CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, October 20, 1989

Appeal No. 3096

IN THE MATTER OF an application heard June 8, 1989, pursuant to section 51.19 of the *Excise Tax Act*, R.S.C. 1970, c. E-13;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated November 2, 1988, with respect to a Notice of Objection filed pursuant to section 51.17 of the Act.

BETWEEN

EASTMAN AUTOMOTIVE LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The Tribunal declares that the appellant is entitled to a refund of federal sales and excise tax paid on three Chevrolet Caprice Classic vehicles bearing the following serial numbers: 1G1BU51Y0HX - 185872, 1G1BU51Y7H9 - 136298 and 1G1BU51Y1H9 -121246.

John C. Coleman
John C. Coleman
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Kathleen Macmillan
Kathleen Macmillan
Member

Robert J. Martin
Robert J. Martin
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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UNOFFICIAL SUMMARY

Appeal No. 3096

EASTMAN AUTOMOTIVE LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Whether the appellant exported three new Chevrolet Caprice Classic vehicles to the United States - Whether entitled to a refund of federal sales and excise tax.

***DECISION**: The appeal is allowed. The appellant and the company to which the cars were sold agreed that the appellant would deliver the vehicles to their destinations in the United States. Having sent the vehicles to the United States, the appellant is the exporter.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*June 8, 1989*
Date of Decision:	*October 20, 1989*
Panel Members:	*John C. Coleman, Presiding Member* *W. Roy Hines, Member* *Kathleen Macmillan, Member*
Counsel for the Tribunal:	*Clifford Sosnow*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Katherine Tsetsos, for the appellant* *Peter Engelmann, for the respondent*
Cases Cited:	*Rex v. Gooderham & Worts Ltd. [1928] 62 O.R. 218; The King v. Carling Export Brewing & Malting Co. Ltd. [1930] S.C.R. 361.*
Statutes and Regulations Cited:	*Canadian International Trade Tribunal Act, S.C. 1988, c. 56, subs. 54(2) and s. 60; Excise Tax Act, R.S.C. 1970, c. E-13, s. 44.1; General Excise and Sales Tax Regulations, C.R.C., c. 594, s. 7.*

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3096

EASTMAN AUTOMOTIVE LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: JOHN C. COLEMAN, Presiding Member
W. ROY HINES, Member
KATHLEEN MACMILLAN, Member

REASONS FOR DECISION

SUMMARY

The appellant, Eastman Automotive Ltd. (Eastman), is a Canadian automobile wholesaler and retailer. It sold three new cars to Powercar Corporation (Powercar), a non-resident purchaser. Eastman paid federal sales and excise tax on the three cars. The appellant now claims a refund of the taxes on the basis that it exported the cars to the United States.

The issue in this appeal is whether the appellant exported the cars from Canada to the United States. If so, then, pursuant to section 44.1 of the *Excise Tax Act*[1] (the Act) and section 7 of the *General Excise and Sales Tax Regulations*[2] (the Regulations), the appellant is entitled to claim a refund of taxes paid.

The appeal is allowed. The appellant and Powercar originally agreed that Eastman would deliver the vehicles to Powercar in Canada. But they subsequently modified their agreement. As a result, Powercar took delivery of the vehicles only after the appellant had the three cars sent to specific destinations in the United States.

1. R.S.C. 1970, c. E-13; *now* R.S.C. 1985, c. E-15, s. 68.1.
2. C.R.C., c. 594.

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

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Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

THE LEGISLATION

The relevant legislative provisions, as they read during the period in issue, are as follows:

The *Excise Tax Act*

44.1 *Where tax under this Act has been paid in respect of any goods and a person has, in accordance with regulations prescribed by the Minister, exported the goods from Canada, an amount equal to the amount of that tax shall, subject to this Part, be paid to that person ...*

The *General Excise and Sales Tax Regulations*

7. *Where goods on which sales tax or excise tax has been paid under the Act are exported without having been used in Canada, a refund of the taxes so paid ... may be granted,*

(a) if evidence of payment of the tax on the purchase of the goods, in the case of domestic goods ...

is maintained on file by the exporter for examination by officers of the Department ... and evidence satisfactory to the Minister is produced to establish that the goods have been exported from Canada.

Although the appeal was originally commenced before the Tariff Board, the appeal is taken up and continued by the Canadian International Trade Tribunal (the Tribunal) in accordance with subsection 54(2) and section 60 of the *Canadian International Trade Tribunal Act*.[3]

THE FACTS

The appellant, Eastman, is a Canadian automobile wholesaler and retailer. It sold three new Chevrolet Caprice Classic vehicles to Powercar, an American company. Powercar is located in the city of New York, but has a branch in Montréal.

Eastman paid federal sales tax on the three cars in the amount of $5 723.38. Three refund claims requesting a refund of federal sales tax paid on the three vehicles were submitted on behalf of the company on April 7, 1987, April 24, 1987, and September 29, 1987. The appellant made the claims on the basis that it had exported the cars to the United States and, therefore, was eligible for refunds.

The Department of National Revenue informed the appellant by Notice of Determination numbers MTL 31272 and MTL 31274 on December 4, 1987, and MTL 32866 on January 8, 1988, that its refund claims had been disallowed. The appellant filed Notices of Objection, but the Minister disallowed the appellant's claims on November 2, 1988. The claims were refused

3. S.C. 1988, c. 56.

because the Minister considered that Powercar had paid the purchase price and the cost of transit of each vehicle before the vehicles were driven to the United States. Therefore, the Minister stated that Powercar owned the three vehicles at the time they were exported from Canada.

The appellant then filed an appeal with the Tariff Board on December 12, 1988, pursuant to section 51.19 of the Act.

Mr. Matthew Enright, a director of the appellant corporation and manager of its day-to-day operations, was the only witness to testify at the hearing. Although Mr. Enright testified in support of the appellant's position, the respondent also used the witness to introduce evidence.

The appellant is a wholesaler of new and reconditioned vehicles for domestic use or overseas export. It operates from offices located in Montréal, Quebec.

A typical transaction involving vehicles purchased for overseas export was explained as follows. A purchaser will place an order with the appellant for a particular type of vehicle (Chevrolet, Oldsmobile, etc.). The appellant will then place an order with any of several retail dealers, located in various regions of Canada, for the particular type of vehicle. When the vehicle arrives at the dealer's place of business, the appellant is notified. After the appellant notifies the buyer of the arrival of the vehicle, the appellant then has the vehicle driven across the US border and to the American port of shipment. An American customs broker enters the vehicle into the United States and later invoices the appellant for the service.

According to the witness, all of the vehicles, including the three in issue, are entered into the United States under the appellant's Transport and Exit Bond. This bond is a guarantee to the US Government that the vehicle being entered will not be used in that country. The bond designates the appellant as the owner of the vehicle. He also said that every vehicle that he delivers overland from different parts of Canada to American ports of exit is insured under a policy that requires the appellant to be the owner of the vehicle.

Once in the United States, the appellant drives the vehicle to an American port, where the appellant places the vehicle on a ship bound for an overseas destination.

The appellant is paid the purchase price of the vehicle prior to its delivery to the US port of exit. Typically, the vehicle is purchased at a price that is f.o.b. (free on board) the US port of exit. After receiving payment from the buyer, the appellant then pays the dealer.

The transactions that are the subject of this appeal concern the sale by the appellant to Powercar of three vehicles ultimately destined for Kuwait. However, the transactions involving Powercar differed from a typical transaction in one respect: Powercar insisted that the vehicles not be purchased f.o.b. the US port of exit. It wanted to purchase the vehicles at a price which would reflect that the cars, to quote Mr. Enright, were "landed in Montréal." Powercar would make its own arrangements to pick up the vehicles in Montréal and subsequently bring them to an American port of exit. The appellant agreed, and so the prices quoted to Powercar did not include a charge to deliver the vehicles to an American port.

According to the appellant, when the dealers received the ordered vehicles and the appellant notified Powercar, Powercar indicated that it was uncertain as to whether it would pick up the cars. The appellant agreed to drive the vehicles to the various US ports of exit from where the vehicles would be shipped for an amount which would cover its expenses in bringing the vehicles to the ports.

At the insistence of Powercar, the appellant agreed to invoice Powercar separately for the transportation costs. Thus, instead of issuing one invoice for an all-inclusive price, the appellant issued two invoices: one for the purchase price of the vehicle and one for the expenses incurred in bringing the vehicle to the port of exit.

The specific details of each of the three transactions, such as they are known, follow. For purposes of clarity, each transaction is identified by the Department of National Revenue (Customs and Excise) Notice of Determination number and by the last six digits of the serial number of each vehicle to which the Determination pertains.

MTL 31272 / 185872

Pursuant to an order made by Powercar, the appellant placed an order with a Chevrolet dealer in Sturgeon Falls, Ontario. Powercar then paid for the vehicle (the exact date is unknown). The vehicle was subsequently entered into the United States by an employee of the appellant on April 3, 1987. At the border, a US Customs Service manifest document was completed, naming Powercar as the exporter. When goods are entered into the United States, the US Customs Service requires that a document entitled Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit be completed. The information contained in the manifest document is supplied by the person entering the goods into the United States.

The car was then driven to the port of Albany, New York. The appellant paid the dealer on April 8, 1987.

On March 31, 1987, Powercar completed a document entitled Export Declaration (Form B13) and filed it with the Canadian Customs Service. Until April 1, 1985, the Canadian Customs Service accepted Form B13 as proof of export for purposes of refund claims under the Act. As of that date, the form is no longer considered as satisfactory evidence of export. Nevertheless, exporters continue to use Form B13 to validate their refund claims.

The document lists Powercar as the exporter and owner of two vehicles: the one to which this determination pertains and the one to which determination MTL 31274 pertains (discussed below).

Two additional pieces of documentary evidence were filed. The first document was a cheque, dated March 31, 1987, from Powercar to the order of the appellant. The cheque, in the amount of $400, contained two sets of six digits. One set corresponded to the last six digits of the serial number of the vehicle involved in Determination MTL 31272. The other set corresponded to the last six digits of the serial number of the vehicle to which Determination MTL 31274 pertains (discussed below). The appellant's witness could not confirm that this

cheque constituted payment of transportation expenses incurred by the appellant in bringing the vehicles to their respective ports of exit.

The second piece of evidence was a form document entitled Bill of Sale. This document was used in all three transactions. It contained the following standard form clause:

> *VENDOR RETAINS FULL OWNERSHIP OF THE VEHICLE(S), AT RISK OF PURCHASER, UNTIL FINAL PAYMENT OF THE TOTAL BALANCE DUE.*

Mr. Enright said that, in all three transactions, the information contained in the Bill of Sale was prepared by the appellant. Powercar neither saw nor signed this document in any of the three transactions. Indeed, the witness took every opportunity to stress that the document was normally used for domestic sales and was prepared in these cases exclusively for internal purposes. The appellant submitted the document to the Department of National Revenue (Customs and Excise) when it made the refund claims, but only because the Department wanted to see a bill of sale regarding the transactions.

In this transaction, the document listed April 3, 1987, as the date the car was sold by the appellant to Powercar and the date the car was delivered to Albany, New York.

MTL 31274 / 136298

Pursuant to an order made by Powercar, the appellant placed an order with a Chevrolet dealer in Montréal, Quebec. Powercar paid for the vehicle on March 31, 1987. The appellant then paid the dealer in two instalments: on April 16, 1987, and on April 21, 1987. The vehicle was subsequently entered into the United States by an employee of the appellant on April 23, 1987. At the border, a US Customs Service manifest document was completed, naming the appellant as the exporter. The vehicle was then driven to the port of exit at New York, New York.

The Bill of Sale for this transaction listed April 23, 1987, as the date the car was sold by the appellant to Powercar and also as the date the car was delivered to the port of exit.

MTL 32866 / 121246

Pursuant to an order made by Powercar, the appellant placed an order with a Chevrolet dealer in Saint John, New Brunswick. The vehicle was entered into the United States by an employee of the appellant on April 10, 1987. At the border, a US Customs Service manifest document was completed, naming the appellant as the exporter. The car was then driven to the port of exit at Wilmington, Delaware.

The appellant paid the dealer on April 10, 1987. Powercar paid for the vehicle on April 20, 1987. Unlike in the previous two transactions, Powercar paid for the vehicle after the car had been transported to the port of exit. Similarly, in this case, the appellant paid the dealer prior to receiving payment of the purchase price from Powercar.

The Bill of Sale for this transaction listed April 10, 1987, as the date the car was sold by the appellant to Powercar and also the date the car was delivered to the port of exit.

THE ISSUE

The issue in this appeal is whether Eastman exported the cars in issue from Canada to the United States. If it did, then pursuant to section 44.1 of the Act and section 7 of the Regulations, the appellant is entitled to claim a refund of taxes paid.

The appellant argued that it was the exporter. The company is described as the exporter of record by US Customs for two of the vehicles entered into the United States. Eastman had to pay a US customs broker the expenses for entering the vehicles into the United States. Furthermore, the vehicles were entered under the appellant's Transport and Exit Bond and insured by the appellant. Both the bond and the insurance policy list Eastman as the owner of the vehicles it enters into the United States. In these circumstances, it ceased to be the owner when it placed the vehicles on board the ships bound for Kuwait.

The respondent argued that the US Customs description of the appellant as the exporter of record is irrelevant in determining whether the appellant is the exporter under the Act. He added that it was a matter of speculation as to whether the appellant would have been able to sustain a claim against its insurance company had any of the vehicles in question been damaged in transport to the US port of exit.

Furthermore, the respondent argued that the appellant's agreement with Powercar to drive the vehicles to their US ports of exit did not make the appellant an exporter. Eastman simply served as an agent of the purchaser in transporting the vehicles, incurring whatever expenses where necessary in the transportation process.

The respondent contended that Powercar owned the cars when it paid the purchase price. In two of the transactions in issue, Powercar paid the price prior to the entry of the vehicles into the United States. In the third transaction, the price was paid after the vehicle was driven to the US port of exit. Because Powercar owned two of the three vehicles prior to their export from Canada, it was the exporter of those two vehicles and, consequently, the company which was entitled to the refund relating to those vehicles.

DECISION

From an examination of the case law, the wording of section 44.1 of the Act and section 7 of the Regulations, the Tribunal considers that the appellant is entitled to claim a refund of federal sales and excise tax paid on the three vehicles in issue.

According to the relevant legislation, a person is entitled to a refund of federal sales and excise tax paid in respect of goods if, amongst other things, that person has exported the goods from Canada. Both parties agree that Eastman paid federal sales and excise tax on the three Chevrolet vehicles driven to the various US ports of exit. The only point in contention is whether the appellant is the "person" who exported the goods from Canada.

The respondent has asked the Tribunal to analyse the issue in terms of ownership. If the appellant did not own the vehicles prior to their delivery to the US ports of exit, then it could not be the exporter. According to the respondent, the Tribunal should settle the issue of ownership by examining when Powercar paid the purchase price of the vehicles. Indeed, the evidence the respondent has provided has been primarily directed at establishing the time Powercar paid for the cars.

The Tribunal is willing to examine ownership as a possible basis for deciding who was the exporter of the vehicles. However, the respondent has not cited any jurisprudence, nor has the Tribunal been able to locate any, that states or supports the proposition that payment of the purchase price will, by that fact alone, result in a transfer of ownership.

In addition, the respondent has not presented any evidence to indicate that the parties contractually had intended that transfer of title would occur when Powercar paid for the vehicles. The bills of sale do state that the vendor is to retain full ownership of the vehicles until final payment of the total balance is due. However, the bills were never seen nor signed by Powercar. Nor has the Tribunal been provided with any other evidence to indicate that the parties agreed to arrange their commercial affairs in this manner.

In view of the foregoing, the Tribunal finds it helpful to examine the jurisprudence on the meaning of the word "export" within the context of the Act. In the Ontario Court of Appeal decision of *Rex v. Gooderham & Worts Ltd.*,[4] Mr. Justice Grant provided the following comments on the meaning of the word export as used in the Act:

> *Sales of goods form the basis for the imposition of the tax, and it seems to me that the word is here used in its commercial sense. Murray's English Dictionary gives the meaning of "to export" in commercial usage, as "to send out commodities of any kind from one country to another." This interpretation ... is also the meaning given to the word in its ordinary acceptation in commercial matters (in this country).*[5]

In the Supreme Court of Canada decision of *The King v. Carling Export Brewing & Malting Co. Ltd.*,[6] Mr. Justice Duff provided the following meaning to the word "export" when the word is used in the Act:

> *Generally speaking, export, no doubt, involves the idea of a severance of goods from the mass of things belonging to this country with the intention of uniting them with the mass of things belonging to some foreign country. It also involves the idea of transporting the thing exported beyond the boundaries of this country with the intention of effecting that.*[7]

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4. [1928] 62 O.R. 218.
5. Ibid. at p. 227.
6. [1930] S.C.R. 361.
7. Ibid. at pp. 371-72.

The evidence presented by the parties to establish whether Powercar or the appellant sent or transported the vehicles from Canada to the United States is incomplete and contradictory. For example, the Canada Customs form B-13 pertaining to determination MTL 31274 lists Powercar as the exporter of the vehicle. However, the US manifest document names Eastman as the exporter.

In spite of these anomalies, the facts taken as a whole indicate to the Tribunal that the appellant exported the vehicles to the US ports of exit. It will be recalled that the transactions involving Powercar differed from the typical transaction. The vehicles were to be purchased at a price which would reflect that the cars were "landed in Montréal." So the prices quoted to Powercar did not include a charge to deliver the vehicles to a US port of exit. But when the dealers received the ordered vehicles and Powercar expressed hesitation about picking up the cars, Eastman agreed to drive the vehicles to the various US ports of exit. The appellant did this because Powercar agreed to pay an amount to cover the appellant's expenses in delivering the vehicles to the ports.

In the Tribunal's view, the agreement between the parties to have Eastman deliver the cars to the US ports of exit constituted a modification of the original commercial transaction. That modification was a change in the place of delivery. Rather than being "landed in Montréal" the vehicles were to be "landed in (specified US ports of exit)." In the result, although Powercar did not initially want to purchase the vehicles at a price f.o.b. the US ports of exit, in substance, it subsequently agreed to that arrangement.

CONCLUSION

In view of the foregoing, the Tribunal considers that Powercar took delivery of the vehicles only after Eastman had the three cars sent to the specified US ports of exit. In accordance with the jurisprudence, the Tribunal considers that the appellant exported the vehicles to the United States and that it is entitled to claim a refund of federal sales and excise tax paid on the three vehicles in issue.

The appeal is allowed.

John C. Coleman
John C. Coleman
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Kathleen Macmillan
Kathleen Macmillan
Member