CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, March 8, 1994

**Appeal No. AP-92-181**

IN THE MATTER OF an appeal heard on November 3, 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 July 31, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**IGL CANADA LIMITED** **Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

## DECISION OF THE TRIBUNAL

The appeal is dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

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

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

*UNOFFICIAL SUMMARY*

**Appeal No. AP-92-181**

**IGL CANADA LIMITED** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue (the Minister) dated September 27, 1991, rejecting part of an application for a federal sales tax inventory rebate on the basis that the goods were being held for further manufacture by the appellant. The Minister allowed part of the application. On October 2, 1991, the appellant served a notice of objection. The Minister varied the determination, awarding an additional amount to the appellant. IGL Canada Limited appealed to the Tribunal to obtain the balance. 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 feltliners, resins and other chemicals which were held in its inventory as of January 1, 1991, and which were to be used by the appellant in its pipe reconstruction process.*

***HELD:*** *The appeal is dismissed. Where the goods are to be "consumed or used" by the person in providing a service, the Tribunal is of the opinion that they are deemed not to be sold and, therefore, not held in inventory "separately" for sale. In this case, the resins and other chemicals held in the appellant's inventory were to be "consumed or used" in its pipe reconstruction process; therefore, they do not qualify for a rebate under section 120 of the Excise Tax Act. Although the evidence revealed that the feltliners had been accumulated as a result of cancelled contracts and that they might not be "consumed or used" by the appellant, the Tribunal finds that they were not held in inventory for sale, lease or rental. Consequently, they also do not qualify for a rebate under section 120 of the Excise Tax Act.*

| | |
|---|---|
| *Place of Hearing:* | *Calgary, Alberta* |
| *Date of Hearing:* | *November 3, 1993* |
| *Date of Decision:* | *March 8, 1994* |
| *Tribunal Members:* | *Anthony T. Eyton, Presiding Member*<br>*Sidney A. Fraleigh, Member*<br>*Robert C. Coates, Q.C., Member* |
| *Counsel for the Tribunal:* | *Joël J. Robichaud* |
| *Clerk of the Tribunal:* | *Anne Jamieson* |
| *Appearances:* | *Jack Dalmaijer, for the appellant*<br>*Anne M. Turley, for the respondent* |

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

**Appeal No. AP-92-181**

**IGL CANADA LIMITED** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
SIDNEY A. FRALEIGH, Member
ROBERT C. COATES, Q.C., 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) dated September 27, 1991, rejecting part of an application for a federal sales tax (FST) inventory rebate filed under section 120[2] of the Act on May 31, 1991. The Minister allowed part of the application. On October 2, 1991, the appellant served a notice of objection. The Minister varied the determination, awarding an additional amount to the appellant. IGL Canada Limited appealed to the Tribunal to obtain the balance.

The appellant is in the business of new sewer construction and pipe reconstruction. In the pipe reconstruction business, the appellant uses a process marketed under the trade name "Insituform." This process extends the life of broken or deteriorating water and sewer pipelines by relining the pipe walls with a resin-impregnated felt tubing. The felt tubing is impregnated with a resin at the appellant's shop and is transported to the job site in a refrigerated truck. At the site, a hardening agent is applied to the tubing, and the tubing is then inverted into the pipe from the surface. Most of the appellant's business is selling materials, such as the felt tubing, to sublicensees; however, it also performs pipe reconstruction to its own account.

Part of the appellant's application and part of its notice of objection were rejected on the basis that the goods, which were not sold directly to sublicensees and which were used by the appellant in its pipe reconstruction process, were considered to be held for further manufacture and not for sale, lease or rental. Consequently, these goods did not qualify for an FST inventory rebate. They included feltliners, resins and other chemicals.

The issue in this appeal is whether the appellant is entitled to an FST inventory rebate under section 120 of the Act for the feltliners, resins and other chemicals which were held in its inventory as of January 1, 1991, and which were to be used by the appellant in its pipe reconstruction process.

At the hearing, the appellant was represented by its Vice-President Finance, Mr. Jack Dalmaijer, who was also the appellant's only witness. Mr. Dalmaijer basically reiterated

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.

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the facts as they had been presented in the appellant's written submissions. He explained to the Tribunal that the appellant's inventory of feltliners was accumulated as a result of cancelled contracts and that these feltliners could not immediately be used by the appellant in any pipe reconstruction process or sold to any of its sublicensees; the feltliners are manufactured in Britain to specific dimensions for every project undertaken. The resins and other chemicals for which the appellant had not received a rebate were, however, to be used in its pipe reconstruction process. He also explained that the goods in issue had not been purchased FST-exempt, even though the appellant was issued a manufacturer's licence on July 1, 1989.

Counsel for the respondent did not present any evidence.

The appellant's representative argued that the goods in issue should qualify for the FST inventory rebate because they are no different from those goods which are sold and for which the appellant was granted the rebate. He also argued that, if the appellant is not granted the rebate with respect to the goods in issue, it will have been taxed twice on the same products. He explained that, on a portion of the inventory of the goods in issue, the appellant had to pay FST and Goods and Services Tax. Since this is inconsistent with the intention of Parliament, the appellant's representative argued that it should be granted the rebate.

Counsel for the respondent argued that the goods in issue held in inventory by the appellant were partly manufactured goods for use in the manufacture or production of new and completed goods. She argued that materials that are to be given new forms, qualities and properties or combinations or that are to be used in the production of articles are held for the purposes of manufacture, not for the purposes of sale. Because the goods manufactured by the appellant are new goods distinct in form and identity from the parts and materials incorporated therein and because they were not acquired for sale, lease or rental, she argued that they cannot qualify for a rebate under the Act. Counsel argued that the amendments to section 120 of the Act, which became effective in June 1993 and which were made retroactive to December 17, 1990, confirmed her position. Finally, counsel argued that, like the Tribunal, the respondent is required to enforce the law and that it lacks jurisdiction to grant equitable relief. Consequently, the fact that double taxation could result cannot alter the legality of the Minister's determination.[3]

For the purposes of this appeal, the relevant rebate provisions of the Act are found at section 120, which states, in part, as follows:

> *120.(1) In this section,*
>
> *[...]*
>
> *"inventory" of a person as of any time means 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 sale, lease or rental separately, for a price or rent in money, to others in the ordinary course of a commercial activity of the person.*
>
> *[...]*

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3. *Granger v. Canada (Canada Employment and Immigration Commission)*, [1986] 3 F.C. 70, affirmed [1989] 1 S.C.R. 141.

*(2.1) For the purposes of paragraph (a) of the definition "inventory" in subsection (1), that portion of the tax-paid goods that are described in a person's inventory in Canada at any time 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.*

*(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).*

In this case, the evidence is that, on January 1, 1991, the appellant was granted a rebate for the goods that it held in inventory that, at least notionally, were to be sold as is to its sublicensees. It was denied a rebate for the feltliners that it held in inventory that were to be used in its own "Insituform" process. This represented approximately 20 percent of its inventory of feltliners, all of which had been accumulated as a result of cancelled contracts. The appellant's representative testified that these goods could probably not be sold or used by the appellant. The appellant was also denied a rebate for the resins and other chemicals that it held in inventory that were to be used in its pipe reconstruction process.

To date, the Tribunal has held, in previous decisions,[4] that a person was entitled to an FST inventory rebate with respect to goods supplied to a customer while the person was providing a service to that customer. However, the reasoning of the Tribunal has been impacted by the retroactive amendments to the FST inventory rebate provisions of the Act.[5] Having considered these amendments, the Tribunal is of the view that it must distinguish between goods that are sold as is (separately) and those sold as part of a contract in which services are also provided.

Paragraph 120(1)(*a*) of the Act now provides that goods must be "held ... for sale ... separately, for a price ... in money" to qualify as inventory. In addition, subsection 120(2.1) of the Act now provides 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." Where the goods are to be "consumed or used" by the person in providing a service, the Tribunal is of the opinion that they are deemed not to be sold and, therefore, not held in inventory "separately" for sale. In this case, the resins and other chemicals held in the appellant's inventory were to be consumed or used in its pipe reconstruction process; therefore, they do not qualify for a rebate under section 120 of the Act. Although the evidence revealed that the portion of the feltliners, on which Revenue Canada did not allow a rebate, might not be "consumed or used" by the appellant, the Tribunal finds that these feltliners were not held in inventory for sale, lease or rental. Consequently, they also do not qualify for a rebate under section 120 of the Act.

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4. *Northern Aircool Engines Co. v. The Minister of National Revenue*, Appeal No. AP-92-104, September 21, 1993; and *P.R.E.P. Consulting Ltd. v. The Minister of National Revenue*, Appeal No. AP-92-002, March 19, 1993.

5. *Supra*, note 2, assented on June 10, 1993, and made retroactive to December 17, 1990.

The Tribunal believes that, if the appellant has been taxed twice, it is as a result of it not claiming an FST exemption when it purchased the goods in issue. As argued by counsel for the respondent, the Tribunal is bound by the law, and it lacks jurisdiction to grant equitable relief in determining appeals.[6]

Accordingly, the appeal is dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

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

6. *Supra*, note 3.