



Ottawa, Tuesday, September 21, 1993

Appeal No. AP-92-104

IN THE MATTER OF an appeal heard on April 5, 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 June 5, 1992, with respect to a
notice of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

NORTHERN AIRCOOL ENGINES CO.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Michèle Blouin

Michèle Blouin
Member

Lise Bergeron

Lise Bergeron
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-104

NORTHERN AIRCOOL ENGINES CO.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

As part of its business, the appellant sells parts over the counter for 16-wheel, all-terrain surface vehicles known as "bush swampers." A witness for the appellant testified that approximately 5 percent of its parts are sold while servicing customers' bush swampers. The appellant applied for a federal sales tax inventory rebate in respect of the bush-swamper parts. The application was disallowed by the respondent on the basis that the parts were used in the provision of repair service and, as such, were not held in inventory, available for taxable supply by way of sale. The appellant appealed the determination to the Tribunal.

HELD: *The appeal is allowed. On January 1, 1991, the appellant held the bush-swamper parts in inventory for purposes of sale, be they ultimately sold as is or as part of a contract in which services were also provided. Accordingly, the goods qualify for the rebate.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: April 5, 1993
Date of Decision: September 21, 1993*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
Michèle Blouin, Member
Lise Bergeron, Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Janet Rumball

*Appearances: Yvon and Margaret Genereux, for the appellant
Michelle Mann, for the respondent*

Appeal No. AP-92-104

NORTHERN AIRCOOL ENGINES CO.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
MICHÈLE BLOUIN, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of a determination of the Minister of National Revenue (the Minister) disallowing, in part, an application for a federal sales tax (FST) inventory rebate made under section 120² of the Act.

Both Yvon and Margaret Genereux served as witnesses for the appellant. Mrs. Genereux testified that the appellant is a small family-run business. Since 1965, its main activity has been selling and distributing snowmobile parts. In 1987, it became involved with 16-wheel, all-terrain surface vehicles known as "bush swampers." As with the snowmobile parts, the appellant sells bush-swamper parts over the counter. Mr. Genereux also does some repairs to both snowmobile and bush swampers in the shop.

On June 10, 1991, the respondent received an application from the appellant for an FST inventory rebate in the amount of \$8,522.79 with respect to the snowmobile and bush-swamper parts. The rebate was disallowed with respect to the bush-swamper parts. By notice of objection date-stamped October 16, 1991, by the respondent, the appellant clarified its claim by enclosing a supporting list of the parts that it had on hand which were "either sold to customers or used to repair customers' machines." By notice of decision dated June 5, 1992, the Minister disallowed the objection on the basis that "the supplies ... will be used in the provision of a repair service" and because "the goods ... were not, in the condition as held in inventory, available for 'taxable supply by way of sale'."

The issue in this appeal is whether the appellant is entitled to the FST inventory rebate of \$4,201.23 with respect to the bush-swamper parts. For purposes of this appeal, the relevant provisions of the Act are found in subsection 120(3), which states:

(3) Subject to this section, where a person who, as of January 1, 1991, is registered under Subdivision d of Division V of Part IX has any tax-paid goods in inventory at the beginning of that day,

(a) where the tax-paid goods are goods other than used goods, the Minister shall, on application made by the person, pay to that person a rebate in accordance with subsections (5) and (8).

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

Mrs. Genereux testified that the bush-swamper parts were acquired from suppliers and FST was paid on them. Mr. Genereux added that many of the parts were machined in some way, including drilling and tapping, to prepare them for sale. He also indicated that the rebate claim was only for parts that were sitting on the shelf on January 1, 1991, and that none of these parts has been used to construct a complete vehicle. It was indicated that many of these parts are still sitting on the shelf.

Mr. Genereux indicated that approximately 5 percent of the bush-swamper parts are used while providing repair services. The witness explained that, if a customer needed repairs to a bush swamper, he would ask for a description of the problem. The machine would be torn apart, an estimate of the cost of repairs would be given and, if approved, the work would be done, the customer would be invoiced for parts and labour separately and charged tax on the whole. In the alternative, if the customer is capable of doing the repairs, the parts are purchased and the repairs done elsewhere.

In the appellant's brief, it was argued that the business consists of sales of bush-swamper and snowmobile parts, as well as some servicing of customers' bush swampers and snowmobiles. The original FST inventory rebate claim covered parts for both bush swampers and snowmobiles. The claim for the snowmobile parts was allowed. As the bush-swamper parts are held in inventory for the same purpose as snowmobile parts, they also should qualify for the rebate.

It was noted in the appellant's brief that on January 1, 1991, the parts in issue were held in inventory for two reasons:

- (a) to be sold over the counter to the appellant's customers, and
- (b) to be used when requested by customers to repair their machines.

It was argued that there is no service contract between the appellant and its customers. When a customer needs repairs to a machine, a work order is prepared, the repairs are done, and an invoice is issued.

Counsel for the respondent submitted that the Act does not extend the rebate to goods that are used in the rendering of a service. The goods do not qualify as "inventory" as that expression is defined in section 120 of the Act.³ Although the supplies are tax-paid goods and are described in the appellant's inventory, they are not held for taxable supply⁴ by way of sale, lease or rental, but are consumed in the performance of a service contract with the appellant's customers. The words "goods for sale or lease" were clearly intended to make a distinction between a contract for the sale of goods and a contract for the supply of services.

Counsel for the respondent argued that the test for determining whether a contract is one for the sale of goods or for the supply of services is to ask the question: What is the substance of the contract? If the substance of the contract is the production of something to be

3. "Inventory" of a person as of any time is defined in subsection 120(1) of the Act to mean "items of tax-paid goods that are described in the person's inventory in Canada at that time and that are (a) held at that time for taxable supply ... by way of sale, lease or rental to others in the ordinary course of the person's business."

4. "Taxable supply" is defined in subsection 123(1) of the Act to mean "a supply that is made in the course of a commercial activity, but does not include an exempt supply." "Supply" is defined to mean "the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition."

sold, with the transfer of property therein to a buyer, then the contract is a sale of goods. But, if the real substance of the contract is the skill and labour of the supplier in the performance of work for another, then the contract is one for work and labour, notwithstanding that property and some materials may pass under the contract as accessory thereto.⁵ Under such a contract, goods are not sold. Rather, title to the goods passes by accession. In the appellant's case, the substance of the contract is for the use of the goods in the process of providing a service to its customers. Therefore, the goods do not qualify as "taxable supply," as the bush-swamper parts used in the repair of the vehicles were not held for sale.

Counsel for the respondent submitted that the Minister is not bound by representations made and interpretations given to taxpayers by authorized officials of the respondent, if such representations and interpretations are contrary to the clear and peremptory provisions of the law. As such, though the appellant was given the rebate with respect to the snowmobile parts, it is not determinative of the appellant's entitlement to the rebate with respect to the bush-swamper parts. Also, the onus is on the appellant to show that the respondent's assessment is incorrect.

In rendering its decision, the Tribunal is guided by its reasoning in *P.R.E.P. Consulting Ltd. v. The Minister of National Revenue*,⁶ where it stated that:

Nor can the Tribunal accept that the appellant is not entitled to the rebate in respect of goods that might ultimately be sold as part of a contract in which services were provided. To paraphrase subsection 120(3) of the Act for purposes of this argument, the Minister shall pay a person a rebate of tax where that person, as of January 1, 1991, has any tax-paid goods in inventory at the beginning of that day. Section 120 of the Act refers to the status of the goods in issue on January 1, 1991. The respondent denied the appellant part of the rebate for which it applied on the grounds that the goods did not meet the definition of the word "inventory" in that they were not "held ... for taxable supply ... by way of sale, lease or rental." However, the uncontroverted evidence of the appellant was that on January 1, 1991, it held the goods for purposes of sale, be they ultimately sold as is or as part of a contract in which services were also provided. Accordingly, such goods can be viewed as being in inventory on January 1, 1991.

In this case, the evidence is that the appellant held the goods for sale on January 1, 1991. Just as the appellant was entitled to the rebate in the *P.R.E.P. Consulting* case, the Tribunal is of the opinion that the appellant is entitled to the rebate in respect of the bush-swamper parts in this case.

In support of this conclusion, with regard to the 5 percent of parts sold while providing services, the Tribunal notes that subparagraph 5(a)(iii) of GST Memorandum 900, entitled Federal Sales Tax Inventory Rebates,⁷ states that:

goods sold by contractors, electricians, plumbers, body shops, etc., in the provision of a service, which are regularly shown and invoiced separately from service labour, will qualify for a rebate.

5. See, for example, *Crown Tire Service Ltd. v. The Queen*, [1984] 2 F.C. 219 (T.D.), *Dixie X-Ray Associates Limited v. The Queen*, [1988] 2 F.C. 89 (T.D.), *Tenneco Canada Inc. v. The Queen*, [1988] 2 F.C. 3 (T.D.).

6. Appeal No. AP-92-002, March 19, 1993.

7. Department of National Revenue, Customs and Excise, May 31, 1990.

The uncontroverted evidence was that, when goods are sold as part of a transaction in which services are provided, the cost of the goods and services are identified separately on the invoice.

This reference is consistent with the meaning of inventory,⁸ as defined for purposes of subsection 120(3) of the Act. For purposes of this argument, inventory can be defined as "items of tax paid goods ... held [on January 1, 1991] for taxable supply ... by way of sale." Taxable supply includes "a supply,"⁹ which is defined to include "the provision of ... a service."¹⁰ Combining the above definitions, inventory can be defined to include items of tax-paid goods held for the provision of a service by way of sale. The Tribunal has interpreted this to support its contention that goods that were held on January 1, 1991, which may have been subsequently sold while providing a service to a client, qualify for the rebate.

Accordingly, the appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Michèle Blouin

Michèle Blouin
Member

Lise Bergeron

Lise Bergeron
Member

8. *Supra*, note 3.

9. *Supra*, note 4.

10. *Ibid.*