

Ottawa, Tuesday, February 9, 1993

Appeal No. AP-92-044

IN THE MATTER OF an appeal heard on October 21, 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 13, 1992, with respect to a
notice of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

INTEG SERVICES LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-044

INTEG SERVICES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether the appellant is entitled, under section 68.2 of the Excise Tax Act, to a refund of the federal sales tax that it paid in respect of paper and cleaning supplies which were allegedly sold to an exempt purchaser, namely, Bonnyville Health Centre, a certified public hospital. More specifically, the issue is whether the supplies were sold to Bonnyville Health Centre and, in the event that the goods were sold to it, whether the supplies were purchased for its sole use and to be used exclusively by it, and thereby sold to an exempt purchaser.

HELD: *The appeal is dismissed. The appellant used the supplies to carry out its management service agreement with Bonnyville Health Centre, and, as a result, it cannot be said that the appellant sold the supplies to an exempt purchaser. Accordingly, the appellant is not entitled to a refund under section 68.2 of the Excise Tax Act.*

Place of Hearing: Edmonton, Alberta

Date of Hearing: October 21, 1992

Date of Decision: February 9, 1993

*Tribunal Members: Sidney A. Fraleigh, Presiding Member
Arthur B. Trudeau, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Dyna Côté

*Appearances: Don Jerchel, for the appellant
Linda Wall, for the respondent*

Appeal No. AP-92-044

INTEG SERVICES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) from a notice of decision dated March 13, 1992, in which the Minister of National Revenue (the Minister) confirmed the determination dated March 25, 1991, and disallowed the appellant's refund claim.

The issue is whether the appellant is entitled, under section 68.2 of the Act, to a refund of the federal sales tax that it paid in respect of paper and cleaning supplies (the supplies) which were allegedly sold to an exempt purchaser, namely, Bonnyville Health Centre (Bonnyville), a certified public hospital. More specifically, the issue is whether the supplies were sold to Bonnyville and, in the event that the supplies were sold to Bonnyville, whether they were purchased for its sole use and to be used exclusively by Bonnyville, and thereby sold to an exempt purchaser.

The appellant relies on subsection 51(1) of the Act that excludes from the imposition of federal sales tax the sale or importation of goods listed in Schedule III to the Act. Section 2 of Part VIII of Schedule III to the Act excludes the following:

Articles and materials for the sole use of any bona fide public hospital certified to be such by the Department of National Health and Welfare, when purchased in good faith for use exclusively by that hospital and not for resale.

The appellant maintains that it sold the supplies to Bonnyville, which is a certified hospital and thus falls within the provisions of this exemption. As it paid federal sales tax when it purchased the supplies, it should now be entitled to a refund of such monies paid, as provided for under section 68.2 of the Act, which reads as follows:

Where tax under Part III or VI has been paid in respect of any goods and subsequently the goods are sold to a purchaser in circumstances that, by virtue of the nature of that purchaser or the use to which the goods are to be put or by virtue of both such nature and use, would have rendered the sale to that purchaser exempt or relieved from that tax under ... subsection ... 51(1) ..., an amount equal to the amount of that tax shall, subject to this Part, be paid to the person who sold the goods to that purchaser.

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

Mr. Don Jerchel of Intenberg, Anderson & Associates Ltd. appeared as a representative of the appellant and testified on its behalf. He described Integ Services Ltd. (Integ) as a professional management and consultant firm that provided managerial expertise with respect to Bonnyville's food services program. He stated that the basis of the agreement between Integ and Bonnyville (the agreement) originated in 1981 in a proposal prepared for, and accepted by, St. Louis Hospital. In 1986, St. Louis Hospital and Duclos Hospital were amalgamated to form Bonnyville and the agreement was continued. Mr. Jerchel further described the relationship between the appellant and Bonnyville as one in which Bonnyville "engaged the services of Integ Services Ltd. to operate, maintain and administer the operations budget with respect to [its] food services." With respect to supplies, he stated that "[p]ursuant to the engagement, Integ Services Ltd. purchased cleaning and paper supplies which were ordered through the hospital [Bonnyville], and [its] inventory is kept within the hospital."

Under cross-examination by counsel for the respondent, Mr. Jerchel agreed that the essence of the agreement was the provision of management services.

Mr. Jerchel also outlined the responsibilities of the manager of the food services program who was employed by Integ. The manager was responsible for hiring, scheduling, supervising and managing the Bonnyville personnel working in food services, with the final approval decisions resting with the administration of Bonnyville. In carrying out these responsibilities, the manager would order supplies to be used by the hospital personnel in carrying out its duties. Once ordered, the supplies would subsequently be delivered to Bonnyville's premises and held there in inventory by Integ. The suppliers would bill Integ in care of Bonnyville, following which the manager would tabulate the invoices and send them to Integ's head office where they would be used to prepare a monthly operating statement detailing costs for food, labour, supplies and administration for that particular accounting period. From that statement, Integ would invoice Bonnyville. Mr. Jerchel introduced, as Exhibit A-1, a sample invoice dated April 30, 1989, from Integ to Mr. Simon Dallaire, the administrator of Bonnyville. The following is an extract of the relevant portions of that invoice:

Management Services:

<i>Food Cost</i>	\$	<i>9,731.39</i>
<i>Operating Expenses</i>		<i>1,112.68</i>
<i>Management Salaries</i>		<i>5,032.59</i>
<i>Other Expenses</i>		<i>90.66</i>
<i>INTEG Income</i>		<i>661.84</i>
<i>Administration Expenses</i>		<i>1,654.61</i>

TOTAL DUE \$ *18,283.77*

Mr. Jerchel submitted that this invoice constitutes evidence of the sale of the supplies to Bonnyville.

The substance of the appellant's contention was that the nature of the agreement is not determinative of whether there is a sale of the supplies. Mr. Jerchel argued that Integ purchased the goods, not for use in the execution of the agreement, but for resale to Bonnyville for use by the employees of Bonnyville in execution of their duties.

Mr. Jerchel commented that Bonnyville would have been entitled to the exemption from payment of federal sales tax if Bonnyville had purchased the supplies directly and that it should not be denied the exemption simply because it engaged the services of a management company.

Counsel for the respondent argued essentially that there was no substratum of agreement or consensus *ad idem* between the appellant and Bonnyville with respect to the sale of the supplies as goods or chattel and, hence, no purchase of the supplies by Bonnyville, as the appellant contends. The point was pressed that there was no evidence of any contract between the appellant and Bonnyville with respect to the passing of title in the supplies. The alternative submission was made that, even if it should be found that the title in the supplies passed from the appellant to Bonnyville, the passing of title was merely ancillary or incidental to the provision of management services under the agreement.

Counsel for the respondent referred to the meaning of a contract of sale as set out in the *Alberta Sale of Goods Act*.² Subsection 3(1) provides that "[a] contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price." Counsel further referred to the test for determining whether a contract is for the sale of goods as applied by the Saskatchewan Court of Appeal in *The Preload Company of Canada Ltd. v. City of Regina*.³ The Court stated that:

Whether a contract is one for the sale of goods, or is one for work and wages depends upon the essential character of the agreement.

It was argued that the weight of evidence lead irresistibly to the conclusion that the relationship between the appellant and Bonnyville connoted a contract for services in which the key feature from Bonnyville's standpoint was the provision of management services, involving necessarily the provision of supplies.

Counsel for the respondent referred to the fact that the agreement, at pages 22 and 23, provided that upon takeover, an inventory of the supplies would be taken and that Integ would purchase the inventory from Bonnyville. From that day forward, Integ would control the purchasing and inventory of the supplies and it did in fact, as was confirmed by Mr. Jerchel. Counsel also referred to the fact that supplies were listed under the heading "Operating Expenses" in Exhibit A-1 and at page 29 of the agreement which, she argued, demonstrated that Integ regarded the supplies as incidental to the services that it had contracted to perform. Finally, counsel referred to page 28 of the agreement headed "Financial Arrangements" that provided for payment of a 6-percent administration fee and a 2.5-percent management fee to be levied on all food, labour and other supplies. All of the above facts, counsel argued, demonstrated that the essential character of the agreement was the provision of services and not the sale of goods.

Counsel argued that the supplies were used to carry out the contract for services, and they were not sold to the appellant since there was no evidence of any intention to sell or of an actual sale of the supplies. Accordingly, counsel submitted that the appellant should not be entitled to a refund under section 68.2 of the Act.

2. R.S.A. 1980, c. S-2.

3. (1958) 13 D.L.R. (2nd ed.) 305 (Sask. C.A.) at 313-314; affirmed [1959] S.C.R. 801.

Both the appellant and the respondent are in agreement with respect to the characterization of the agreement as a management services agreement; however, there is disagreement with respect to the treatment of the supplies in relation to this agreement.

In the Tribunal's view, the issue in this appeal does not turn on the common law distinction between a contract for sale and a contract for services, but rather on the meaning to be given to the words "sold to a purchaser" in section 68.2 of the Act. In other words, the question is whether it is reasonable to conclude that, by the word "sold," Parliament contemplated the type of transaction being considered in this appeal.

Since the Act does not give a special definition of the word "sold," it must be interpreted according to its common and ordinary meaning. In determining the ordinary meaning of a word, the use of dictionaries is permissible and helpful. In the Oxford English Dictionary,⁴ the word "sold" is defined under the word "sell" as follows:

a. To give up or hand over (something) to another person for money ... to dispose of (merchandise, possessions, etc.) to a buyer for a price.

In the Webster's New Twentieth Century Dictionary,⁵ the word "sell" is similarly defined as follows:

1. to give up, deliver, or exchange (goods, services, etc.) for money or its equivalent; to part with for a price.

The above definitions demonstrate that "sold" has the common and ordinary meaning of giving up something in exchange for consideration.

In the context of this appeal, the Tribunal must determine if the agreement or the relationship between Integ and Bonnyville demonstrates that Integ intended to give or did give the supplies to Bonnyville in exchange for consideration.

Upon reviewing the agreement, the Tribunal notes that supplies are discussed, but only in relation to Integ's management of Bonnyville's food services program. Firstly, under the heading "Financial Arrangements" at page 28 of the specific proposal part of the agreement, it is stated that Bonnyville will be charged a 6-percent administration fee and a 2.5-percent management fee which will be based on "all food, labour and other supplies as related to the Dietary Department" (Emphasis added). Secondly, the projection of the total dietary operating costs at page 29 of the agreement includes food, labour and direct operating expenses, which list, among other things, cleaning supplies and paper goods, and, finally, a management fee. Lastly, at page 22 of the part of the agreement entitled "Purchasing and Inventory Control," it is stated that:

Upon take-over an inventory of all food, paper and cleaning supplies will be taken. The value of this inventory will be credited to St. Louis Hospital on six period payments at the end of which the inventory will be Integ's total responsibility.

4. Volume 14, 2nd ed., Oxford: Clarendon Press, 1989, p. 935.

5. Unabridged, 2nd ed., New York: Simon and Schuster, 1979, p. 1648.

Mr. Jerchel elaborated on the meaning of this clause. He stated that, at the time Integ began to provide management services to St. Louis Hospital pursuant to the agreement, it purchased all inventories held by St. Louis Hospital, thereby assuming control of the inventory, and that Integ continued to retain control of all inventory.

The invoice, introduced by the appellant to support its contention that there is a sale of goods, is no more than an invoice for the provision of management services, a component of which is the amount spent by Integ for operating expenses, which includes supplies.

The Tribunal finds that the agreement, invoice and relationship between Integ and Bonnyville are consistent with the view that Integ did not intend to give and, in fact, did not give the supplies to Bonnyville in exchange for consideration. Integ used the supplies to carry out its obligation under the agreement, which use cannot be characterized as a sale to Bonnyville. Accordingly, there was no sale of the supplies.

Given that the Tribunal finds that there was no sale of the supplies to Bonnyville, it is not necessary to decide whether the supplies were purchased for its sole use and to be used exclusively by Bonnyville.

The Tribunal finds that the appellant is not entitled to a refund under section 68.2 of the Act, and this appeal is dismissed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member