

Ottawa, Thursday, April 28, 1994

**Appeal No. AP-92-195**

IN THE MATTER OF an appeal heard on June 3, 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 August 14, 1992, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**JOSTENS CANADA LTD. AND JOSTENS OF QUEBEC LTD.**

**Appellants**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed in part.

Charles A. Gracey

Charles A. Gracey  
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan  
Member

Desmond Hallissey

Desmond Hallissey  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-195**

**JOSTENS CANADA LTD. AND JOSTENS OF QUEBEC LTD.**      **Appellants**

**and**

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

*The appellants carry on, inter alia, the business of portrait photography. By separate applications dated July 5, 1991, the appellants applied for federal sales tax inventory rebates in respect of tax-paid goods consisting of colour paper, colour chemicals, mounts intended to be used for the display and protection of photographs, and combination picture and autograph albums. The issue in this appeal is whether the appellants are entitled to rebates of federal sales tax paid on the goods in issue. More specifically, the Tribunal must determine whether the goods qualify as tax-paid goods held in inventory as of January 1, 1991, for taxable supply by way of sale to others in the ordinary course of the appellants' businesses.*

**HELD:** *The appeal is allowed in part. The Tribunal agrees with counsel for the respondent that only those goods in issue that are held for sale separately to others in the ordinary course of the appellants' commercial activities fall within the amended definition of "inventory" under section 120 of the Excise Tax Act. Since the respondent has, in effect, acknowledged in the agreed statement of facts that at least some of the goods in issue are held for sale to the appellants' customers, the Tribunal refers the matter back to the Minister of National Revenue to determine which goods are so held and, therefore, qualify for a rebate under the Excise Tax Act.*

*Place of Hearing:*                      *Ottawa, Ontario*

*Date of Hearing:*                      *June 3, 1993*

*Date of Decision:*                      *April 28, 1994*

*Tribunal Members:*                      *Charles A. Gracey, Presiding Member*

*Kathleen E. Macmillan, Member*

*Desmond Hallissey, Member*

*Counsel for the Tribunal:*                      *Hugh J. Cheetham*

*Clerk of the Tribunal:*                      *Janet Rumball*

*Parties:*                                      *Neil E. Bass, for the appellants*

*F.B. Woyiwada, for the respondent*

**Appeal No. AP-92-195**

**JOSTENS CANADA LTD. AND JOSTENS OF QUEBEC LTD. Appellants**

**and**

**THE MINISTER OF NATIONAL REVENUE Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member  
KATHLEEN E. MACMILLAN, 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 two determinations of the Minister of National Revenue (the Minister) rejecting the appellants' applications for federal sales tax (FST) inventory rebates under section 120 of the Act.<sup>2</sup> The appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> In this regard, the parties submitted an agreed statement of facts, from which the facts herein are taken.

Jostens Canada Ltd. is a corporation subsisting under the laws of the province of Manitoba. Jostens of Quebec Ltd. is a corporation subsisting under the laws of the province of Quebec and is a wholly owned subsidiary of Jostens Canada Ltd. The appellants carry on, *inter alia*, the business of portrait photography. In carrying on this business, the appellants acquired, before 1991, colour paper, black and white paper, black and white paper prints, process camera film, colour chemicals, black and white chemicals, mounts intended to be used for the display and protection of photographs, and combination picture and autograph albums.

By separate applications dated July 5, 1991, the appellants, both Goods and Services Tax registrants since January 1, 1991, applied for FST inventory rebates in respect of the goods in issue. These goods were new and unused, described in each of the appellants' inventories as of January 1, 1991, and, as of that date, had not previously been written off in the accounting records of each appellant for purposes of the *Income Tax Act*.<sup>4</sup> By notices of determination dated July 26, 1991, the Minister rejected these applications. The appellants objected to these determinations. By notices of decision dated August 14, 1992, the Minister confirmed both determinations on the basis that the goods in issue did not qualify for FST inventory rebates under subsection 120(3) of the Act because they were not held for "taxable supply" by way of sale, lease or rental.

Prior to the Tribunal's decision and reasons being issued, the Tribunal became aware that, on June 10, 1993, Royal Assent was given to amendments to section 120 of the Act.<sup>5</sup> These

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

2. S.C. 1990, c. 45, s. 12.

3. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.

4. R.S.C. 1985, c. 1 (5th Supp.).

5. *An Act to amend the Excise Tax Act, the Access to Information Act, the Canada Pension Plan, the Customs Act, the Federal Court Act, the Income Tax Act, the Tax Court of Canada Act, the Tax Rebate Discounting Act, the Unemployment Insurance Act and a related Act*, S.C. 1993, c. 27.

amendments were deemed to have come into force on December 17, 1990. By letter dated November 15, 1993, the Tribunal informed the parties of the amendments and gave them the opportunity to file further written submissions, if any, relating to the impact of these amendments on the appeal, by December 10, 1993.

By letter dated December 1, 1993, the appellants submitted that the Tribunal should decide the appeal based on the law as it stood on June 3, 1993 (the date of the hearing). The appellants indicated that consideration of the amendments may require the submission of further evidence and, possibly, oral argument. Finally, the appellants requested that, should the Tribunal feel bound to consider the amendments, it should hold its decision in abeyance due to cases before the Federal Court of Canada, which would be relevant to the Tribunal's decision in this matter. The respondent filed additional written submissions on December 9, 1993.

By letter dated January 24, 1994, the Tribunal informed the parties that it did not intend to hold the matter in abeyance, but intended to proceed on the basis of the documentation on record. The Tribunal also stated that, based on certain concerns raised by the parties, it was prepared to hold a hearing if either of the parties requested one and asked the parties to indicate their intent in this regard by February 3, 1994. By letters dated February 4, 1994, both parties indicated that they did not wish to request a hearing. In their letter, the appellants reiterated their position that the appeal be heard based on the law at the time of the consideration of the appeal on June 3, 1993.

The issue in this appeal is whether the appellants are entitled to rebates of FST paid on the goods in issue. More specifically, the Tribunal must determine whether the goods qualify as tax-paid goods held in inventory as of January 1, 1991, for taxable supply by way of sale to others in the ordinary course of the appellants' businesses.

Prior to the amendments to section 120 of the Act referenced above, "inventory" was defined, in part, as follows:

*"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 taxable supply (within the meaning assigned by subsection 123(1)) by way of sale, lease or rental to others in the ordinary course of the person's business.*

"Inventory" is defined as follows in the amendments:

*"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.*

The appellants originally submitted that the goods in issue are "tax-paid goods" as defined in subsection 120(1) of the Act and that they were described in the inventory of each appellant as of January 1, 1991, and held at that time for "taxable supply," as defined in subsection 123(1) of the Act, by way of sale to others. In support of these submissions, the appellants referred to numerous recent decisions of the Tribunal. In particular, the appellants directed the Tribunal

to its decisions in *Techtough Business Systems Ltd. v. The Minister of National Revenue*,<sup>6</sup> *A.J.V. Tools Ltd. v. The Minister of National Revenue*,<sup>7</sup> and *J. & D. Trophies & Engraving v. The Minister of National Revenue*.<sup>8</sup> As noted above, in their subsequent submissions, the appellants argued that the Tribunal should decide the appeal on the basis of the law at the time of the consideration of the appeal on June 3, 1993.

Counsel for the respondent originally submitted that the goods in issue were not "in inventory" because they were not held for the purpose of being sold to others in the ordinary course of the appellants' businesses, but were held to be used in the production of articles, which, in turn, would be sold. Citing the Supreme Court of Canada's decision in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*,<sup>9</sup> counsel argued that materials that are to be given new forms, qualities and properties or combinations, and are thereby to be used in the production of articles, are held for the purpose of manufacture, not for the purpose of sale.

With respect to the issue of whether the goods in issue are "tax-paid goods," counsel for the respondent submitted that, to be considered "tax-paid goods," goods must have been "acquired" before 1991. Counsel argued that the goods in issue were not acquired, but were produced by the appellants, as they had undergone a process of manufacture. Further, counsel argued that, to be considered "tax-paid goods," they must be goods in respect of which tax imposed under subsection 50(1) of the Act has been paid. As the goods in issue had not yet been sold, no tax could have been imposed or paid in respect of them.

In the respondent's subsequent submissions, counsel for the respondent argued that the amendments reinforce the original position of the respondent, by making it explicit that, to qualify for the FST inventory rebate, goods must be tax-paid goods held for sale separately, and not as components of finished goods or as components to be incorporated into finished goods. Counsel stated that, as the goods in issue were to be used as materials in the production of other goods, they were not held for sale separately to others in the ordinary course of the appellants' commercial activities. Counsel also submitted that the line of decisions following the Tribunal's decision in *Techtough* were no longer applicable to this case.

In coming to its decision, the Tribunal considered the documents and submissions filed with the Tribunal prior to the hearing date of June 3, 1993, and the documents and submissions filed with the Tribunal subsequent to the Tribunal notifying the parties of the amendments and of the fact that they were deemed to have come into force on December 17, 1990. The Tribunal is of the opinion that, since the amendments are clear as to their retroactive effect to December 17, 1990, they must be applied. It is a long-standing principle of Canadian law that legislation enacted after a case is commenced is to apply to such a case where it is clear from the language of that legislation that it is to have retroactive effect when it is adopted.<sup>10</sup> As noted, the language of subsection 6(7) of *An Act to amend the Excise Tax Act*<sup>11</sup> makes clear that subsections 6(1) to (6) are to apply retroactively to December 17, 1990, i.e. prior to the

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

7. Appeal No. AP-91-229, December 16, 1992.

8. Appeal No. AP-91-213, January 26, 1993.

9. [1968] S.C.R. 140.

10. See, for instance, *John J. Williams v. The Hon. George Irvine*, [1893] 22 S.C.R. 108; and *Western Minerals Ltd. v. Gaumont and Western Minerals Ltd. v. Brown*, [1953] 1 S.C.R. 345.

11. *Supra*, note 5.

commencement of this appeal. Since these subsections are relevant to this appeal, the Tribunal is of the view that the amendments must be applied in reaching a decision in this case.

The Tribunal agrees with counsel for the respondent that only those goods in issue that are held for sale separately to others in the ordinary course of the appellants' commercial activities fall within the amended definition of "inventory" under section 120 of the Act. Paragraph 6 of the agreed statement of facts states that the goods in issue are "for sale to its customers or for use in producing photographic products for sale." The evidence on record does not specifically identify which goods in issue are held for sale to the appellants' customers. The evidence does, however, refer to certain goods in issue, namely, frames and albums that are in a finished form and offered for sale directly to the appellants' customers. Since the respondent has, in effect, acknowledged that at least some of the goods in issue would qualify for the FST inventory rebate, even under the amendments, the Tribunal refers the matter back to the Minister to determine whether, in addition to those goods already identified, any other goods in issue are held for sale to the appellants' customers.

Therefore, the Tribunal finds that the appellants' appeal should be allowed in part and the matter referred back to the Minister to determine whether, in addition to the frames and albums in the appellants' applications, any other goods in issue were held for sale separately to others in the ordinary course of the appellants' commercial activities and, thus, qualify for the FST inventory rebate.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Desmond Hallissey  
Desmond Hallissey  
Member