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COMINCO LTD.

v.

ASSESSOR OF AREA 18 - TRAIL

Supreme Court of British Columbia (C821402) Vancouver Registry

Before: MR. JUSTICE W.J. WALLACE (In Chambers)

Vancouver, May 13, 1982

J.R. Lakes for the Appellant
J.E.D. Savage for the Respondent

Reasons for Judgment

August 11, 1982

I

The appellant requested the Assessment Appeal Board to state the following case for the opinion of the Court as to whether the Board erred in law in its decision that two representative items were assessable.

The Statement of Facts disclose:

1. The issue, which is the subject of this stated case, was as to the assessability of installations in Appellant's Zinc Electrolytic and Melting Plant. The roll numbers are 04118 and 04119. The issue involves several hundred separate roll items but by agreement between the parties, only two were dealt with at the hearing on the understanding that the final decision on the two will be taken as determinative of the issue on all.
2. The issue as put to the Board was this: can an item be placed on the roll before it is completely installed and operational. Appellant says no. Respondent says yes.
3. The two items agreed to be dealt with were:
 - (a) the melting furnace;
 - (b) the zinc stripping machine.
4. The evidence on the two items is presented in Exhibits 2 and 6 and was amplified by the oral testimony of witnesses.
5. Upon the evidence the Board made the following findings of fact:
 - (1) both items are of enormous size, weight and complexity, costing millions of dollars;
 - (2) a special building, the size of several football fields has been built to house them;

- (3) as at December 31, 1980, the items had been substantially, but by no means completely installed;
- (4) the Assessor has placed the value of the items on the Roll to the extent they were installed as of December 31, 1980;
- (5) the furnace sits on huge concrete pylons specially formed to receive it; the pylons are embedded in and arise from the ground below the main plant floor; the furnace is bolted to the pylons; the furnace is lined with fire brick;
- (6) the zinc stripping machine is perhaps more complex than the furnace, if that is possible. To the extent installed at December 31, 1980, the parts were secured to the floor and walls, both specially designed to receive it; bolts secured it to the supporting members;
- (7) neither item was operational at December 31, 1980; power and hundreds of other connections were necessary before operation; the items themselves might have to be adjusted with shims to bring them into perfect alignment with the whole melting and zinc stripping operations; and
- (8) as of December 31, 1980, the items, to the extent then installed, were placed with a degree of permanence, save only for the fractional adjustments for alignment, if any.

6. The Board found that the two items, to the extent installed as of December 31, 1980, were "structures" erected upon and forming part of the melting and electrolytic plant and were assessable. The appeal on the issue was therefore dismissed.

II

The questions stated for the consideration of Court are:

- 1) Did the Assessment Appeal Board err by applying the definition of "improvements" in the Act to all those items set out on Assessment Roll Nos. 04118 and 04119 which were disputed in this appeal and which had been included in the assessment roll as machinery and equipment?
- (2) Did the Assessment Appeal Board err by applying the said definition of "improvements" to the said items under appeal notwithstanding the fact that none of them was complete or operational as of December 31, 1980?
- (3) Did the Assessment Appeal Board err by describing the melting furnace and the zinc stripping machine as "structures"?
- (4) Was there any evidence on which the Assessment Appeal Board could properly find that the zinc stripping machine and the melting furnace were properly assessable as "structures" on the 1981 assessment roll?
- (5) Was there any evidence on which the Assessment Appeal Board could properly find that all the items under dispute on the said roll numbers were assessable as improvements?

The issue simply stated would appear to be whether an item such as a melting furnace, or a zinc stripping machine can be placed on the assessment roll as an improvement before it is completely installed and operational.

In the instant case neither item was completely installed or operational in 1980.

III

The relevant sections of the *Assessment Act*, R.S.B.C. 1979, c. 21, provide in part:

S. 1-"improvements" for general municipal and Provincial taxation purposes. . . includes

(a) all buildings, fixtures, machinery, structures and similar things erected in, on, under or affixed to land or to a building. . .".

"improvements" for purposes other than for general municipal and Provincial taxation purposes. . . includes:

(a) all buildings, fixtures, machinery, structures and similar things erected or placed in, on, under or affixed to land or to a building. . . .

S.26 provides, in part:

"1) The assessor shall determine the actual value of land and improvements.

"(2) In determining the actual value under subsection (1) the assessor may give consideration to the present use, location. . . and the assessment shall be the sum of those values.

"(3) Without limiting the application of subsections (1) and (2), where an industry, commercial undertaking public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern".

(I have underlined those words upon which counsel have placed considerable emphasis in the course of their submissions.)

IV

S. 74(1) of the *Assessment Act* provides, in part, that the board may submit, on the form of a stated case for the opinion of The Supreme Court, a question of law arising in the appeal.

Respondent's counsel asserts the questions referred to the Court on this stated case are questions of mixed law and fact and are not reviewable-I can not agree. As I view the stated case there is no dispute on the primary facts and the issue before this Court is whether the term "improvements", as defined in the Act, includes component parts of an intended, but incomplete, structure or machine. In *Tisdale (TP) v. Hollinger Consolidated Gold Mines Ltd.* (1933) S.C.R., 321, Cannon J. at p. 323 stated "The construction of a statutory enactment is a question of law while the question of whether a particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact". It is the construction of the term "improvements" with which we are primarily concerned in this stated case.

"Improvements", as defined by s. 1, of the *Assessment Act* includes, among other things, "fixtures", "machinery" and "structures".

(a) *Structures*

In *Re Assessment Equalization Act-Re Trans Mountain Oil Pipe Line Company* (1966) 56 W.W.R., 705, the British Columbia Court of Appeal had occasion to consider the meaning of the term "structure". Branca, J.A. at p. 721 adopted a definition stated by Humphrey, J. in *Hobday v. Nichol* [1944] 1 A.E.R., 302, 303-4.

"Structure as I understand it is anything which is constructed, and it involves the notion of something which is put together, consisting of a number of different things which are so put together, or built together, constructed as to make one whole, which then is called a structure",

In my view this careful definition accurately reflects the meaning ordinarily given to the term "structure".

In the *City of London v. John Labatt Ltd.* [1953] O.R., p. 800, Spence, J. (as he then was) stated at p. 801:

"structure is defined in the Shorter Oxford Dictionary as inter alia, that which is built or constructed, a building or edifice of some kind. . . a fabric or framework of material parts put together".

It is my opinion the term "structure" does not apply to partially assembled components of an uncompleted project. The term structure implies something constructed to that degree of completion which would enable it to perform its intended function. Until that stage is reached one only has an assembly of different items.

(b) *Machinery*

In the *Northern Broadcasting Company Limited v. The Improvement District of Mountjoy*, 1950, S.C.R., 502, the Supreme Court applied considered the definition of "machine" found in the Oxford Dictionary:

"any instrument employed to transmit force or to modify its application".

In *City of London v. John Labatt* (supra) Spence, J. adopted, as reasonable, the very broad definition of machinery contained in Webster's new International Dictionary, 2nd ed. 1948:

"The means and appliances by which anything is kept in action or a desired result is obtained".

At p. 806 Judge Spence pointed out that in the Courts of the United States the word "machinery" has been uniformly interpreted to have a much broader connotation than the word "machine" and to include any appurtenances necessary for the working of the machine.

While the items in question might well come within the definition of machinery when they had reached a stage of completion which would permit them to perform their intended function, it is my opinion that component parts of an incomplete assembly which could not perform the intended function or object of the completed assembly can not be considered "machinery" in the context in which the term is used in the *Assessment Act*.

(c) *Fixtures*

In order to respond to the questions raised in the stated case it is necessary to consider whether the items come within the category described as "fixtures".

In *La Salle Recreation Ltd. v. Canadian Camdex Investments Ltd. et al* [1963] 4 D.L.R., 549, McFarlane, J.A. at p. 554 stated:

"A study of these and other authorities has led me to the conclusion that the principles to be applied are stated accurately by Meredith, C.J., speaking for a Divisional Court in *Stack v. T. Eaton Co.*, [1902] 4 O.L.R. 335 at p. 338 as follows:

'I take it to be settled law:

- (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
- (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
- (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
- (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation."

The Statement of Facts (supra), para. 5 discloses the degree of annexation of the items to the property; the special housing provided for these immense installations; the object and permanence of their installation; - all of which inevitably leads one to the conclusion that the items were intended to, and did become fixtures, affixed to land or buildings and hence are "improvements" within the definition of that term set forth in s. 1 of the *Assessment Act*. How improvements of this nature are to be valued by the assessor in compliance with the directions contained in s. 26, and what, if any, value they may have, are not matters raised in the stated case.

V

Conclusion:

In accord with the conclusions I have reached on the above issues, the following are the answers to the questions raised in the stated case.

Q. (1) Did the Assessment Appeal Board err by applying the definition of "improvements" in the Act to all those items set out on Assessment Roll Nos. 04118 and 04119 which were disputed in this appeal and which had been included in the assessment roll as machinery and equipment?

A. The Board did not err since the items, on the facts stated, come within the category of "fixtures" and by definition under the Assessment Act were "improvements".

Q. (2) Did the Assessment Appeal Board err by applying the said definition of "improvements" to the said items under appeal notwithstanding the fact that none of them was complete or operational as of December 31, 1980?

A. The state of completion, or operational status of an item is not relevant to the determination of whether or not an item is a "fixture".

Q. (3) Did the Assessment Appeal Board err by describing the melting furnace and the zinc stripping machine as "structures"?

A. Yes-partially assembled components of an incomplete project do not constitute a "structure".

Q. (4) Was there any evidence on which the Assessment Appeal Board could properly find that the zinc stripping machine and the melting furnace were properly assessable as "structures" on the 1981 assessment roll?

A. No-since it is agreed the materials assembled were not complete to the stage necessary to perform the intended function of the item.

Q. (5) Was there any evidence on which the Assessment Appeal Board could properly find that all the items under dispute on the said roll numbers were assessable as improvements?

A. Yes-the evidence indicated the items were annexed to the land and buildings with the intention of making such annexation permanent thus establishing the items as fixtures and hence assessable under the *Assessment Act* as "improvements".