

Ottawa, Friday, December 24, 1993

**Appeal Nos. AP-92-227, AP-92-228, AP-92-229, AP-92-230,
AP-92-231, AP-93-044 and AP-93-045**

IN THE MATTER OF appeals heard on June 16, 1993,
under section 81.19 of the *Excise Tax Act*, R.S.C. 1985,
c. E-15;

AND IN THE MATTER OF decisions of the Minister of
National Revenue dated September 10, 1992, and
February 16, 1993, with respect to notices of objection
served under section 81.17 of the *Excise Tax Act*.

BETWEEN

**MEMORIAL GARDENS (MANITOBA) LIMITED
MEMORIAL GARDENS (ONTARIO) LIMITED
MEMORIAL GARDENS (QUEBEC) LIMITED
MEMORIAL GARDENS (BRITISH COLUMBIA) LIMITED
MEMORIAL GARDENS (SASKATCHEWAN) LIMITED
MEMORIAL GARDENS ASSOCIATION (ALBERTA) LIMITED
MEMORIAL GARDENS (ATLANTIC) LIMITED**

Appellants

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

W. Roy Hines

W. Roy Hines
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Charles A. Gracey

Charles A. Gracey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

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AP-92-231, AP-93-044 and AP-93-045

MEMORIAL GARDENS (MANITOBA) LIMITED
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MEMORIAL GARDENS ASSOCIATION (ALBERTA) LIMITED
MEMORIAL GARDENS (ATLANTIC) LIMITED

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

These are appeals under section 81.19 of the Excise Tax Act. The appellants own and operate cemeteries. The issue in these appeals is whether the appellants are entitled to federal sales tax inventory rebates under section 120 of the Excise Tax Act in respect of crypts and niches.

HELD: *The appeals are dismissed.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: June 16, 1993
Date of Decision: December 24, 1993*

*Tribunal Members: W. Roy Hines, Presiding Member
Kathleen E. Macmillan, Member
Charles A. Gracey, Member*

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Anne Jamieson

*Appearances: Rick H. Kesler, for the appellant
Linda J. Wall, for the respondent*



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MEMORIAL GARDENS (ATLANTIC) LIMITED**

Appellants

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL:

W. ROY HINES, Presiding Member
KATHLEEN E. MACMILLAN, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

These are appeals under section 81.19 of the *Excise Tax Act*¹ (the Act) of determinations of the Minister of National Revenue. The appellants own and operate cemeteries. They applied for federal sales tax (FST) inventory rebates under section 120² of the Act in respect of crypts and niches. The applications were disallowed on the basis that the crypts and niches are not "tax-paid goods" under section 120 of the Act.

The issue in these appeals is whether the appellants are entitled to FST inventory rebates in respect of crypts and niches. The appellants are seeking to obtain refunds of the FST incorporated into the cost of building materials and paid to contractors at the time that the units were constructed, prior to January 1, 1991. The crypts and niches were sold after that time and were subject to the Goods and Services Tax.

Mr. Robert J. Sumsion, Executive Vice-President, Finance, and Treasurer of Memorial Gardens Canada Limited, testified on behalf of the appellants. Arbor Capital Inc. is the controlling shareholder of all of the appellants. Mr. Sumsion explained that crypts and niches are compartments contained in a mausoleum or columbarium for the interment and storage of human remains. A crypt is a compartment used to contain a casket, and a niche accommodates cremated remains.

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

According to Mr. Sumsion, when the appellants sell crypts and niches, they are not selling real property. Rather, as he pointed out, they are selling the perpetual interment rights to the compartments. Mr. Sumsion explained that the reason that the real property remains in the hands of the memorial company is that provincial legislation requires that the company maintain the premises. In support, counsel for the appellants introduced a copy of the relevant Ontario legislation and an example of a "Certificate of Interment Rights" which set out the various terms and conditions of vendors and purchasers of crypts and niches.

In argument, counsel for the appellants pointed out that the FST inventory rebate provisions set out in section 120 of the Act do not apply to capital property. He maintained, however, that the crypts and niches in issue do not constitute real property, but are rights that fall within the definition of goods and, thereby, qualify for FST inventory rebates. In support, counsel referred to Mr. Sumsion's evidence that the crypts and niches were not depreciated for income tax purposes and were treated as inventory, not as capital property, in the appellants' financial statements. Finally, counsel reminded the Tribunal of its previous decisions, such as *TechTouch Business Systems Ltd. v. The Minister of National Revenue*,³ allowing FST inventory rebates under section 120 of the Act. Counsel urged the Tribunal to give section 120 of the Act the widest possible scope to avoid the double taxation that exists in this instance.

Counsel for the respondent argued that there is too tenuous a link between the tax paid on construction materials used by contractors and the FST inventory rebates claimed on the interment rights or rights to occupy space. Counsel underlined the conditions set out in section 120 of the Act. In her view, section 120 of the Act clearly intends that an FST inventory rebate be restricted to goods. In this instance, counsel argued, rights, not goods, are sold. The construction materials were incorporated into immovable property, or real property, and ceased being movable. Thus, they lost an essential characteristic of being goods. Finally, counsel maintained that the fact that the appellants chose to treat crypts and niches as inventory, and not as capital property, is not determinative for the purpose of refund applications under the Act.

Having reviewed the evidence and considered the arguments, the Tribunal is of the view that the appeals should be dismissed. First, the Tribunal notes that section 120 of the Act provides for a rebate for "tax-paid goods" held in inventory and precludes capital property from this definition. The witness and counsel for the appellants both conceded that the crypts and niches are real property that remain in the control and ownership of the appellants. The evidence has clearly established that the crypts and niches are not sold to the public. In the Tribunal's opinion, the fact that the appellants sell the perpetual interment rights does not change the fact that the crypts and niches are capital property (immovables) and, therefore, do not fall within the purview of the relevant rebate provisions.

Furthermore, the Tribunal does not accept the arguments of counsel for the appellants that the right to occupy space sold by the appellants is personal property to the purchaser which takes on the character of goods. In this connection, the Tribunal agrees with counsel for the respondent that an essential characteristic of goods is their movability, as this is implied in the

3. Appeal No. AP-91-206, September 18, 1992.

French term for "goods," namely, "*marchandises*." The crypts and niches do not exhibit this characteristic. Moreover, as stated above, the crypts and niches remain the real property of the appellants, even after a sale of the interment rights is made.

Accordingly, the appeals are dismissed.

W. Roy Hines

W. Roy Hines
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Charles A. Gracey

Charles A. Gracey
Member