CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 10, 1992

Appeal No. AP-91-184

IN THE MATTER OF an appeal heard on May 11, 1992, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated February 13, 1991, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

VOLKSWAGEN CANADA INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-91-184

VOLKSWAGEN CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether certain expenses incurred by Volkswagen Canada Inc. in the movement of vehicles from the port of entry into Canada to its dealers, who were subsequently invoiced for these expenses, represent part of the sale price of the vehicles and are thus subject to sales tax. If so, the Tribunal must decide whether these expenses represent transportation costs that may be excluded from the calculation of sale price of the vehicles pursuant to clause 46(c)(ii)(B) of the Excise Tax Act.

HELD: *The Tribunal believes that the expenses in issue do form part of the sale price of the vehicles on which tax is payable. Further, it concludes that certain of the expenses represent transportation costs that may be excluded from the calculation of sale price.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 11, 1992*
Date of Decision:	*August 10, 1992*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Sidney A. Fraleigh, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Michael Kaylor, for the appellant* *Alain Préfontaine, for the respondent*

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Appeal No. AP-91-184

VOLKSWAGEN CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
SIDNEY A. FRALEIGH, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

The issue in this appeal is whether certain expenses incurred by Volkswagen Canada Inc. (Volkswagen) in the movement of vehicles from the port of entry into Canada to its dealers, who were subsequently invoiced for these expenses, represent part of the sale price of the vehicles and are thus subject to sales tax. If so, the Tribunal must decide whether these expenses represent transportation costs that may be excluded from the calculation of sale price of the vehicles pursuant to clause 46(*c*)(ii)(B) of the *Excise Tax Act*[1] (the Act).

The appellant imports several models of cars into Canada from Europe, Brazil and the United States. Vehicles imported from Europe and Brazil arrive at the Port of Halifax where they are handled by Autoport Limited (Autoport) pursuant to agreements concluded with Volkswagen from time to time. Vehicles arriving from the United States by rail pass through Toronto where they are sorted and shipped by rail, either east or west. At Halifax the vehicles are also handled by Autoport.

Vehicles arriving by ship are unloaded by stevedores who are hired by the ship's agent. They are responsible for driving the cars to their first place of rest (the surge area) that is owned and controlled by Autoport. Charges for these services are part of the ocean freight. When the vehicles enter the surge area they are cleared through customs. At the surge area a survey is performed by Volkswagen and Autoport to identify any marine damages. Any claims for such damages would be made against the marine carrier. At this point the vehicles are marked for destination.

Depending on whether the vehicle is to be immediately released to the dealer who ordered the vehicle or not, it is moved to either the rail loading area or storage area pending future release. Before being moved to either area, the wax that had been applied as protection during the ocean voyage is removed. Any repairs required to move the vehicle to the rail loading area are performed by Autoport. Such services include charging a battery or repairing a flat tire. All other repairs are performed by the dealer.

Vehicles destined for dealers in the Atlantic provinces are delivered by truck from Autoport's premises. Those destined for Newfoundland or Gaspé, Quebec, are reloaded onto

1. R.S.C., 1985, c. E-15, as amended.

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ships for transport. Those destined to travel west are loaded onto CN Rail (CN) cars and transported to drop-off points across the country. There are 10 such points, namely, Québec, Montréal, Toronto, Thunder Bay, Winnipeg, Saskatoon, Regina, Edmonton, Calgary and Vancouver. From the drop-off points the vehicles are processed through the yards to an area where they are loaded onto trucks and delivered to the dealer. The drop-off points are owned and operated by either an independent trucking company or the railways.

The Department of National Revenue (Revenue Canada) has allowed a deduction from the sale price of the vehicles for some of the costs associated with moving the vehicles from the port of entry into Canada to the dealers. Specifically, it allowed the costs of loading, unloading and freight of the vehicles by rail. It also allowed the cost of trucking, including the loading onto, and unloading from, the trucks. What has not been allowed are the costs incurred for the services provided by Autoport up to the loading of the vehicles onto rail and the costs incurred for processing the vehicles through the drop-off yards, which includes sorting and driving the vehicles to the loading area. The appellant has accounted for these disallowed expenses under storage and handling. In addition, Revenue Canada did not allow the cost of loading vehicles onto ships for shipment to Newfoundland or Gaspé, Quebec. It is these disallowed costs that the appellant claims do not form part of the sale price of the vehicles or, alternatively, are excluded from the sale price of the vehicles pursuant to section 46 of the Act.

By virtue of paragraph 2(1)(*g*) and subsection 2(4.1) of the Act, the appellant is deemed to be the manufacturer or producer of the imported cars. Therefore, pursuant to subparagraph 50(1)(*a*)(i) of the Act, the appellant is liable for sales tax based on the sale price of the imported cars.

Counsel for the appellant argued that the vehicles are not sold at a price that includes the cost of transportation. Rather, ownership of the goods passes to the dealers at the port of entry. He argued that the definition of "sale price" in section 42 of the Act does not include transportation costs. Sale price must be considered in relation to the goods and not to such things as incidental services. In support of this proposition, counsel referred to section 46 of the Act that allows for the exclusion of transportation costs from the calculation of sale price of delivered goods. The effect of sections 42 and 46, he argued, is to exclude the cost of transportation from the calculation of sale price.

In the alternative, counsel argued that if the Tribunal finds that the goods have been sold at a price that includes the cost of transportation, then a deduction for the storage and handling expenses incurred in the movement of the vehicles from the Port of Halifax to the dealers should be allowed pursuant to section 46 of the Act. The relevant portions of section 46 state:

> *(c) in calculating the sale price of goods manufactured or produced in Canada, there may be excluded*
>
> *...*
>
> *(ii) under such circumstances as the Governor in Council may, by regulation, prescribe, an amount representing*
>
> *...*
>
> *(B) the cost of transportation of the goods incurred by the manufacturer or producer in transporting the goods between premises of the manufacturer or producer in Canada, or in delivering the goods from the premises of the manufacturer or*

> *producer in Canada to the purchaser, where the goods are sold at a price that includes those costs of transportation,*
>
> *determined in such manner as the Governor in Council may, by regulation, prescribe.*

Counsel referred to section 3 of the *Sales Tax Transportation Allowance Regulations*[2] (the Transportation Allowance Regulations), which state that exclusions under section 46 "shall be determined by reference to the invoices, statements, records or books of account of the manufacturer or producer ... and in accordance with generally accepted accounting principles." He argued that the abundance of invoices introduced at the hearing represent evidence of the amounts posted to the storage and handling accounts. Further, he emphasized the testimony of Mr. Michael F. Garvey, a chartered accountant and audit partner with Price Waterhouse, who indicated that the cost of transportation is a broad term that includes all of the charges that are necessary to move the vehicles from port to dealer. Specifically, it would include those expenses accounted for under storage and handling by the appellant.

Counsel noted that, pursuant to the Act, allowable transportation costs are those incurred "in transporting the goods between premises of the manufacturer or producer in Canada."[3] Counsel referred to Excise Memorandum ET 204, noting that Revenue Canada has interpreted this not to preclude a location where a manufacturer or producer has goods stored on its behalf for a charge, such as a public warehouse.

Counsel submitted that the storage and handling expenses the appellant is claiming were incurred by legitimate and well-recognized transportation companies. The accounts were established to accommodate the parent company's internal accounting purposes and German law. The way in which the appellant allocated these expenses to the two accounts should not bar them as eligible deductions.

Counsel for the respondent argued that the total amount billed to a dealer for a vehicle included the cost of transportation of that vehicle. Counsel argued that, pursuant to section 42 of the Act, the sale price on which sales tax is payable includes both the amount charged as price and any amount that the purchaser is liable to pay to the vendor by reason of, or in respect of, the sale in addition to the amount charged as price. Therefore, the amount charged for transportation must be included in the sale price of the vehicle for purposes of paying sales tax.

Counsel argued that the onus is on the appellant to establish that it met the necessary legislative conditions to benefit from the exemption it is claiming, and that it has failed to discharge that burden.

Counsel referred to the Transportation Allowance Regulations submitting that they impose three conditions that must be met before an exemption can be taken. First, a taxpayer must produce physical evidence or documentary evidence of the expenses incurred. He submitted that the invoices produced by the appellant do not relate to the expenses in dispute. Second, the expenses must be established in accordance with generally accepted accounting

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2. SOR/83-95, Canada Gazette Part II, Vol. 117, No. 3, p. 497.
3. Prior to amendment on February 11, 1988, by R.S.C., 1985, c. 12 (4th Supp.), s. 13, the Act allowed a deduction for "the cost of transportation of the goods incurred by the manufacturer or producer in delivering the goods from his premises to the purchaser."

principles. Finally, referring to subsection 4(1) of the Transportation Allowance Regulations, he argued that the goods must be transported by an independent carrier and "the amount excluded in respect of the cost of that transportation shall be supported by ... transportation receipts that identify the goods transported." Counsel submitted that the receipts presented in evidence do not identify the goods transported.

Referring to the Act, counsel argued that the goods were not transported between premises of the manufacturer in Canada. Rather, the appellant transports the vehicles between the premises of third parties such as Autoport and several transportation companies. There are no premises owned, operated or leased by Volkswagen in Canada.

Pre-hearing Challenge to the Appellant's Right to Appeal

To appreciate the arguments, a brief history of the proceedings is necessary. The notice of assessment was dated September 27, 1988, covering the period of September 28, 1984, to May 31, 1988. The appellant did not file an objection to the assessment within the statutorily prescribed 90 days and, on March 14, 1989, it requested an extension of time, pursuant to section 81.32 of the Act, to file its objection. The Tribunal granted the extension on April 28, 1989, giving the appellant until June 5, 1989, to serve its objection. The objection was served on the Minister of National Revenue (the Minister) on June 2, 1989, and date-stamped June 6, 1989. However, by letter dated January 31, 1991, Jonathan D. Spencer of Price Waterhouse informed Revenue Canada that the appellant desired to withdraw its notice of objection. By notice of decision dated February 13, 1991, the appellant's objection was disallowed and the assessment confirmed. The decision informed the appellant that it may appeal the assessment to the Tribunal within 90 days.

On October 7, 1991, the appellant sought an extension of time from the Tribunal to appeal the assessment to the Tribunal. On October 17, 1991, the Secretary of the Tribunal acknowledged receipt of the request for the extension and sent a copy to Mrs. R. Hubbard, Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister), requesting representations on the matter. By letter date-stamped November 26, 1991, Revenue Canada informed the Tribunal that the Deputy Minister did not desire to make any representations on the application. The extension of time was granted on December 5, 1991, giving the appellant until January 29, 1992, to appeal the assessment. By letter dated December 11, 1991, the appellant appealed the assessment to the Tribunal.

The substance of the arguments of counsel for the respondent was twofold. First, the extension of time given by the Tribunal allowing Volkswagen to appeal the assessment was improperly obtained. Volkswagen received an extension of the same delay more than one year after the statutory time limit had expired. Also, the appellant did not inform the Tribunal that it had received an earlier extension of time to serve its notice of objection to the assessment. Second, counsel argued that, when the appellant withdrew its notice of objection to the assessment, it in effect completely abandoned its objection.

With regard to the first argument, the Tribunal notes that under section 81.32 of the Act, a taxpayer may apply to the Tribunal for an extension of time for either serving on the Minister a notice of objection to an assessment or appealing the assessment to the Tribunal. Pursuant to subsection 81.32(6), the request for an extension of time must be made within one year after the expiration of the time allowed to serve the notice of objection or appeal to the Tribunal. Therefore, the appellant could have requested an extension of time to serve its notice of objection within one year and 90 days from the date of the assessment. Similarly, the appellant

could have requested an extension of time to appeal the assessment to the Tribunal within one year and 90 days from the date of the notice of decision.

Pursuant to subsection 81.32(7) of the Act, the Tribunal may make an order extending the 90-day time limit if, among other things, it has not previously made an order extending that time. The Tribunal interprets this to mean that a taxpayer may be given only a single extension of time to serve its notice of objection and a single extension of time to appeal the assessment to the Tribunal. The Tribunal further interprets this provision to mean that a taxpayer may be given an extension of time to serve its notice of objection and a second extension to appeal to the Tribunal.

Counsel for the respondent argued that the appellant requested the second extension of time outside the one-year-and-90-day time limit prescribed by the Act. However, the Tribunal notes that the decision of the Minister is dated February 13, 1991. Therefore, to be eligible for an extension of time to appeal the decision, Volkswagen must have applied to the Tribunal by May 13, 1992. Volkswagen applied on October 7, 1991, well within the prescribed time.

With regard to the second argument, the Tribunal notes that, pursuant to subsection 81.15(4) of the Act, on receipt of a notice of objection the Minister shall reconsider the assessment and vacate, vary or confirm the assessment or make a reassessment. The Tribunal notes that there is no mechanism in the Act allowing the Minister to deal with withdrawals of objections. It would appear therefore that, strictly speaking, a taxpayer cannot withdraw an objection once it has been served on the Minister.[4]

The Tribunal notes that, in recognition of this, the Minister issued a notice of decision on February 13, 1991. In that decision, the Minister stated that he considered the information and reasons set forth in Volkswagen's notice of objection, but disallowed that objection. However, the Minister also acknowledged the appellant's withdrawal.

In response to the argument by counsel for the respondent that the attempted withdrawal of the objection "retroactively annul[led]" the notice of objection, the Tribunal feels that, if this were so, the Minister would not have gone to the trouble of issuing a notice of decision. Of greater significance to the Tribunal, and fatal to counsel's arguments, the Tribunal notes that the notice of decision informed the appellant that it could appeal the assessment to the Tribunal within 90 days from the date of the decision.

The Tribunal concluded, therefore, that the appellant had not lost its right to appeal. Also, as Volkswagen did serve a notice of objection under section 81.15 of the Act, the Tribunal had the jurisdiction to proceed to the merits of the appeal.

Consideration of the Storage and Handling Expenses

The Tribunal is in agreement with counsel for the respondent that the storage and handling expenses in issue do form part of the sale price of the vehicles on which tax is payable. More generally, as stated in earlier decisions of the Tribunal,[5] sale price is to include

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4. See, e.g., *Charles R. McCambridge v. The Queen in right of Canada*, [1980] 2 F.C. 142, at 145.
5. *Dure Foods v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-158, November 21, 1991; and *Sunset Lamp Manufacturing Company Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-032, December 12, 1991.

"any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price."[6] The issue then became whether these expenses may be excluded from the sale price of the vehicles pursuant to clause 46(*c*)(ii)(B) of the Act.

Pursuant to this clause, it is only the cost of transporting goods "between premises of the manufacturer or producer in Canada, or in delivering the goods from the premises of the manufacturer or producer in Canada to the purchaser"[7] that may be excluded from sale price. The Tribunal notes that this provision was amended, without effect to this appeal, during the assessment period.[8] Counsel for the respondent argued that the premises must be owned, operated or leased by the appellant.

While acknowledging that excise memorandums are not binding on the Tribunal, it has made reference to them in the past as an aid to interpreting the Act in the event of doubt as to the meaning of the legislation. For this purpose, the Tribunal made reference to Excise Memorandum ET 204, which sets out Revenue Canada's policy regarding the exclusions of the cost of transportation in the calculation of sale price. It defines "his premises," which is from the earlier drafting of clause 46(*c*)(ii)(B), noting that it "does not preclude a location where a manufacturer or producer has goods stored on his or her behalf for a charge." In other words, a manufacturer or producer need not own, operate or lease the premises for it to take advantage of the exclusions in the calculation of sale price. The respondent has acknowledged that the vehicles are transported between premises of the appellant by allowing certain of the transportation expenses billed from CN, Autoport and the trucking companies. The Tribunal agrees with this interpretation.

The circumstances under which the costs of transportation may be excluded from the sale price of goods are prescribed in the Transportation Allowance Regulations. Counsel for the respondent referred to section 3 which states that exclusions under section 46 of the Act shall be determined by reference to invoices, etc. For purposes of this appeal, subsection 4(1) states that where goods are transported by an independent carrier, the amount that may be excluded in respect of the cost of that transportation shall be supported by transportation receipts that identify the goods transported. It would appear that the total of such expenses may be excluded from the calculation of sale price.

At the hearing, counsel for the appellant provided the Tribunal with an abundance of invoices addressed to Volkswagen by CN. Also provided were waybills that identified such things as the vehicles being transported by CN. An example of an invoice from an independent trucking company, Canadian Auto Carriers Ltd., being Exhibit A-6, was also provided, which identified the vehicles being handled. A great deal of time was spent at the hearing reviewing the numerous invoices, statements, etc., that counsel furnished, and the Tribunal accepts that, given reasonable constraints of time, it was impossible to review every relevant invoice covering the four-year assessment period, though such was not provided. Acknowledging this, and in view of the above, the Tribunal believes that all the costs incurred by the appellant in moving a vehicle via rail or truck may be excluded from the calculation of the sale price of that vehicle. This would include the charges invoiced by these carriers and considered as storage and handling charges by Volkswagen because of its internal and corporate reporting requirements.

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6. See "sale price" at subparagraph 42(*a*)(ii) of the Act.
7. Clause 46(*c*)(ii)(B) of the Act.
8. *Supra*, footnote 3.

With regard to the expenses invoiced by Autoport to the appellant, as enumerated in Exhibit B-1, being a Memorandum of Agreement between the parties, it is the view of the Tribunal that, based on the above analysis, certain of these expenses are eligible exclusions in the calculation of sale price. Again, counsel for the appellant provided numerous examples of invoices received by the appellant from Autoport, and it was not argued on behalf of the respondent that Autoport failed to qualify as an independent carrier. In addition to the charges presently being accepted by Revenue Canada as exclusions from sale price as costs of transportation, the Tribunal believes that all charges from Autoport to the appellant directly related to transportation, after Autoport assumes responsibility for the goods at its surge area, should be allowed. Specifically, as enumerated in paragraph 3(a) of the Memorandum of Agreement, these include the costs associated with: placement in storage; communications; release to highway carrier and dealer pick-up, and outside storage of up to 9,000 vehicles at all times. As enumerated in paragraph 3(d), it includes the costs associated with loading vessels for shipment to Newfoundland and Gaspé, Quebec.

The Tribunal believes that its decision is consistent with the evidence which supports that according to generally accepted accounting principles, the cost of transportation would include all charges that are necessary to move the imported vehicles from the port of entry to the various dealers. Accordingly, the appeal is allowed in part.

Arthur B. Trudeau
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Presiding Member

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