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**ALBERTA WHEAT POOL et al**

**v.**

**ASSESSOR OF AREA 27 - PEACE RIVER**

Supreme Court of British Columbia (A900980) Vancouver Registry

Before the HONOURABLE MR. JUSTICE MILWARD

Vancouver, January 21, 1991

W. S. Johnson for the Appellants
G. E. McDannold for the Respondent

**Reasons for Judgment** January 21, 1991

This is an appeal by way of Stated Case pursuant to section 74 (2) of the Assessment Act. The facts material to this appeal are as follows:

1. The Appellants own land in the Dawson Creek Rural area, British Columbia. They are in the business of operating grain elevators and on their land are grain elevators and storage bins used for the storage of grains.

2. The grain elevators are used by the Appellants for retailing seed grains, fertilizers, chemicals, animal feeds and other materials used by farmers.

3. The storage bins are cylindrical steel containers with conical roofs, supported on a steel frame. Most of these bins contain seed grains which are purchased by the farmers. The weight of the grain in the bins will keep the bins in place, however, the bins are placed on and bolted to concrete pads to prevent damage to the bins when they are empty. The bins can be moved by hand.

4. In 1989 the Assessor had placed both the grain elevators and the storage bins under class 5 "light industry" of B.C. Reg. 438/81, the Prescribed Classes of Property Regulation (hereinafter "Regulation 438/81"). Class 5 provides:

> Class 5 property shall include only land or improvements, or both, used or held for the purpose of extracting, processing, manufacturing or transporting of products, and for the storage of these products as an ancillary to or in conjunction with such extraction, processing, manufacture or transportation, but does not include those lands or improvements, or both,
>
> (a) included in class 2 or 4
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> (b) used principally as an outlet for the sale of a finished product to a purchaser for the purpose of his own consumption or use and not for resale in either the form in which it was purchased or any other form, and

(c) used for processing, manufacturing or storage of food or non-alcoholic beverages.

The present Class 5 of Regulation 438/81 was amended on March 25, 1988. Prior to the amendment grain elevators had been classified as Class 5 "Industrial." Under the old scheme grain elevators were included on a list of items prescribed as Class 5 (see the unamended B.C. Regulation 438/81, class 5, item (j)).

The Appellants submit that the changes in Regulation 438/81 are such as to exclude the grain elevators from Class 5, "Light Industry" because of exceptions (b) and (c) of Class 5, which are reproduced above. The Appellants submit that grain elevators should be classed under Class 6, Business and Other. Class 6 is the "catch-all" class and has been applied to property involved in the manufacturing, processing and storage of food.

In respect to the bins the Appellants submit that they are not assessable because they do not fall into the definition of "improvements" as they are removable as between landlord and tenant (section 1 (n) of the Assessment Act).

The Assessment Appeal Board ("the Board") in a hearing on August 14, 1989 found that:

(a) the elevators were assessable because the intention of the Regulations was to exempt from assessment and taxation land and improvements used for the storage of "food." Grain is not fit for human consumption until there has been further processing and therefore is not "food" within the meaning of Regulation 438/81. In addition, the Board noted that in one of these facilities the sole activity being carried on was the receiving, cleaning, storage, bagging and shipping of fescue, a grass seed; and

(b) the grain bins are not storage tanks or tanks as described in paragraph (g.1) of section 1 of the Assessment Act. The bins are items which, if erected or affixed by a tenant, would as between landlord and tenant, be removable by the tenant as personal property, and, therefore, they are excluded from the definition of "improvements" (section 1 of the Assessment Act) and are not assessable.

The Board has been requested on behalf of both the Appellants, Alberta Wheat Pool, Cargill Limited, and the United Grain Growers Limited, and the Respondent, Assessor of Area 27, to ask the opinion of this Court on a number of questions. They are as follows:

1. Did the Assessment Appeal Board exceed its jurisdiction by qualifying the definition of the word "food" in section 5 of Regulation 438/81 (the "Regulation") under the Assessment Act, R.S.B.C. 1979, c. 21?

2. Did the Assessment Appeal Board err in law in holding that the intent of the regulation was to encompass only food "for human consumption?"

3. Did the Assessment Appeal Board err in law in ruling that the product had to be further processed before becoming food within the meaning of the regulation?

4. Alternatively, did the Assessment Appeal Board err in law in ruling that the product stored in the elevator was insufficiently processed to qualify the product as food within the meaning of the Regulation?

5. Did the Assessment Appeal Board err in law in not applying the "predominant use" rule in determining whether each individual elevator falls within the exceptions contemplated by the regulation?

6. Did the Assessment Appeal Board err in law in concluding that because a facility could have an alternate function it could not fall within the exemption contemplated by the regulation?

7. Did the Assessment Appeal Board err in law in not giving any consideration to the evidence of the retailing function of all the facilities under assessment?

8. Did the Assessment Appeal Board err in law in not finding that the facilities under assessment are involved in primary agricultural production or storage, thereby either fall (sic) within Classification 1 (b) -- "farm" or alternatively Classification 6 -- "Business and Other" for tax assessment purposes and not Class 5 -- "Industrial."

9. Did the Assessment Appeal Board err in law in not recognizing the inequity of assessing grain storage and processing facilities in the light industrial classification, while all other primarily agricultural food storage facilities receive a less taxable property classification?

Before answering the questions presented it is important to set out the function of this Court on hearing a Stated Case. The Assessment Act, R.S.B.C. 1979, c. 21 provides a procedure to appeal to the Supreme Court of British Columbia by way of Stated Case the decision of the Assessment Appeal Board (section 74). The jurisdiction of such an appeal is limited to questions of law (section 74).

There have been a number of judicial pronouncements on the role of the Supreme Court upon hearing a Stated Case on appeal for the Assessment Appeal Board. Southin, J. in Crown Forest Industries Ltd. v. Assessor of Area 6 -- Courtenay (Aug. 1985) B.C.A.C. Stated Cases No. 210, pp. 1179 (B.C.S.C.), noted that the Court's jurisdiction to intervene in such cases is limited to where the Appeal Board has:

(1) misinterpreted or misapplied legislation;

(2) misapplied principles of general law; or

(3) acted without any evidence or upon a view of the facts which could not reasonably be entertained.

It is clear then, that this Court is only permitted to exercise its jurisdiction when the issue raised involves a question of law.

*Questions One through Four*

The Appellants have requested that the Board ask the opinion of this Court on 9 questions, one of which was withdrawn at trial. All of the Appellants' questions deal with the assessment classification of the grain elevators. The first four questions asked on behalf of the Appellants can conveniently be grouped together and are as follows:

1. Did the Assessment Appeal Board exceed its jurisdiction by qualifying the definition of the word "food" in section 5 of Regulation 438/81 (the "Regulation") under the Assessment Act, R.S.B.C. 1979, c. 21?

2. Did the Assessment Appeal Board err in law in holding that the intent of the regulation was to encompass only food "for human consumption?"

3. Did the Assessment Appeal Board err in law in ruling that the product had to be further processed before becoming food within the meaning of the regulation?

4. Alternatively, did the Assessment Appeal Board err in law in ruling that the product stored in the elevator was insufficiently processed to qualify the product as food within the meaning of the Regulation?

The above cited questions all deal with the interpretation of the word "food" as it is used in exception (c) of Class 5 of Regulation 438/81. The Respondent submitted that this Court did not have the jurisdiction to change the decision of the Assessment Appeal Board in regards to the grain elevators, as this Court must accept the findings of fact made by the Board and not look beyond the Stated Case in order to make inferences of fact, nor find new facts. Interpreting legislation, however, involves a question of law. In this regard, I note also the words of Robinson, D.C. J., as he then was, in R. v. Forest (1979), 49 C.C.C. (2d) 126, a case which involved interpreting the word "food" in s. 322 (1) of the Criminal Code (as it then was) when he states:

It was common ground between counsel that the appeal involved a question of law as whether or not the word, "food" in s. 322 (1) of the Code was wide enough to include beer which the Appellant admittedly did obtain fraudulently.

It is open to me to decide whether the Board misinterpreted or misapplied Regulation 438/81.

I note first that section 61 (a) of the Assessment Act gives the Board jurisdiction to hear all assessment appeals from the Courts of Revision. Further, section 69 (1) (b) of the Assessment Act gives the Board the power to determine "whether or not the land or improvements, or both, have been properly classified." This power would necessarily include interpreting legislation in regards to classification and, therefore, the Board did not act outside the ambit of their jurisdiction when they held that "food" as the term is used in Regulation 438/81 must be food fit for human consumption.

The question still to be determined is whether the Board erred in their interpretation of the word "food" as it is used in Regulation 438/81. On page 3 of the Board's decision the Board's interpretation is set out as follows:

The Appellant contends that grain is a food and that grain elevators are ". . . used for processing, manufacturing, or storage of food . . ." within the meaning of Sub-paragraph C.

The Board does not agree. While some grains can be considered a food, and parenthetically the Board believes that the intent of the regulation was to encompass only food for human consumption, ordinarily grain is only made fit for consumption by further processing. It is significant that the sole activity carried on at one of these facilities is the receiving, cleaning and storage, bagging and shipping of fescue, a grass seed.

Notwithstanding that this facility is in all physical respects a typical grain elevator, which could be used for handling feed and cereal grains, the very fact that it is used for handling grass seed illustrates that it is not necessarily used for ". . . processing, manufacturing or storage of food . . ."

The Board's conclusion that the term "food" should, in this instance, be inferred to mean food for human consumption arises from the fact that it is followed by the phrase ". . . or non-alcoholic beverages." "Beverages" in ordinary use denotes liquids to be consumed by humans, and the context confers a similar distinction on "food."

In support of the Appellants' submission that the Board erred in its interpretation of the word "food" as used in part (c) of Class 5 of Regulation 438/81, the Appellants point out the use of the disjunctive "or." The Appellants submit that the word "or" serves to totally separate the "non-alcoholic beverages" from the "food" and, therefore, allows each word to maintain its independent meaning. Further, the Appellant cited the case of B.C. Fruit Packers Co-Operative Naramata Co-Op Growers Exchange v. Assessor Area 17 -- Penticton (Jan. 7, 1988, Stated Case 248, B.C.S.C.) where Legg, J. held that packing houses that store fruit and vegetables should be assessed under Class 6 "the catch all" rather than the farm class. The Appellants submit that the only difference between the B.C. Fruit Packers case, supra, and the case at hand is that most grains in their natural state require further processing before they show up as food on our tables. The Appellants point out that the ordinary usage of the word "food" would include products used to feed animals and, further, grains in their natural state are used in feeding livestock.

While it is true that the disjunctive "or" is used in part (c) of Class 5 of Regulation 438/81, it is my opinion that the Board did not err in regards to the use of the word "or." The disjunctive "or" may simply deal with whether or not the provision is inclusive. It may not shed any meaning on the words that surround it.

While it is also true that the canons of interpretation require that generally words are to be interpreted according to their ordinary meaning, it is my opinion that the Board did not misinterpret or misapply the legislation, nor did they misapply principles of general law when they found that the word "food" as used in Regulation 438/81 must mean food fit for human consumption. When interpreting statutes one generally starts by applying the ordinary meaning to words. If, however, the context in which the word is used alters that meaning, the meaning taken in context may be preferred. In support of this method of interpretation I note the words of Estey, J. in R. v. Golden [1986] 3 W.W.R. 1 (S.C.C.) where he states at page 6:

> In Stubart Invt. Ltd. v. R. [1984] 1 S.C.R. 536 at 573\-79, [1984] C.T.C. 294, 84 D.T.C. 6305, 53 N.R. 241 (sub nom, Stubart Invt. Ltd. v. M.N.R.), the court recognized that in the construction of taxation statutes the law is not confined to a literal and virtually meaningless interpretation of the Act where the words will support on a broader construction a conclusion which is workable and in harmony with the evident purposes of the Act in question. Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statutes in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.

In my opinion the ordinary meaning of the term "food" would include grain. It is evident from the Board's decision, however, that it read the word "food" in context with the words, "non-alcoholic beverage," and in so doing limited the meaning of the word "food." In doing this the Board did not misinterpret the legislation, nor did it misapply a general principle of law, and, therefore, the answer to questions 1 through 4 is no.

*Questions Five and Six*

The Board, on behalf of the Appellants, asked the following questions that can conveniently be dealt with together:

> 5. Did the Assessment Appeal Board err in law in not applying the "predominant use" rule in determining whether each individual elevator falls within the exceptions contemplated by the regulation?
>
> 6. Did the Assessment Appeal Board err in law in concluding that because a facility could have an alternate function it could not fall with the exemption contemplated by the regulation?

The above two questions deal with the Board's finding that one of the grain elevators was in fact used for storing fescue, a grass seed rather than a food product. The Appellants submit that the Board should have only considered the "predominant use" of the elevators when determining how they should be assessed. The finding that a grain elevator stored fescue is a finding of fact and not open to challenge in this Court. The Board found that a grain elevator was used to store fescue and this was evidence that "it is not necessarily used for ". . . processing, manufacturing or storage of food . . ." "(Page 3 Assessment Appeal Board's Decision). The weight that the Board attaches to a fact is also not open to challenge in this Court. I would like to point out, however, that even if the Board had only concerned itself with the "predominant use" of the elevators, and the predominant use of the elevators was to store grain, the elevators still would not fall under exception (c) of Class 5. This is because the Board held that "grain" is not included in the word "food" as it is used in Regulation 438/81.

*Question 7*

> 7. Did the Assessment Appeal Board err in law in not giving any consideration to the evidence of the retailing function of all the facilities under assessment?

The Appellants submit that the grain elevators could be excluded from Class 5 under either exception (c) or exception (b). The discussion thus far has solely centred around subsection (c). Subsection (b) of Class 5 excludes property:

> "used principally as an outlet for the sale of a finished product to a purchaser for the purpose of his own consumption or use and not for the resale in either the form in which it was purchased or any other form."

In question 7 the Appellants submit that the Board erred in not discussing this challenge. I do not agree with the Appellant's submission. The Board has not erred in law in this regard. While the Board must consider every point raised, the Board is not bound to discuss every point raised in their reasons. There is no reason to believe that the Board did not consider this point. It is clear that this matter was argued as an ancillary argument. There was ample evidence to support a finding that the grain elevators were not principally used as an "outlet for the sale of a finished product to a purchaser for the purpose of his own consumption or use and not for the resale in either the form in which it was purchased or any other form" and would, therefore, not fall under 5 (b).

*Question 8*

Question 8 was withdrawn by the Appellants at trial.

*Question 9*

> 9. Did the Assessment Appeal Board err in law in not recognizing the inequity of assessing grain storage and processing facilities in the light industrial classification, while all other primarily agricultural food storage facilities receive a less taxable property classification?

The Appellants submit that adopting the Board's interpretation of the word "food" as used in Regulation 438/81 would create an inequity in the taxing scheme in that storage facilities for fruits and vegetables would be assessed at a lower tax rate than storage facilities for grains. Further, the Appellants submit that the Board erred in law in not considering this inequity in their decision.

The Board has not made a mistake of law in this regard. The Board, in deciding the matter, was simply exercising its statutory power as outlined in section 69 (1) (b) of the Assessment Act, that

being determining "whether or not the land or improvements, or both, have been properly classified." In doing this the Board made a determination on whether grain elevators are used for "processing, manufacturing or storage of food or non-alcoholic beverages" and held that they were not because grain is not "food" as the word is used in section 5 (c) of Regulation 438/81. There are no principles of law which would require the Board to consider the equitable ramifications of holding grain elevators assessable under Class 5 whereas storage facilities for peaches are exempt from Class 5. Regulation 438/81 is drafted in such a way as to create a different tax level for storage facilities of fruits and vegetables than that of grain elevators. The legislation supports the distinction between taxing consequences for storage facilities of fruits and vegetables and storage facilities for grain and, therefore, only the legislature can deal with any inequity that might exist.

The Board has been requested, by the Respondent, Assessor of Area 27 - Peace River, to ask the opinion of the Supreme Court on three questions. Each of these questions deals with the tax classification of the storage bins. The questions are as follows:

> 10. Did the Assessment Appeal Board err in law when they concluded that the "grain bins" were "as between landlord and tenant, removable by the tenant as personal property" within the meaning of section 1 (n) of the definition of improvements in the Assessment Act when the bins had not been moved and there was no evidence of an intention to move them?
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> 11. Did the Assessment Appeal Board err in law when they concluded that the "grain bins" were "buildings, fixtures, structure and similar things erected on or affixed to the land . . ." within the meaning of section 1 (a) of the definition of improvements in the Assessment Act and not tanks or storage tanks?
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> 12. Did the Assessment Appeal Board err in law when they concluded that the "grain bins" were not "tanks" within the meaning of section 1 (g.1) of the definition of improvements in the Assessment Act?

The Board held that:

> the grain bins are not storage tanks or tanks as described in paragraph (g.1) of section 1 of the Assessment Act. Since they are items which, if erected or affixed by a tenant, would as between landlord and tenant, be removable by the tenant as personal property, they are not assessable as provided under subsection (n) of section 1 of the Assessment Act.

Property will fall within Class 5 only if it is "land" or an "improvement." The questions presented on behalf of the Respondent all involve considering the definition of "improvements" in section 1 of the Assessment Act.

Prior to July 24, 1990 the definition of "improvements" in the Assessment Act included the following:

> but does not, except for buildings, storage tanks or tanks described in paragraph (g.1), include
>
> (n) anything referred to in paragraph (a), (b), or (f), as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property.

It was on the above basis that the Board excluded the bins from assessment.

The Assessment and Property Tax Reform Act (No. 2), 1990 ("Bill 78") has since changed the definition of "improvements" for the purpose of the Assessment Act. Under the present section 1 (2) of the Assessment Act "bins" are expressly included as an improvement. The relevant section reads:

> 1 (2) Without limiting the definition of "improvements" in subsection (1), the following things are deemed to be included in that definition unless excluded from it by a regulation under section 80 (1) (a.3).
>
> (1) any vessels, such as tanks, bins, hoppers and silos, with a prescribed capacity and any structure that is connected to those vessels.

Bill 78 retroactively amends the definition of "improvements" for the 1987\-1990 assessment rolls. Section 14 of Bill 78 reads:

> 14. (1) Anything that
>
> (a) existed on September 30, 1986, and
>
> (b) would have been included in the definition of "improvements" as enacted by section 1 of this Act if that definition had existed on that date
>
> shall be conclusively deemed
>
> (c) to be an improvement for the purposes of assessment and taxation during the 1987, 1988, 1989 and 1990 calendar years, . . .

Considering the mandatory retroactive effect of Bill 78, the decision of the Appeal Board in respect to the bins may now be incorrect. The Board based its finding that the bins were not assessable on the fact that the bins were removable as between landlord and tenant. Bill 78 has removed the concept of removal as between landlord and tenant from the definition of "improvements." The answer to Questions 10\-12 must necessarily, therefore, be yes. Pursuant to section 14 (6) of the Assessment Act, the case must be remitted back to the Board for a determination under the legislation as it now stands.

*Summary*

In summary I would answer the questions as follows:

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| Question 1 | No; |
| Question 2 | No; |
| Question 3 | No; |
| Question 4 | No; |
| Question 5 | No; |
| Question 6 | No; |
| Question 7 | No; |

Question 8 Withdrawn;

Question 9 No;

Question 10 Yes;

Question 11 Yes;

Question 12 Yes.