

Ottawa, Friday, June 11, 1993

Appeal No. AP-92-078

IN THE MATTER OF an appeal heard on January 11, 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 24, 1992, with respect to a  
notice of objection served under section 81.17 of the  
*Excise Tax Act*.

**BETWEEN**

**MCDONALD'S RESTAURANTS OF CANADA LIMITED**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Desmond Hallissey  
Desmond Hallissey  
Presiding Member

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

Lise Bergeron  
Lise Bergeron  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-078**

**MCDONALD'S RESTAURANTS OF CANADA LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The issue in this appeal is whether the appellant is entitled to a federal sales tax inventory rebate under section 120 of the Excise Tax Act. Particularly, the Tribunal has to decide whether the tax-paid goods contained in the appellant's paper inventory were held for taxable supply by way of sale, lease or rental within the meaning of the relevant rebate provisions.*

**HELD:** *The appeal is dismissed.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: January 11, 1993*  
*Date of Decision: June 11, 1993*

*Tribunal Members: Desmond Hallissey, Presiding Member*  
*Robert C. Coates, Q.C., Member*  
*Lise Bergeron, Member*

*Counsel for the Tribunal: Robert Desjardins*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: Lynn Schmeekle, for the appellant*  
*Linda J. Wall, for the respondent*

**MCDONALD'S RESTAURANTS OF CANADA LIMITED**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member  
ROBERT C. COATES, Q.C., Member  
LISE BERGERON, Member

### REASONS FOR DECISION

In April 1991, the appellant applied for a federal sales tax (FST) inventory rebate in respect of tax-paid goods contained in its inventory as at January 1, 1991. The goods are described in the rebate application as paper inventory, i.e. containers, paper wrappings and other coverings used in dispensing the food prepared and served at the appellant's restaurants. The total amount claimed is \$132,455. By notice of determination dated June 4, 1991, the respondent disallowed the application for rebate. Following the filing of a notice of objection by the appellant, the respondent confirmed the notice of determination by a notice of decision dated April 24, 1992.

The issue in this appeal is whether the appellant is entitled to an FST inventory rebate under section 120 of the *Excise Tax Act*<sup>1</sup> (the Act). Particularly, the Tribunal must decide whether the tax-paid goods contained in the appellant's paper inventory were held for taxable supply by way of sale, lease or rental within the meaning of the rebate provisions of the Act.

Ms. Lynn Schmeackle, who is Tax Manager for the appellant, served as its representative and was allowed to adduce evidence on the appellant's behalf. In essence, she indicated to the Tribunal that the appellant's finished goods were packaged food products and added that the paper products in issue were critical to maintaining the quality and safety of such products. During cross-examination, Ms. Schmeackle said that the appellant considered the goods in issue to be components of the finished food products. In the appellant's view, the wrappers and containers also enhance the presentation of the food products. The appellant's representative also mentioned that the appellant does not invoice the hamburger wrappers separately to its customer. In a situation where a customer wanted a hamburger without a paper wrapping, the price of the hamburger would not be reduced.

The appellant's representative argued that the paper goods in issue met all the criteria for the rebate - these goods were tax-paid and held at the time for taxable supply by way of sale in the ordinary course of the appellant's business. She noted that various items may be consumed in the provision of the appellant's finished food products, such as paper napkins, salt and pepper. In her view, nothing in the legislation supports the restrictive approach of denying the rebate on the "wrapping component" of the appellant's finished food products.

Counsel for the respondent argued that the goods in issue did not qualify for the rebate under section 120 of the Act. These goods are not sold to the customer and, therefore, cannot be held for taxable supply by way of sale, lease or rental. In the respondent's view, the goods in issue are for the appellant's own use and consumption in the delivery of its services to its

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1. R.S.C. 1985, c. E-15, as amended by S.C. 1990, c. 45, s. 12.

cliente. They are simply used as a form of packaging, as wrapping, which is incidental to the delivery of food. Counsel for the respondent questioned the appellant's concept that it sells a product. In her view, the appellant merely sells food, and there is no difference between a cardboard cup with the McDonald's golden arch and a porcelain cup that an upscale restaurant might use for serving coffee. The appellant has chosen the throw-away packaging route. It is one way of marketing food, but, analytically, it is no different from the way in which a high-end restaurant markets its food. The goods in issue "are all simply throw-away items that assist McDonald's in getting the food to the customers' mouths."

Counsel for the respondent distinguished the present case from the *Valleybrook Gardens* case<sup>2</sup> on the ground that, here, there is no price difference in the price of a food product like a hamburger, whether the hamburger is served with or without a wrapping. She added that the goods in issue are not part of a food product. They are merely a means of delivering the food. Referring to the *Techtough* case,<sup>3</sup> counsel argued that the combination of a paper wrapping and a hamburger does not result in the creation of a new product; it is still a hamburger.

Finally, should the Tribunal find that a wrapped hamburger amounts to a new product, counsel for the respondent urged the Tribunal to bear in mind the definition of "inventory" in section 120 of the Act; the new product (e.g. a hamburger) was clearly not held in inventory before or at January 1, 1991.

Having carefully reviewed the evidence and considered the arguments, the Tribunal is of the opinion that the appeal must be dismissed. The paper goods held by the appellant on January 1, 1991, were not held for taxable supply by way of sale, lease or rental, but rather were essentially used and consumed in the delivery of the appellant's food. The Tribunal agrees with the respondent that these goods are merely throw-away items that assist the appellant "in getting the food to the customers' mouths." The Tribunal is not convinced by the appellant's basic contention that the paper goods combine with the various food items to bring about a wholly new food product. In the Tribunal's view, the goods in issue are not intrinsic components of a new food product. To consider the container for french fries as being incorporated into and forming a part of a new food product appears to be, in the Tribunal's opinion, somewhat far-fetched. In light of the foregoing, the goods in issue do not qualify for the rebate under section 120 of the Act.

The appeal is dismissed.

Desmond Hallissey  
Desmond Hallissey  
Presiding Member

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

Lise Bergeron  
Lise Bergeron  
Member

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2. *Valleybrook Gardens Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-91-186, October 19, 1992.

3. *Techtough Business Systems Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-91-206, September 18, 1992.