

Ottawa, Wednesday, September 11, 1996

Appeal No. AP-92-081

IN THE MATTER OF an appeal heard on March 4, 1996, 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**

**SHOPPERS AUTOBODY REFINISHERS LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Anita Szlazak  
Anita Szlazak  
Presiding Member

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

Desmond Hallissey  
Desmond Hallissey  
Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-081**

**SHOPPERS AUTOBODY REFINISHERS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

The appellant carries on a business of painting and refinishing vehicles in Edmonton, Alberta. 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* for the paint, supplies and parts which were held in inventory as of January 1, 1991, and which were to be used by the appellant in its painting and refinishing business.

**HELD:** The appeal is dismissed. Since the retroactive amendments to the federal sales tax inventory rebate provisions of the *Excise Tax Act*, the Tribunal has consistently held that it must distinguish between goods sold as is or “separately” and goods sold as part of a contract for the provision of services. Subsection 120(2.1) of the *Excise Tax Act* now specifically states that the “portion of the ... goods ... that can reasonably be expected to be consumed or used by the person shall be deemed not to be held at that time for sale, lease or rental.” The Tribunal has stated that, where the goods are to be consumed or used by the appellant in providing a service, it is of the opinion that the goods are deemed not to be sold and, therefore, not held in inventory “separately” for sale. Without cogent evidence which may distinguish the appellant’s circumstances from those in previous decisions, the Tribunal has no basis upon which to conclude that the goods in inventory were held for sale separately in the ordinary course of the appellant’s business.

Place of Hearing:	Edmonton, Alberta
Date of Hearing:	March 4, 1996
Date of Decision:	September 11, 1996
Tribunal Members:	Anita Szluzak, Presiding Member Robert C. Coates, Q.C., Member Desmond Hallissey, Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerk of the Tribunal:	Anne Jamieson
Appearance:	Frederick B. Woyiwada, for the respondent

**Appeal No. AP-92-081**

**SHOPPERS AUTOBODY REFINISHERS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANITA SZLAZAK, 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*<sup>1</sup> (the Act) of a decision of the Minister of National Revenue dated April 24, 1992, disallowing, in part, the appellant's application for a federal sales tax (FST) inventory rebate.

The appellant carries on a business of painting and refinishing vehicles in Edmonton, Alberta. On March 27, 1991, the appellant filed its rebate application in the amount of \$1,684.03 for paint, refinishing supplies, shop supplies and parts held in inventory on January 1, 1991. By notice of determination dated May 28, 1991, the respondent disallowed the application, in part, on the grounds that some of the goods were not goods held for sale, lease or rental in the ordinary course of the appellant's business. The respondent allowed \$416.20 of the appellant's claim. On August 29, 1991, the appellant served a notice of objection and, by notice of decision dated April 24, 1992, the respondent allowed the objection, in part, and confirmed the balance of the determination. The amount allowed related to parts used in work in progress. The amount disallowed was \$842.30.

The issue in this appeal is whether the appellant is entitled to an FST inventory rebate under section 120 of the Act<sup>2</sup> for the paint, supplies and parts which were held in inventory as of January 1, 1991, and which were to be used by the appellant in its painting and refinishing business.

The appellant did not appear at the hearing of this appeal. The Tribunal, therefore, proceeded on the basis of the documents filed by both parties and heard argument from counsel for the respondent. In its brief, the appellant submitted that GST-Memorandum 900<sup>3</sup> specifically states that goods sold by body shops for use in the provision of a service, which are regularly shown and invoiced separately from service labour, will qualify for an FST inventory rebate.<sup>4</sup> The appellant indicated that representatives of the respondent confirmed this information and that it filed blank invoices that show labour and materials as being charged as separate items.

Counsel for the respondent first submitted that the appeal should be dismissed on the basis that there is no evidence before the Tribunal on which it could properly make a decision, as there is no sworn evidence and nothing on which counsel could cross-examine. With respect to the materials in the file, counsel submitted that section 120 of the Act is intended to cover inventory held by someone who is in the business of selling, leasing or renting that

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

2. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27, s. 6.

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

4. *Ibid.* subparagraph 5(a)(iii).

inventory and that the materials filed indicate that the appellant is not in the business of selling, leasing or renting the inventory. Rather, the appellant is in the business of providing a service in which the goods are consumed. Counsel argued that the real substance of the contract between the appellant and its customers is the appellant's skill and labour. Counsel referenced cases cited in the respondent's brief in support of the position that, in these circumstances, anything consumed in the provision of the service is not considered to have been transferred by means of a sale, but rather is an ancillary part of the service contract.<sup>5</sup> Therefore, at the relevant time, the goods were not held for sale, lease or rental and, thus, cannot be considered to be inventory for purposes of section 120 of the Act.

In deciding this appeal, the Tribunal must apply the law applicable to FST inventory rebates. The Tribunal notes that GST-Memorandum 900 does not constitute part of that law. Since the retroactive amendments to the FST inventory rebate provisions of the Act, the Tribunal has consistently held that it must distinguish between goods sold as is or "separately" and goods sold as part of a contract for the provision of services. Subsection 120(2.1) of the Act now specifically states that the "portion of the ... goods ... that can reasonably be expected to be consumed or used by the person shall be deemed not to be held at that time for sale, lease or rental" (emphasis added). The Tribunal has stated that, where the goods are to be consumed or used by the appellant in providing a service, it is of the opinion that the goods are deemed not to be sold and, therefore, not held in inventory "separately" for sale.<sup>6</sup> Without cogent evidence which may distinguish the appellant's circumstances from those in previous decisions, the Tribunal has no basis upon which to conclude that the goods in inventory were held for sale separately in the ordinary course of the appellant's business.

Accordingly, the appeal is dismissed.

Anita Szlazak  
Anita Szlazak  
Presiding Member

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

Desmond Hallissey  
Desmond Hallissey  
Member

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

6. See, for example, *IGL Canada Limited v. The Minister of National Revenue*, Appeal No. AP-92-181, March 8, 1994, and *Light Touch Stenographic Services Ltd. v. The Minister of National Revenue*, Appeal No. AP-91-182, March 8, 1994.