CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 19, 1993

Appeal No. AP-92-056

IN THE MATTER OF an appeal heard on January 22, 1993, 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 dated April 15, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

ARC INDUSTRIES - COMMUNITY LIVING - SOUTH HURON **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-056

ARC INDUSTRIES - COMMUNITY LIVING - SOUTH HURON **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the appellant, a certified institution under subsection 68.24(1) of the Excise Tax Act, is entitled to a refund in respect of sales tax paid pursuant to a lease agreement for a passenger van.

HELD: *The appeal is dismissed.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*January 22, 1993*
Date of Decision:	*March 19, 1993*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Michèle Blouin, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Clifford Sosnow*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Ralph Underwood, for the appellant* *Wayne D. Garnons-Williams, for the respondent*

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Appeal No. AP-92-056

ARC INDUSTRIES - COMMUNITY LIVING - SOUTH HURON **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
MICHÈLE BLOUIN, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal pursuant to section 81.19 of the *Excise Tax Act*[1] (the Act) of a decision of the Minister of National Revenue (the Minister) dated April 15, 1992. The appeal proceeded on the basis of written submissions pursuant to rule 25 of the *Canadian International Trade Tribunal Rules*.[2] In this regard, the parties submitted an agreed statement of facts, from which the facts set out herein are taken.

The facts are straightforward. Arc Industries - Community Living - South Huron (Arc Industries) is a certified institution, holding certificate No. W2451 issued by the Department of National Health and Welfare effective April 1, 1977. On November 19, 1990, the appellant entered into a 48-month "lease agreement with option to purchase" contract with Frayne Chevrolet Oldsmobile Limited (Frayne) as the lessor. The agreement was for the lease of a 1990 GMC van.

Several clauses of the lease, which are relevant to this appeal, follow.

> *Lessor intends to assign this Lease Agreement (including the payments due under it) to General Motors Acceptance Corporation of Canada, Limited ("GMAC").*
>
> ...
>
> *Notwithstanding the assignment of this Lease to GMAC, the original Lessor (the dealer) remains the owner of the vehicle described herein and a party to this Lease for the purposes of any provision of this Lease pertaining to the ownership, use, maintenance, preservation, operation and possible purchase of the vehicle.*
>
> ...

1. R.S.C. 1985, c. E-15.
2. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.

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6. OPTION TO PURCHASE

> *If you [the lessee] are not in default ... you will have the option to purchase the vehicle at the scheduled termination of this Lease ... At any other time during the Lease term if you are not then in default you also have the option to purchase the vehicle.*

To date, the appellant has not exercised its "option to purchase" the van in question pursuant to the terms of the lease agreement.

On September 9, 1991, the appellant filed an application for refund of sales tax pursuant to subsection 68.24(6) of the Act, respecting tax imposed on the passenger van under subsection 50(1) of the Act. The application was disallowed because the respondent's officials and thence the respondent did not consider the appellant to have purchased the van in question within the meaning of subsection 68.24(6) of the Act.

Thus, the issue before the Tribunal is whether the appellant has purchased the van in question and is thereby entitled to a refund of sales tax pursuant to subsection 68.24(6) of the Act.

Subsection 68.24(6) of the Act reads as follows:

> *Where tax under Part VI has been paid in respect of any goods and a certified institution or previously certified institution has purchased the goods on or after the specified day for the sole use of the institution and not for resale and met the conditions referred to in subsection (2) at the time of the purchase, an amount equal to the amount of that tax shall, subject to this Part, be paid to that institution if it applies therefor within two years after it purchased the goods.*

In its brief, the appellant argued that the term "purchased," contained in subsection 68.24(6) of the Act, should encompass the current situation. The appellant stated that, in the past, the Department of National Revenue (Revenue Canada) allowed a refund in respect of monies paid pursuant to a lease agreement where such agreement was for a term greater than 12 months, irrespective of whether or not a "buy-out" option existed and was acted upon. Although the appellant acknowledged that Revenue Canada had stopped this practice, the appellant argued that the test of entitlement to a refund should be defined by the party that uses and consumes the goods in question, not by the party that remains the owner of the goods or the holder of a chattel mortgage respecting those goods. The appellant argued that it should be entitled to the refund because it is using the van.

In the respondent's brief, it was argued that the lease agreement makes it clear that the appellant never purchased the van in question and, thus, that the vehicle fails to qualify for a refund.

After having examined the file, the applicable documents and the relevant jurisprudence, the Tribunal concludes that the appeal must be dismissed. Regardless of previous Revenue Canada administrative practices, the Tribunal is bound by the wording of the legislation and, in particular, the terms of subsection 68.24(6) which, ultimately, is the "law" that governs the outcome of this appeal.

According to subsection 68.24(6) of the Act, a refund of sales tax is payable provided the conditions set out therein are met. Of particular relevance to this appeal is the phrase "[w]here tax under Part VI has been paid in respect of any goods and a certified institution or previously certified institution has purchased the goods" (emphasis added). As this wording makes clear, the payment of tax is a necessary but not sufficient condition to the receipt of a refund. The use of the conjunctive "and" establishes that the goods must also have been purchased. Thus, the wording of subsection 68.24(6) of the Act does not accord with the appellant's argument that the governing refund criterion should be whether the claimant uses and consumes the goods in question.

As the lease agreement between the appellant and Frayne makes clear, Frayne remains the owner of the vehicle until the appellant exercises its option to purchase the van either at the end of the lease agreement or at an earlier point in time. The appellant has not yet exercised this option. Consequently, notwithstanding the fact that the appellant has paid tax in respect of a portion of the term of the lease agreement, the appellant cannot yet claim a refund of sales tax. The Tribunal uses the word "yet" because it considers that the appellant's application for a refund is premature.

In the case of *Ngoc-Trieu Photolab 1-Hour v. The Minister of National Revenue*,[3] a decision dealing with the interpretation of subsection 68.28(2) of the Act, the Tribunal noted that the two-year refund clock commences with the purchase of the product in question. Similarly, the phrase "if it applies therefor within two years after it purchased the goods" contained in subsection 68.24(6) of the Act makes it equally clear that, provided the other conditions in that subsection are satisfied, the appellant would be entitled to a refund if claimed within two years after purchasing the van in question. Accordingly, nothing in this decision affects the rights of the appellant, subsequent to the purchase of the van, to file a new application for the refund of the sales tax paid in respect of this van.

Accordingly, the appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Desmond Hallissey
Desmond Hallissey
Member

3. Canadian International Trade Tribunal, Appeal No. AP-92-047, January 14, 1993.