased the assets of another company, one of the items included was a computer system used to design the trusses. It did not pay Health Services Tax on the purchase price of the computer. After an audit, it was assessed sales tax on a number of pieces of equipment, including the computer and an auto strapping machine. The respondent filed a Notice of Objection in which it disputed the assessment for tax on the computer and strapping machine and the assessment for interest and penalties. The respondent did not object to the assessment in respect of the other pieces of equipment.

When the Notice of Objection was considered by the Provincial Tax Commissioner, he allowed the objection respecting the tax on the strapping machine, denied the objection regarding the computer and stated that details of the adjustment would be forwarded by the Audit Section. On appeal to the Utility and Review Board, the Board found that although the computer was not "used in the manufacture of trusses", it was involved in the production of plans which were sold with the trusses and therefore the computer was tax exempt. The Board also waived all penalty charges assessed against the respondent.

The issues raised by the appellant are as follows:

> "1. Did the Board err in law in finding that the Respondent's computer system was exempt from health services tax pursuant to s. 12(1)(n) of the **Health Services Tax Act**, R.S.N.S., 1989, c. 198 ?
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> 2. Did the Board err in finding that it had jurisdiction to hear an appeal of an assessment for penalty and interest alone made by the Provincial Tax Commissioner, pursuant to s. 32(1) of the **Health Services Tax Act** and in so finding that the letter of February 9, 1994 from Eric L. Lavers to the Respondent was a decision of the Provincial Tax Commissioner respecting a Notice of Assessment which was appealable to the Board under s. 20(5) and 20L(1) of the **Health Services Tax Act**?"

FIRST ISSUE:

The relevant sections of the **Health Services Tax Act** on the first issue are as follows:

> Section 2(e):
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> "In this Act
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> . . .
>
> (e) 'manufacture or production' means the transformation or conversion of raw or prepared material into a different state or form from that in which it originally existed as raw or prepared material but does not include production or processing;"
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> Section 12(1):
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> "The following classes of tangible personal property are specifically exempted from the provisions of this Act:
>
> . . .
>
> (n) subject to the regulations, machinery and apparatus and parts thereof which are to be used or which are used in the manufacture or production of goods for sale;"

The appellant submits that the Board erred in finding that the computer was exempt from tax because the plans it produced were sold with the trusses. The test for establishing entitlement to the manufacturing exemption was explained by Freeman, J.A. in **Stora Forest Industries Limited v. Nova Scotia (Minister of Finance)** (1991), 105 N.S.R. (2d) 115 as follows:

> "Because the exemption applies to machinery and equipment used in the "conversion and transformation" of materials, "raw or processed", subject to the particular manufacturing operation in question, it follows that it does not apply to equipment used with respect to the materials before the transformation or conversion in question is to begin. To have become processed, materials required at the start of a s. 10(1)(h) manufacturing operation must have undergone an earlier, separate and distinct, manufacturing or production process from which they emerged as "goods for sale". For example the pulp

produced by the appellant would likely be sold to another manufacturer where it might become the processed material used at the beginning of another s. 10(1)(h) manufacturing cycle. Under the scheme of the Act a s. 10(1)(h) exemption cannot, by definition, apply to machinery or apparatus used with respect to materials prior to the start of their specific transformation or conversion during the particular manufacturing or production process required to turn them into identified goods for sale.

Machinery and apparatus used in connection with the material at and after this starting point, even for purposes only incidental to the commencement of actual manufacturing such as further handling or preparation, would appear to be prima facie eligible for the exemption. For convenience, I will refer to "transportation in" as the cutoff point establishing s. 10(1)(h) eligibility: the point where the materials may reasonably be said to be at the start of the actual process of losing their characteristics as mere materials and acquiring the characteristics of the goods being made for sale.

Once the materials have been completely converted to goods for sale, the plant's finished product, and are ready for "transportation out", s. 10(1)(h) no longer applies. "Goods for sale" means goods not only packaged for eventual sale to retailers, but packed in containers for sale to the plant's own customers, presumably distributors or other manufacturers. Finished product cannot be allowed to pile up at the end of the production line: handling and holding of the goods for sale is a necessary incident of manufacture or production prior to "transportation out".

The language of s. 10(1)(h) and s. 1(ca) as it applies to machinery and apparatus used in the actual manufacture or production - between transportation in and transportation out - is broad and nonrestrictive, particularly since the removal of the words "directly and exclusively" by the 1982 amendment. Cases decided since 1982 suggest the following as a simple test or guide applicable to the facts of the present case: is the machinery and apparatus in question reasonably essential to the manufacture or production of goods for sale? Perhaps that becomes clearer if stated in the negative: can the goods for sale be manufactured or produced without the step in the manufacturing process performed by the machinery or apparatus in question? The manufacturing step might previously have been performed by manpower or by some other process, but it

> must be shown to be reasonably necessary to the finished product."

The evidence before the Board in this case established that the computer operator inputs specific data for a particular building, such as its dimensions and its location within the province (which determines the anticipated snow load) and the computer program designs the roof trusses. The information provided by the computer-drawn plans includes the size, grade and length of lumber required, the angles and placement of the saw cuts necessary, and the exact placement and size of the supporting braces of the truss. The plans or "output" of the computer are posted in the plant to be used as a guide for the production staff. The plans are shipped to the purchaser with the truss. The respondent's president testified that it would be impossible to build the trusses without the computer generated plans. He also indicated that some roof truss firms in larger markets have computers that actually control the saws that cut the wood to the specified shapes and sizes.

Although the Board decided the issue in favour of the taxpayer on the basis that the plans were the goods sold, it is my view that the evidence confirmed that the computer is an integral part of the truss manufacturing process. To answer the questions as framed in **Stora**, it is reasonably essential to the manufacture of the goods for sale, the goods being the trusses, and the goods could not be produced without the step in the process performed by the computer. Accordingly, I would dismiss the first ground of appeal.

SECOND ISSUE:

The appellant contends that the Board did not have jurisdiction to consider the assessment of interest and penalties. The following is a précis of the relevant sections of the **Health Services Tax Act**:

s. 34(2) - provides for an assessment of taxes by the Commissioner and an

appeal pursuant to ss. 20 and 21;

s. 20(1) - provides that a person who disputes an assessment made under s.34(2) may file a notice of objection;

s. 20(4) - upon receiving a notice of objection, the Commissioner shall reconsider the assessment;

s. 20(5) - the decision of the Commissioner made under s.20(4) may be appealed to the N.S. Utility and Review Board;

s. 20L (1) - a person who is dissatisfied with a decision of the Commissioner may appeal to the Board [a duplication of s.20(5)];

s. 32(1) - provides for the assessment of interest and penalty by the Commissioner;

s. 32(3) - the Commissioner may vary an assessment made under s.32(1).

The Board determined that it had jurisdiction to hear an appeal by the taxpayer concerning the interest and penalties assessed pursuant to s. 32. It appeared to the Board that the respondent had not been given any credit for the interest and penalty assessed in relation to the strapping machine and therefore the taxpayer was assessed unfairly. The Board found that the interest and penalty assessment was appealable to it pursuant to s.20(5) and 20L(1), apparently being of the view that all decisions of the Commissioner were appealable, whether specific jurisdiction was conferred by statute or not.

On the appeal to this Court, counsel for the appellant advised that an adjustment for the interest and penalty relating to the strapping machine was carried out automatically by the Audit Section and the respondent has received credit for that amount.

There is nothing in the **Act** establishing the Board that gives it general jurisdiction. Section 4 of the **Utility and Review Board Act**, .S.N.S. 1992, c.11 provides:

> " 4 (1) The Board has those functions, powers and duties that are, from time to time, conferred or imposed on it by
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> (a) this Act, the **Assessment Act**, the **Deed Transfer Tax Act**, the **Expropriation Act**, the **Gasoline and Diesel Oil Tax Act**, the **Health Services Tax Act**, the **Heritage Property Act**, the **Insurance Act**, the **Motor Carrier Act**, the **Municipal Boundaries and Representations Act**, the **Planning Act**, the **Public Utilities Act**, the **School Boards Act**, the **Shopping Centre Development Act**, the **Tobacco Tax Act**, the **Village Service Act** or any enactment; and
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> (b) the Governor in Council.
>
> (2) The Governor in Council may assign to the Board the powers, functions and duties of any board, commission or agency and while the assignment is in effect, that board, commission or agency is discontinued and Sections 49 and 50 apply mutatis mutandis with respect to that board, commission or agency."

The **Health Services Tax Act** provides only for appeals to the Board from decisions made by the Commissioner pursuant to s.20(4) of the **Act**. There is no appeal to the Board from decisions of the Commissioner made pursuant to s. 32, and in deciding that there was, the Board erred in law and exceeded its jurisdiction. I would allow the second ground of appeal and rescind the order of the Board waiving the penalty charges.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Matthews, J.A.