CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, August 1, 2001

Appeal No. AP-2000-021

IN THE MATTER OF an appeal heard on January 16, 2001, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

1211863 ONTARIO INC. O/A A & T LEASING **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Patricia M. Close
Patricia M. Close
Member

Michel P. Granger
Michel P. Granger
Secretary

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

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

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-2000-021

1211863 ONTARIO INC. O/A A & T LEASING **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* (the Act) concerning an application for a refund of the excise tax on air conditioners installed in automobiles. On March 23, 2000, the Minister of National Revenue rendered a number of decisions, under section 68.1 of the Act, denying the appellant's application for a refund of the excise tax imposed on air conditioners installed in exported automobiles. The issue in this appeal is whether the appellant is entitled to a refund of the excise tax under section 68.1 of the Act, which is imposed on air conditioners installed in exported automobiles.

HELD: The appeal is allowed in part. According to the Tribunal, to be refundable under section 68.1 of the Act, the excise tax must first be payable, that is, the automobiles must be equipped with air conditioners. Once it has been established that it is payable, the excise tax is deemed to be included in the sale price, pursuant to section 154 of the Act; consequently, when the automobiles are sold, the tax is deemed to have been paid. It is also necessary for the automobiles to be exported and to be new. In the present case, the respondent acknowledges that these two conditions are met. In this instance, it is sufficient for the appellant to show that the automobiles are equipped with air conditioners to establish that the excise tax has been paid and to show that the exporter has purchased the automobiles. The Tribunal is of the view that the dealers' invoices, alone or together with the manufacturer's invoices, which state that an excise tax is included in the price of the automobile or mention that the automobile is equipped with an air conditioner, are sufficient at the outset to establish that an excise tax is payable in these particular cases. The Tribunal also accepts that the Goods and Services Tax on the excise tax was reimbursed to the appellant and that this is an indication that it purchased the automobiles and that the exporter paid the excise tax in this case. The Tribunal, therefore, finds that, in all cases where the dealers' invoices, alone or together with the manufacturer's invoices, expressly state that the excise tax is included in the sale price or that the automobiles are equipped with air conditioners, the appellant is entitled to a refund of the excise tax.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 16, 2001
Date of Decision:	August 1, 2001
Tribunal Members:	Richard Lafontaine, Presiding Member Pierre Gosselin, Member Patricia M. Close, Member
Counsel for the Tribunal:	Michèle Hurteau
Clerks of the Tribunal:	Susanne Grimes Margaret Fisher
Appearances:	Denis Péloquin, for the appellant Marie Crowley, for the respondent

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

333, 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. AP-2000-021

1211863 ONTARIO INC. O/A A & T LEASING **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member
PIERRE GOSSELIN, Member
PATRICIA M. CLOSE, Member

REASONS FOR DECISION

INTRODUCTION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] concerning an application for a refund of the excise tax on air conditioners installed in automobiles. On March 23, 2000, the Minister of National Revenue (the Minister) rendered a number of decisions under section 68.1 of the Act denying the appellant's application for a refund of the excise tax imposed on air conditioners installed in exported automobiles on the grounds that the appellant had not established that the tax had been paid pursuant to section 23 of the Act and section 7 of the *General Excise and Sales Tax Regulations*.[2] On June 23, 2000, the appellant appealed the Minister's decisions. Although the parties acknowledge that the appeal was filed with the Tribunal two days late, the respondent has not objected to the appeal being heard.

The issue in this appeal is whether the appellant is entitled to a refund of the excise tax under section 68.1 of the Act, which is imposed on air conditioners installed in exported automobiles.

The relevant sections of the Act are as follows:

> 23. (1) Subject to subsections (6) to (8.3) and 23.2 (6), whenever goods mentioned in Schedules I and II are imported into Canada or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this or any other Act or law, an excise tax in respect of those goods at the applicable rate set out in the applicable section in whichever of those Schedules is applicable, computed, where that rate is specified as a percentage, on the duty paid value or the sale price, as the case may be.
>
> (2) Where goods are imported, the excise tax imposed by subsection (1) shall be paid in accordance with the provisions of the *Customs Act* by the importer, owner or other person liable to pay duties under that Act, and where goods are manufactured or produced and sold in Canada, the excise tax shall be payable by the manufacturer or producer at the time of delivery of the goods to the purchaser thereof.
>
> 68.1 (1) Where tax under this Act has been paid in respect of any goods and a person has, in accordance with regulations made 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 if that person applies therefor within two years after the export of the goods.

1. R.S.C. 1985, c. E-15 (hereinafter Act).
2. C.R.C., c. 594 (hereinafter Regulations).

333 Laurier Avenue West
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333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
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(2) Subsection (1) does not apply in respect of

(*a*) taxes imposed under Part III in respect of tobacco products mentioned in Schedule II; or

(*b*) tax imposed under Part V.1.

Section 154 reads as follows:

154. For the purposes of this Part, the consideration for a supply of property or a service includes any tax, duty or fee (other than a prescribed tax, duty or fee, or tax under this Part, payable by the recipient in respect of the supply) imposed under an Act of Parliament or the legislature of a province in respect of the supply, production, importation, consumption or use of the property or service that is payable by the recipient or is payable or collectible by the supplier.

Section 7 of the Regulations reads as follows:

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 or a deduction from future taxes payable may be granted,

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

(*b*) if evidence of payment of the tax on the importation of the goods in the form of a receipted copy of the original import entry, in the case of goods imported into Canada,

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.

Schedule I of the Act, which contemplates goods taxable pursuant to Part III, stipulates, in section 7, that air conditioners designed for automobiles, station wagons, vans or trucks will be subject to an excise tax of $100 if they are included as permanently installed equipment in these vehicles at the time of sale or importation by the manufacturer or importer, as the case may be.

PRELIMINARY MATTER

On December 22, 2000, and January 10, 2001, the appellant asked to file confidential documents for the following reasons: it need not disclose its cost prices or its markup or the identity of its suppliers; and the disclosure would be prejudicial to both the appellant and its suppliers, given the restrictive business practices of manufacturers. On January 12, 2001, the Tribunal agreed to the filing of the confidential documents, but did not rule on the confidential content of the documents. The Tribunal informed the parties that, at the start of the hearing, it would ask for further explanation of the reasons why the documents should be considered confidential. In the mean time, the documents were treated as confidential.

At the hearing, the appellant explained that the documents were business documents that determined the appellant's cost prices and that the appellant competed with automobile manufacturers on their own export market. To allow this information to be made public could well give rise to remedies in damages against the appellant by the manufacturers and be prejudicial to the appellant. In answer to a question of the Tribunal as to what information could be prejudicial to the appellant, the appellant cited, as examples, the serial number of the automobile, the purchase price and the supplier's name.

The respondent was of the view that only certain information, such as the serial number of the automobile and the sale price, could be subject to confidentiality and that the rest of the invoice could

remain in the public record. The respondent also acknowledged that some of this information was in the N-15 forms that the respondent had placed in the public record on July 18, 2000, and January 10, 2001.

The Tribunal ruled that the documents filed by the appellant remained confidential and that the appellant was to produce a non-confidential version of the documents excluding the serial number of the automobiles, the purchase price, the supplier's name, the invoice number, the vendor's Goods and Services Tax (GST) number and the supplier's number. The Tribunal also ruled that the documents filed by the respondent were also confidential. The respondent was also to produce a non-confidential version of the documents excluding the same information as the appellant.

EVIDENCE

The appellant called Mr. Andrew Pilsworth, secretary of the appellant company, as a witness. Mr. Pilsworth explained that the appellant purchases new automobiles from Canadian dealers and then exports them to the United States, Europe, Japan and elsewhere in the world. He explained that, if the automobiles are available in Canada at a lower price and the appellant can supply them to customers in other countries or markets at a lower price than that of the manufacturer in those countries or markets, then the appellant can make a profit. Mr. Pilsworth also explained how he obtained his price based on the manufacturer's suggested price, that is, the price that the dealer could invoice for the automobile, less a discount price. According to him, in some cases, the manufacturer sends the dealer an invoice; in most cases, however, given the franchise agreement between the manufacturer and the dealer, the automobiles are not destined for export and manufacturers prefer not to have their invoices circulate showing the price of their automobiles. Some manufacturers, such as General Motors, Ford and Chrysler, have systems that allow dealers to have access to the invoices and to print them as needed. According to Mr. Pilsworth, this is not the case with Toyota, Lexus, Honda, BMW and the majority of Japanese and European automobile dealers.

Mr. Pilsworth also testified that the appellant sometimes relies on agents to purchase automobiles from dealers. He explained that this protected both the appellant and the dealer from reprisals from the manufacturer and allowed the appellant to stay in business.

Mr. Pilsworth testified that the appellant had been reimbursed the GST for the 250 or so exported automobiles. According to him, since the automobiles had been exported from Canada and had never been used in Canada, the appellant was entitled to apply for a refund, which it did. The same thing happened with respect to the provincial sales tax. As for payment of the excise tax on the air conditioners, Mr. Pilsworth said that the appellant had paid the excise tax and that the amount of the tax on the air conditioners appeared on the dealer's invoice. He learned that other companies that were exporting new automobiles had claimed the excise tax on air conditioners and obtained a refund. He then contacted the Canada Customs and Revenue Agency (CCRA) to inquire about how to proceed. According to Mr. Pilsworth, the CCRA provided him with conflicting information. He testified that, initially, a CCRA employee had told him that the purchase invoice, the sales invoice and an entry summary from the exporting country would suffice as evidence. In fact, he submitted these documents to the CCRA. Mr. Pilsworth wanted to know which documents to submit with the application for a refund of the excise tax. According to him, it seems that the CCRA had no uniform policy and that the offices required different documents for a refund of the excise tax. Finally, he testified that the appellant had been denied the excise tax refund for the 250 automobiles.

In cross-examination, Mr. Pilsworth said that the dealer's invoice includes the $100 excise tax in the sale price of the automobile that is billed to the purchaser. He admitted that the dealer's sales invoice does not show that the manufacturer paid the $100 excise tax for the air conditioners to the Crown. Moreover, in

looking over the invoices, Mr. Pilsworth acknowledged that some of them showed that the automobile had no air conditioner and that the $100 was, therefore, not shown on the invoice. In some cases, the invoice showed only that the automobile was equipped with the manufacturer's standard options. In his opinion, this information, in addition to the model and number of the automobile, shows that the automobile is equipped with an air conditioner. In answer to the respondent, Mr. Pilsworth acknowledged that he had not asked the manufacturers to certify that the excise tax had been paid on the automobiles in issue, for the reasons stated above. Furthermore, dealers do not want to provide a copy of the manufacturer's invoice even when they have access to it, because these invoices reveal the purchase price of the automobile, which information is confidential.

The respondent called Mr. Gary Gizzie, an auditor with the CCRA, as a witness because of his knowledge of the automotive industry. He explained that his role is to ensure that the excise tax has been paid and that the automobile has been exported without having been used before export, in accordance with the Act and the applicable regulations. When he visited the appellant, he audited the appellant's records, namely, the N-15 form, the sales invoice, the dealer's invoice and the export documents. Mr. Gizzie testified to not having seen any manufacturer's invoices. In his opinion, only the manufacturer can pay the excise tax at the time the automobiles are sold. He also examined the documents, including the dealer's invoice, as well as subsection 23(2) and section 68.1 of the Act; he concluded that these invoices did not prove that the manufacturer had paid the excise tax. Mr. Gizzie also concluded that the exporter was to provide documents showing that the excise tax had been paid. In this case, the appellant had not kept this documentation as required under section 7 of the Regulations. According to Mr. Gizzie, the exporter is responsible for verifying whether the excise tax has been paid. Mr. Gizzie testified that the CCRA can check whether the manufacturer has paid the excise tax; however, this is difficult to do and can be long and cumbersome, since it is necessary to cross-check the number of the automobile and the manufacturer, working from the N-15 form.

Upon review of certain invoices, Mr. Gizzie testified that, although the manufacturer's invoice entered into the record does not show that the excise tax had been paid to the Crown, the CCRA accepted it as evidence of payment by the manufacturer. However, the only way that the CCRA can know whether the excise tax has been paid is to contact the manufacturer itself. In this particular case, the manufacturer's invoice shows that a tax has been levied; however, according to Mr. Gizzie, this is not a tax, but rather a cost recovery. For this reason, the dealer's invoice, which includes the amount of $100 on the air conditioners, does not prove that the tax has been paid to the Crown, but rather that this is a cost recovery by the dealer.

Mr. Gizzie testified that another automobile exporter was able to obtain an invoice from Toyota. In cross-examination, he acknowledged that the said invoice from Toyota had been obtained as the result of an audit. He also acknowledged that it was difficult for the CCRA to verify whether the manufacturer had paid the excise tax to the Crown. In this case, the appellant asked how the CCRA could expect the exporter to obtain this information if the CCRA itself has difficulty obtaining it. Mr. Gizzie answered that the purchaser, that is, the appellant, must obtain the information in accordance with the Act and the applicable regulations. Moreover, there were already certain of the manufacturer's invoices on record.

In answer to the questions of the Tribunal, Mr. Gizzie testified that the excise tax is payable by the manufacturer only, at the time it sells the automobile.

POSITION OF THE PARTIES

The appellant claims that, with the introduction of the GST, and particularly section 154 of the Act, all taxes that exist with respect to a product and that are upstream from the payment of the GST are included

in the price on which the GST is charged. Ultimately, it is the consumer who pays all taxes that apply to a product.

According to the appellant, the evidence that the excise tax has been paid follows from the very fact that the GST has been refunded. The appellant claims that the respondent acknowledges in its brief that the automobiles in issue were equipped with air conditioners, and in refunding the GST to the appellant, the respondent acknowledges having received the $100 excise tax, since he is refunding $7, namely, the GST collected on the excise tax.

The appellant argues that, when a refund application is made under section 68[3] of the Act, the federal government must determine whether the goods are subject to an excise tax; whether they have been paid for; whether they have been exported; and whether they were new. These are the conditions set out in section 7 of the Regulations. The appellant, therefore, concludes that, once these conditions are met, there is a presumption that the excise tax has been paid. According to the evidence and the testimony of Mr. Pilsworth, the appellant purchased new automobiles equipped with air conditioners and was refunded the GST on the $100 excise tax for each automobile. In addition, the appellant maintains that section 68 of the Act stipulates that the excise tax must have been paid. As for evidence of payment, the appellant argues that it is not in a position to be able to ask the manufacturer for evidence that the appellant has paid the excise tax because the manufacturer is a competitor. Moreover, it is not possible to obtain the invoice from the manufacturer or dealer because, first, the latter is not obliged to provide it, and second, if the appellant is too insistent, the dealer could refuse to sell it automobiles destined for export, given the agreements between dealers and manufacturers.

The appellant maintains that section 68 of the Act must be read in conjunction with section 7 of the Regulations, which states that it is necessary to prove payment of the tax at the time of purchase of the goods and not at the time of manufacture. In the present case, the appellant claims that it is the vendor's invoice that enables it to prove payment of the excise tax at the time of purchasing automobiles. According to the appellant, the Act stipulates that the sale price includes all taxes payable for the purposes of calculating the GST.

The appellant argues that it is not possible to take the concept of section 23 of the Act and integrate it with that of section 68. Section 23 applies to the beginning of the chain of events, while section 68 and section 7 of the Regulations apply to the end of the chain of events, namely, the point at which one asks whether the goods are destined for domestic consumption. According to the appellant, when the goods are destined for domestic consumption, they are taxable. However, when the goods are not destined for domestic consumption, they are "zero-rated" with respect to the GST and to all other taxes.

Finally, the appellant claims that the GST is an excise tax and that section 154 of the Act covers all the foregoing. In other words, the appellant is of the opinion that the GST regime is not a separate act, but is part of the Act.

For its part, the respondent claims that, to be entitled to a refund, the appellant must prove that the requirements of section 68.1 of the Act have been met. The first requirement is that the tax imposed under the Act has been paid. In order to determine this requirement, it is necessary to refer to subsection 23(2) of the Act. The appellant must, therefore, establish that the manufacturer paid the excise tax at the time of delivery of the goods in issue. This burden rests with the appellant and has been codified in the regulations. In particular, the respondent points out to the Tribunal that paragraph 7(*a*) of the Regulations stipulates that

3. Although the appellant made reference to section 68 of the Act, it was referring to section 68.1.

the person applying for the refund must establish that the tax has been paid at the time of purchase of the goods. In addition, evidence of payment of the tax is furnished by the manufacturer that paid it. According to the respondent, the taxes are paid pursuant to the Act and, in the case of goods manufactured in Canada, by the manufacturer. Once there is evidence that the manufacturer has paid the tax, the exporter is entitled to the refund.

The reason for this provision is that it is difficult for the CCRA to determine whether the tax has actually been paid by the manufacturer. The declaration that is completed and provided by the manufacturer mentions only a global amount that is later impossible to trace back. The only way for the CCRA to determine whether the tax has been paid would be to audit manufacturers' books, which, the respondent argues, really is not realistic. The legislator has, therefore, placed the burden on the person applying for the refund.

According to the respondent, the best evidence for the person applying for the refund is the manufacturer's declaration. However, given the difficulties that can be faced by the exporter who would like to obtain a declaration from the manufacturer stating that the tax has been paid, the CCRA has attempted to relax the requirements by accepting the manufacturer's invoice as evidence of payment of the tax. Technically, the invoice does not show that the tax has been paid; but it is a reliable record, since it is supplied by the taxpayer. Ultimately, the CCRA always has its remedies against this taxpayer.

The respondent argues that, to be eligible for the refund under section 68.1 of the Act, the following three conditions must be met:

- the excise tax must have been paid to the Crown;
- the refund applicant must be the exporter;
- the exported automobiles must be new and must not have been used.

The respondent acknowledges that the last two conditions have been met. As for the first condition, the respondent alleges that there is not sufficient evidence to establish that the excise tax has been paid to the Crown.

The respondent claims that dealers' invoices are not sufficient evidence to fulfil the requirements of the Regulations because, firstly, the dealer's invoice does not originate with the taxpayer; secondly, some invoices make no mention of the $100 excise tax; and finally, according to the evidence filed, certain other invoices make no mention of air conditioners. Therefore, the respondent argues, the dealer's invoice is not the best evidence to submit to fulfil the requirements of section 7 of the Regulations.

In addition, the respondent claims that, under subsection 98(1) of the Act, any person who applies for a refund pursuant to section 68.1 must keep records and books of account containing such information as will enable the amount of taxes that should have been paid to be determined. Accordingly, one of the pre-conditions to obtaining a refund under section 68.1 is that the excise tax has been paid to the Crown.

As for the appellant's argument that section 154 of the Act helps prove that the excise tax has been paid, the respondent suggests that it should be studied with caution. According to the respondent, while the consideration is entered on the dealer's invoice, the invoice does not show what it includes. In other words, there is nothing to indicate that the excise tax is included in the consideration. It is therefore necessary to make do with the manufacturer's invoice, which includes the amount of the excise tax in the sale price. Without this evidence, it is impossible to say, in examining the dealer's invoice, if the excise tax has been paid.

In conclusion, the respondent argues that it has not been proven that the tax has been paid and that the requirements of the Act and the applicable regulations have not been met.

DECISION

The Tribunal is of the opinion that the excise tax contemplated by subsection 23(2) of the Act is a tax payable by the manufacturer at the time of delivering the goods to the purchaser, whereas the tax contemplated by section 68.1 is paid by the exporter. Otherwise, why would the tax be refundable? The evidence required by section 7 of the Regulations must be evidence that the tax was paid pursuant to the Act, that it was paid at the time of purchasing the goods and that the goods were exported without having been used in Canada.

In the present case, the evidence on the record indicates that the appellant has produced dealers' invoices, some of which are supported by the manufacturer's invoices, and some of which are not. Moreover, some dealers' invoices do not show that an excise tax has been invoiced or that the automobile was equipped with an air conditioner.

According to the CCRA, only the manufacturer's invoices serve to establish that the excise tax has been paid. A dealer's invoice showing that the tax is owed does not suffice, in its view, any more than does mention on the invoice that the automobile is equipped with an air conditioner.

The Tribunal has reviewed the books of account and record keeping regime referred to in sections 98 to 102 of the Act. In its view, under subsection 100(2) of the Act, the Minister has the discretion to prescribe the form that the documentation must take. But the Minister must not exercise his discretion unreasonably. In the present case, the Tribunal is convinced that it is not reasonable to require the exporter to provide the invoices or supporting documents from the manufacturer or even to require dealers to provide these documents, given the restrictions that manufacturers impose on the export of automobiles or the possibility of dealers not wanting to disclose their markup. In addition, Mr. Pilsworth told the Tribunal, and this evidence has not been disputed by the respondent, that the GST pertaining to these same sales had been refunded to the appellant on the basis of the dealers' invoices. The Tribunal is not convinced that two different approaches are required to administer the refund of these two types of taxes, which are part of the Act. If dealers' invoices suffice in one case, they should, in its view, suffice in the other, and all the more so when it is pursuant to the same act.

According to the Tribunal, in order to be refundable pursuant to section 68.1 of the Act, the excise tax must first be payable, that is, the automobiles must be equipped with air conditioners in this case. Once it is established that it is payable, the excise tax is deemed to be included in the sale price, pursuant to section 154 of the Act; consequently, once the goods are sold, the tax is deemed paid. Also, the automobile must be exported and it must be new. In the present case, the respondent acknowledges, in paragraph 20 of its brief, that both these conditions have been met. In this instance, it is, therefore, sufficient for the appellant to show that the automobiles are equipped with air conditioners to establish that the excise tax has been paid and to show that the exporter has purchased the automobiles.

The appellant claims that the respondent acknowledged in his brief that all the automobiles in issue were equipped with air conditioners. This is not the Tribunal's view. During his cross-examination and in his argument, the respondent implied that, in some cases, there was not sufficient evidence of this. However, the Tribunal is of the opinion that the dealers' invoices, alone or together with the manufacturer's invoices, which show that an excise tax is included in the price of the automobile or mention that the automobile is equipped with an air conditioner, are sufficient at the outset to establish that the excise tax is payable in these

particular cases. The respondent has submitted no evidence to the contrary, nor has it disputed the appellant's claims in this regard.

The Tribunal also accepts that the GST on the excise tax was refunded to the appellant and that this indicates that the automobiles were purchased by it and that the exporter paid the excise tax in this case. The Tribunal, therefore, finds that, in all instances where the dealers' invoices, alone or together with the manufacturer's invoices, expressly state that the excise tax is included in the sale price or that the automobiles are equipped with air conditioners, the appellant is entitled to the refund of the excise tax.

Therefore, for the foregoing reasons, the appeal is allowed in part.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Patricia M. Close
Patricia M. Close
Member