CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, May 5, 1993

Appeal No. AP-92-057

IN THE MATTER OF an appeal heard on December 7, 1992, 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 March 30, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

RUTHERFORD AUTO SALES LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
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

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-057

RUTHERFORD AUTO SALES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant, a car dealership located on Vancouver Island, is in the business of selling cars. The issue in this appeal is whether the cars used by the appellant as test-drive cars on January 1, 1991, satisfy the conditions set out in subsections 120(1) and 120(3) of the Excise Tax Act and, therefore, qualify for the federal sales tax inventory rebate. In particular, the Tribunal must determine whether they are "new goods that are unused" within the meaning of these provisions.

***HELD:** The appeal is allowed. The Tribunal finds that all of the conditions required for the federal sales tax inventory rebate have been satisfied. In particular, the Tribunal finds that the cars in issue are "new" cars that are unused.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*December 7, 1992*
Date of Decision:	*May 5, 1993*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Robert C. Coates, Q.C., Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Gordon E. Heys, for the appellant* *Linda J. Wall, for the respondent*

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. AP-92-057

RUTHERFORD AUTO SALES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
ROBERT C. COATES, Q.C., Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act). The appellant, a car dealership located on Vancouver Island, is in the business of selling cars. The appellant was not a licensed manufacturer for federal sales tax (FST) purposes, but has been a Goods and Services Tax (GST) registrant since January 1, 1991.

On January 24, 1991, the appellant applied for a federal sales tax inventory rebate (the Rebate) in the amount of $54,160.68 in respect of its tax-paid inventory held as of January 1, 1991. On May 3, 1991, the respondent issued a notice of determination which disallowed, in part, the appellant's application. The amount disallowed, totalling $6,618.26, related to five cars which the appellant used as test-drive cars for 4 to 16 months. The notice indicated that the respondent did not consider these cars as "new goods that are unused." On June 12, 1991, the appellant objected to the determination. By notice of decision dated March 30, 1992, the respondent confirmed the determination.

The issue in this appeal is whether the cars used by the appellant on January 1, 1991, as test-drive cars satisfy the conditions set out in subsections 120(1) and 120(3) of the Act[2] and, thus, qualify for the Rebate. In particular, the Tribunal must determine whether they are "new goods that are unused" within the meaning of these provisions.

The appellant was represented by its president, Mr. Gordon E. Heys. Mr. Heys began his testimony by explaining how the appellant made use of the cars in issue in its operation. He indicated that, unlike many other dealerships, he does not provide salespeople with company-owned cars to take prospective buyers for test drives. Rather, his salespeople use cars from the company's new car inventory for this purpose. In this way, Mr. Heys stated, mileage is not put on all of his new cars, and they are sold as new. He also indicated that, at the time in question, he was using five new cars, one of each model, for test drives. He noted that his salespeople drive their own cars and are given a car allowance by the appellant.

1. R.S.C. 1985, c. E-15.
2. S.C. 1990, c. 45, s. 12.

Mr. Heys then explained what he understood a "new" car to be. He stated that every new car comes from the manufacturer with a "New Vehicle Information Statement" (NIVIS). When a car is sold, this form is completed by the dealer and is reported to the factory. It is at this point that the manufacturer starts the new car warranty. The NIVIS is also used by the provincial motor vehicle licensing bureau to register the vehicle in the name of the new owner. Mr. Heys emphasized that the cars in issue had not been registered prior to their sale to one of his customers and that they were sold as new cars, as evidenced by the relevant NIVIS completed in the name of the buyer.

With respect to the introduction of the GST, Mr. Heys testified that, at January 1, 1991, the appellant had listed all its "new" cars as inventory and that all of these cars were "unused" in that they were not registered. He also noted that the appellant had not capitalized the cars, which would have disqualified them for the Rebate, nor had it taken any capital cost allowance in respect of these cars.

Finally, with regard to the matter of the mileage on the cars in issue, Mr. Heys noted that the mileage set out in the respondent's materials was based on an audit taken on April 15, 1991, and thus did not reflect the actual mileage on the cars on January 1, 1991.

During cross-examination, Mr. Heys stated that all cars are sold with a discount of some sort, in that a final price is the result of negotiation between the parties. He also confirmed that he had no record of the mileage on the cars as at January 1, 1991, and that the cars in issue had been in inventory for 4 to 16 months. In response to questions from the Tribunal, Mr. Heys stated that he did not know if the five cars being used for test drives on January 1, 1991, were the same cars that were later audited. Mr. Heys confirmed that, by using a new car that was not registered, the appellant was not covered under warranty and that the mileage warranty on a car used for test drives was not extended to compensate for the existing mileage on them when they were sold. He also explained that he understood a "used car sale" to mean the sale of a car which had been registered prior to the sale in question and for which a NIVIS was not exchanged because it was only exchanged in the initial sale to the first owner.

In argument, the appellant's representative stated that the cars in issue were bought as new cars in transactions in which title for the particular car was transferred for the first time. In reply, he stated that the tax paid on these cars was not recoverable under paragraph 120(3)(*b*) of the Act because that paragraph refers to "used goods" and the cars in issue were "new" cars. In addition, the appellant's representative argued that the cars in issue complied with GST Memorandum 900,[3] which sets out, in part, which goods qualify for the Rebate according to the Department of National Revenue. Finally, he added that the Act does not designate at how many miles or kilometres a new vehicle becomes a used vehicle.

Counsel for the respondent began her argument by indicating that it appeared that the appellant had complied with all of the elements of the exemption that it was claiming except for the requirement that the goods be "unused." Counsel submitted that the appellant had failed to prove that the cars were unused. In support of this submission, counsel pointed to the amount of mileage accumulated on each of the cars in issue and the amount of time each car had been in use. With respect to mileage, counsel submitted that the Tribunal should consider the evidence of mileage found in the respondent's audit as the best evidence of mileage.

---

3. Federal Sales Tax Inventory Rebates, Department of National Revenue, Customs and Excise, March 25, 1991.

Counsel noted that the appellant had not introduced any records or other evidence that the cars in issue had a particular mileage as at January 1, 1991. With respect to the question of time of use, counsel referred to the appellant's admission that these cars were used for 4 to 16 months. Counsel concluded that, in light of this evidence, on no construction of the term "unused" could the vehicles be found to be unused.

Counsel for the respondent also submitted that the Tribunal could not insulate the cars in issue from inquiry based on what a dealer, manufacturer or customer called them. Counsel suggested that, even though the appellant's witness would not admit it, the fact that the manufacturer would not take back vehicles with more than 100 kilometres mileage was an indication that the manufacturer no longer considered the vehicles as new. Finally, counsel brought to the attention of the Tribunal the possibility that the appellant qualified for the input tax credit available for used goods under paragraph 120(3)(*b*) of the Act to show that the Act has not entirely abandoned used goods.

In order for the cars in issue to qualify for the Rebate, they must meet all of the following requirements provided for in subsections 120(1) and 120(3) of the Act:

(a) they must not have been previously written off in the accounting records of the appellant's business for purposes of the *Income Tax Act*;

(b) they must be new goods that are unused;

(c) they must have had federal sales tax paid on them that is not otherwise recoverable;

(d) they must be described in the appellant's inventory as of January 1, 1991;

(e) they must be held for taxable supply (within the meaning of subsection 123(1) of the Act) by way of sale, lease or rental to others in the ordinary course of business; and

(f) they must not be capital property of the appellant.

The Tribunal is of the opinion that the appellant has shown that each of these conditions has been met. The appellant gave uncontroverted evidence that would satisfy requirements (a), (d), (e) and (f), and this evidence is accepted by the Tribunal. With respect to condition (c), counsel for the respondent raised the possibility that the appellant might qualify for an input tax credit under paragraph 120(3)(*b*) of the Act, though she noted that she could not comment on whether the cars in issue qualified for this provision. In reply, Mr. Heys argued that the appellant's cars would not qualify for this credit, as the cars were not acquired by the appellant as "used" goods but rather as new cars. The Tribunal makes reference to the distinction between "used goods" and "new goods that are unused" in subsection 120(1) of the Act. Based on the Tribunal's finding that the cars in issue are not "used goods," but rather "new goods that are unused," then it is not convinced that the FST paid on these cars is otherwise recoverable.

This brings the Tribunal to the final condition, that the cars must be "new goods that are unused." As noted above, this is the only requirement with which counsel for the respondent took serious issue. The Tribunal is of the view that the cars are clearly "new goods" in that they

were sold with their NIVIS, which indicates that title to each car has not previously been transferred prior to relevant sale and subsequent registration of the form. With respect to the question as to whether the cars are new goods "that are unused," the Tribunal notes that this phrase must mean something different from the phrase "used goods" which appears under a separate subparagraph in the relevant definition in subsection 120(1) of the Act. The Tribunal is of the view that the words "that are unused" condition the words "new goods" in the sense of requiring that the cars in issue must be "unused" as new cars. Since they were sold as new cars by the appellant, then they were unused as new cars at the relevant time, and, thus, the condition is satisfied.

Accordingly, the appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Desmond Hallissey
Desmond Hallissey
Member