LEGAL BRIEFS

QUARRYING IS NOT MINING

Decisions rule out diesel fuel rebate for quarries

By Roger Northcote
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The Administrative Appeals Tribunal, recently affirmed on appeal by the Full Federal Court, has found that quarrying rock, sand and gravel for building materials is not 'mining for minerals', and is therefore ineligible for diesel fuel rebate.

In 1995, the AAT found in the Neumann Sands case that dredging sand for use in concrete was 'mining for minerals' within the definition of 'mining operations' in the *Customs Act 1901* and so was eligible for the rebate. After that decision, diesel fuel rebate claims and subsequent AAT applications were lodged for most quarries in Australia. Claims were lodged for fuel used since 1 August 1986 at about 400 quarries, for a total rebate of about $100 million.

Legislative amendments to the Customs Act were made to exclude sand, granite, gravel and similar materials from the definition of 'minerals', but only from 1 July 1995. The dispute continued over claims for the period 1 August 1986 to 1 July 1995. About 300 of the quarries were owned by the three major building materials groups Boral, CSR, and Pioneer, and those companies sought to bring their claims before the AAT, with smaller companies awaiting the outcome.

The Australian Customs Service sought to establish that quarrying rock, sand and gravel for building materials was not 'mining for minerals' within 'informed general usage'and that the Neumann Sands decision should not be followed. The evidence gathered by the parties was far more extensive than evidence given to the AAT in the Neumann Sands case. Customs was able to engage witnesses with extensive and distinguished experience in quarrying, building materials and mining. Thirty-three quarries were visited with witnesses in preparing for the hearings.

In October 1996, after a hearing that took about 20 days, the AAT affirmed Customs decisions to refuse rebates for 14 of Boral's sites, which were selected as being representative of all Boral's operations. In June 1997, the AAT affirmed decisions by Customs to refuse diesel fuel rebates for five of CSR's sites, which were selected as being representative of CSR's operations. On 23 October 1997, the Full Federal Court dismissed CSR's appeal from that AAT decision.

Of the five CSR sites, three were hard-rock quarries where rock was extracted by drilling and blasting, then crushed and screened into various sizes and mixes. These crushed-rock products were used as building materials such as concrete aggregate, road base and road-sealing aggregate. At the other two CSR sites, sand was quarried or dredged, then washed and screened, mainly for use as fine concrete aggregate.

In the CSR case, the AAT adopted and applied the test of 'informed general usage' as explained in the earlier Boral AAT decision. 'Informed general usage' means usual usage in Australia in regard to the operations in question. The fact that quarrying was technically similar to mining, because both used the same or similar extraction equipment and techniques, did not mean that quarrying was regarded as being mining. The AAT found the weight of the evidence was that CSR's operations were regarded as quarrying and not mining as a matter of informed general usage.

It noted that: CSR reported its mining and quarrying operations separately in its annual reports; there were separate quarrying and mining professional and industry associations; separate advertising of quarrying and mining in the Yellow Pages; and evidence of witnesses that CSR's operations were usually referred to as quarrying. All this supported the view that mining and quarrying were distinguished in 'informed general usage'. Quarrying involved extracting material for use in building which must have suitable physical properties, while mining involved extracting material for its particular mineral content.

The Full Federal Court in dismissing CSR's appeal found the AAT had made no error in adopting the test of 'informed general usuage'. The AAT had properly construed 'mining for minerals' in accordance with its ordinary meaning having regard to the statutory context. The nature of the materials being sought and the use to which they may be put was relevant and important in determining whether they were minerals. The AAT's finding that CSR was not 'mining for minerals' but seeking construction materials with suitable physical properties was supported by the evidence and made without error of law.

CUSTOMS VALUE

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In April 1997, the Administrative Appeals Tribunal upheld a Customs view that a commission paid to an overseas company associated with a car manufacturer should be included in the customs value of certain imported cars.

KIA Australia Pty Ltd imported cars from KIA Korea, and Itochu of Japan acted as the importer's buying agent. Itochu had a two-per cent shareholding in KIA Korea. The question before the AAT was whether the buying commission paid to Itochu should be included in the customs value of the imported cars because Itochu was 'associated' with KIA Korea, due to the effect of sub-paragraph 155(2)(e)(ii) of the Customs Act.

The AAT held that the term 'associated' carried its ordinary English meaning of "to join as a companion, partner or ally; to unite; a partner in interest, as in business or in an enterprise or action; to unite; combine". It therefore meant that because of the shareholding, Itochu was associated with the vendor. It followed that the buying commission paid by the importer formed part of the customs value of the cars.

AAT JURISDICTION TO REVIEW CUSTOMS DECISIONS

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In June 1997, the Administrative Appeals Tribunal ruled that it had jurisdiction to review decisions by Customs officers made under sub-item 43(5) of the *Customs Amendment Act 1996*.

NS Komatsu Pty Ltd had sought a review of Customs decisions made under sub-item 43(5) that certain goods were not 'made-to-order capital equipment' as defined in sub-item 43(6), and therefore by-laws or determinations which had been revoked did not continue to apply to those goods.

The decisions resulted in payments under protest and refusal of a refund application. The disputed goods were dump trucks and drilling rigs. Section 273GA(2) of the Customs Act empowers the tribunal to review not only the demand for duty, but also "any other decisions forming part of the process of making, or leading up to the making of, that first-mentioned decision". For the payments made under protest, the issue was whether the made-to-order capital equipment decision was one that formed part of the process of making, or led up to the making of, the demand for duty.

Customs submitted that item 43 was a savings provision which continued the effect of the by-law should a Customs officer be satisfied that certain pre-conditions existed. Such decisions were properly characterised as decisions which related to by-laws and determinations, and were not reviewable by the tribunal.

Customs submitted that NS Komatsu was attempting to review decisions relating to continuation of a by-law under the guise of having the AAT consider a reviewable decision. It was also submitted that the relevant decisions were made before assessment of duty commenced, and were not decisions made in the process of calculating that duty. Sub-item 43(5) conferred a free-standing discretion upon the officer exercising that power, and was only reviewable by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

NS Komatsu submitted that the decisions under item 43(5)were about continued eligibility to take advantage of relevant by-laws, and there was a dispute as to duty reviewable by the tribunal. The AAT found that the decision relating to the nature of the equipment must be regarded as a decision leading up to the making of the demand for duty, that it was immediately proximate to the demand; and that it was necessary to calculate the amount of duty claimed. Therefore the AAT had jurisdiction to hear the applications relating to the payments made under protest.

The AAT also found that decisions made under sub-item 43(5)of the Customs Amendment Act were not about continuation of the by-law but about eligibility of the applicant's goods to continue to have access to a revoked instrument. Whether an importer has been entitled to take advantage of the terms of a particular by-law and whether the terms of that by-law apply to particular goods, have always been reviewable by the tribunal under section 273GA(1)(haaa) of the Customs Act.

RECENT AMENDMENTS TO ACTS AND REGULATIONS ADMINISTERED BY CUSTOMS

The *Excise Tariff Amendment Act (No. 2) 1997* (Act No. 78 of 1997) amends the *Excise Tariff Act 1921* to:

- Alter arrangements for calculating and paying excise duty on stabilised crude petroleum oil (crude oil) under sections 6B, 6C and 6D of the Excise Tariff Act. These amendments form part of a package of amendments to the excise treatment of

crude oil in conjunction with amendments to the *Petroleum Excise (Prices) Act 1987* and took effect from 1 July 1997.

- Remove liquid petroleum gas, which was excise free, from the application of the Excise Tariff Act. This amendment took effect from 18 June 1997.
- Decrease excise duty on aviation gasoline (avgas) by 0.75 cents per litre and on aviation kerosene (avtur) of 0.75 cents per litre, both with effect from 1 September 1996. These decreases were proposed in Excise Tariff Proposal No. 1 of 1996.

The *Customs and Excise Legislation Amendment Act (No. 1) 1997* (Act No. 97 of 1997) gives effect to announcements made in the 1996-97 Budget to amend the provisions of the *Customs Act 1901* and the *Excise Act 1901* relating to the Diesel Fuel Rebate Scheme (DFRS). The amendments:

- Restrict eligibility in the "mining operations" category following consultation with the mining industry.
- Address recent Federal Court and Administrative Appeals Tribunal decisions in the "mining operations" category.
- Improve accountability under the DFRS and assist in reducing expenditure due to misuse (the 'modernisation' amendments).

The amendments are to commence on a day or days to be fixed by proclamation. Amendments relating to eligibility provisions for mining operations are expected to be proclaimed to commence in early August. Amendments relating to modernisation of the DFRS will be proclaimed to commence late in 1997 to allow time for people affected to be informed of their entitlements and obligations under the new provisions.

The *Bounty Legislation Amendment Act 1997* (Act No. 105 of 1997) is a 1996-97 Budget savings measure which originally proposed the early termination of the Books, Ships and Machine Tools and Robots bounties with effect from 20 August 1996 and the Computers Bounty with effect from 30 June 1997. The Bill was the subject of extended parliamentary debate, as well as Government, Opposition and Democrats amendments.

The final Amendment Act amends:

- The *Bounty (Computers) Act 1984* to terminate the bounty with from 30 June 1997.
- The *Bounty (Ships) Act 1989* to extend the bounty to 30 June 1999 for vessels the construction or modification of which is the subject of firm commitment existing on 31 December 1997. The amendments provide for bounty to be payable for vessels the construction or modification of which is at least 50 per cent complete by 30 June 1999.

The Machine Tools and Robots bounty terminated on 30 June 1997and the Books bounty will terminate on 31 December 1997.

Customs Regulations (Amendment) (Statutory Rules 1997 No 128).

These amendments, which commenced on 4 June 1997:

- Implement the annual increase in warehouse licence fees in accordance with rises in the Consumer Price Index, with effect from 1 July 1997.
- Insert a new definition of 'Customs place' for the purposes of determining the overtime fee prescribed under Section 28 of the Customs Act. The table in regulation 19 of the Customs Regulations prescribes the working days and hours of business for Customs operations and prescribes where those operations may be performed. The table provides the basis for levying the overtime and location fees under section 28 of the Customs Act. This regulation inserts a new definition of 'Customs place' so that Customs can charge the section location fee for the performance of functions at a non-proclaimed airport or port. This amendment commenced on 4 June 1997.
- Replace obsolete references to the Comptroller-General of Customs, the Comptroller-General, the Comptroller, or the Collector of Customs for a State or Territory, with references to the Chief Executive Officer or Regional Directors.

An amendment to Customs (Prohibited Imports) Regulations (Amendment) (Statutory Rules 1997 No. 129) removed the import controls on coffee which were in regulation 4C. The restrictions had been introduced to meet Australia's treaty obligations as a member of the International Coffee Agreement. Quotas under the agreement have been suspended and Australia is not currently a member. Therefore, the import controls on coffee have been repealed. The amendment commenced on 4 June 1997.