CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, April 5, 1994

Appeal No. AP-92-252

IN THE MATTER OF an appeal heard on May 21, 1993, and January 12, 1994, 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 September 25, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

HARRY M. GRUENBERG, SYNODA CO. REG'D **Appellant**

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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-252

HARRY M. GRUENBERG, SYNODA CO. REG'D **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 rejecting the appellant's application for a federal sales tax inventory rebate under section 120 of the Excise Tax Act. The issue in this appeal is whether the appellant is entitled to a federal sales tax inventory rebate in respect of various electronic components, including goods such as cables, discs, keyboards, monitors, modems, plotters and cards.

HELD: *The appeal is allowed in part. Relying on the appellant's testimony that 80 percent of the inventory in issue was sold "as is" and was not subject to further assembly prior to being sold, the Tribunal finds that 80 percent of the appellant's inventory qualifies for a federal sales tax inventory rebate and refers the matter back to the Minister of National Revenue to determine the amount of the rebate.*

Place of Hearing:	*Ottawa, Ontario*
Dates of Hearing:	*May 21, 1993, and January 12, 1994*
Date of Decision:	*April 5, 1994*
Tribunal Members:	*Charles A. Gracey, Presiding Member* *Kathleen E. Macmillan, Member* *Arthur B. Trudeau, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Harry M. Gruenberg, for the appellant* *Stéphane Lilkoff, for the respondent*

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Appeal No. AP-92-252

HARRY M. GRUENBERG, SYNODA CO. REG'D **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
KATHLEEN E. MACMILLAN, Member
ARTHUR B. TRUDEAU, 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) rejecting the appellant's application for a federal sales tax (FST) inventory rebate in the amount of $2,562.60. The appeal concerns the tax treatment of inventory during the transition period from the FST to the Goods and Services Tax (GST). The Minister's determination was made on the basis that the goods in issue were not available for "taxable supply ... by way of sale, lease or rental to others in the ordinary course of the [appellant's] business." In the case of those goods already incorporated into manufactured or produced goods, the Minister determined that they were not "tax-paid goods." The appellant objected to the determination, which was confirmed by a notice of decision of the Minister.

The appellant's business is the sale, assembly and service of computers. The goods in issue are various electronic components held for sale, further assembly or service of computers, including goods such as cables, discs, keyboards, monitors, modems, plotters and cards.

The issue in this appeal is whether the appellant is entitled, under section 120 of the Act,[2] to an FST inventory rebate in respect of the goods in issue.

During the hearing, the appellant, Mr. Harry M. Gruenberg, estimated that as much as 80 percent of the inventory of electronic components held on January 1, 1991, was sold in the same form as when it was imported. In this respect, the appellant acted as a distributor, reselling the electronic components which he imported. To substantiate this claim, the appellant filed several invoices showing that some of the electronic components were sold in an "as is" state. Further, Mr. Gruenberg maintained that he had paid FST on all the items that were held in inventory as of January 1, 1991.

Counsel for the respondent accepted that the appellant is entitled to an FST inventory rebate in respect of the goods held in inventory that were later resold in the same form. However, counsel maintained that the appellant did not provide sufficient proof to establish which goods in inventory fell into this category. Counsel acknowledged that the Minister had rejected the FST inventory rebate application in respect of all the goods held in inventory at the relevant time.

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

Counsel for the respondent undertook to break the inventory down into the two categories, for resale in the same form and for further manufacture, and to advise the appellant by letter of the breakdown. Counsel argued that the FST inventory rebate application should be rejected in respect of that portion of the inventory held for further manufacture.

At the conclusion of the hearing, recognizing that the evidence was clear and consistent with a number of earlier cases, the Tribunal stated that a breakdown of the inventory was not required, announced its intention to allow the appeal and indicated that it would release its reasons as soon as possible.

However, the Tribunal was later faced with a very unusual set of circumstances. On June 10, 1993, subsequent to the hearing and prior to the decision and reasons being issued in writing, Royal Assent was given to amendments to section 120 of the Act,[3] the FST inventory rebate provisions. These amendments were deemed to have come into force on December 17, 1990.[4]

As a creature of statute, the Tribunal has only the powers expressly granted to it by its constituent legislation.[5] Once those powers have been exercised and the Tribunal has issued a decision, it becomes *functus officio*.[6] The Tribunal's powers with respect to issuing decisions are set out in subsection 81.27(3) of the Act which provides that a "decision of the Tribunal disposing of an appeal shall be recorded in writing and include the reasons for the decision, and a copy thereof shall forthwith be sent to the parties to the appeal." Thus, until the Tribunal issues a decision in writing, it remains seized of the matter.

The Federal Court of Appeal has found that, where there is such a requirement that a decision be in writing, and there is no specific provision for oral judgments, an oral expression of an intention to dispose of a matter in a particular manner has no decisive effect and is subject to reconsideration.[7] In making this finding, the Federal Court of Appeal indicated that it expected that such an oral expression would only be varied in a written decision in extraordinary circumstances.[8] However, the Federal Court of Appeal gave no indication as to what constitute extraordinary circumstances.

In accordance with these general principles and being of the view that the amendments to the Act constituted extraordinary circumstances, the Tribunal concluded that it should

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3. *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.
4. *Ibid.*, s. 6(7).
5. *Panagiotis Grillas v. The Minister of Manpower and Immigration*, [1972] S.C.R. 577.
6. See, for example, *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; and *Siavash Vatanabadi v. The Minister of Employment and Immigration*, [1993] 2 F.C. 492. "*Functus officio*" is defined as follows: [L. having discharged one's duty] Describes an arbitrator or judge who has made an award or order or given a decision which exhausts the authority of that office," The dictionary of Canadian law (Scarborough: Thomson Professional Publishing Canada, 1991) at 427, and "Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority," Black's Law Dictionary, 5th ed., (Minnesota: West Publishing Co., 1979) at 606.
7. *John Shairp v. Her Majesty The Queen*, [1989] 1 F.C. 562 at 567.
8. *Ibid.*

reconsider the appeal in light of the amendments to the FST inventory rebate provisions prior to issuing its written decision.

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

Both the appellant and respondent filed additional written submissions on November 25 and December 10, 1993, respectively. The appellant, in his supplementary submission, stated that his position had not changed after having reviewed the amendments. He agreed that "parts and components held for assembly into finished goods that will be sold will NOT qualify for the inventory rebate." However, he submitted that "the mere fact that [his] inventory contained components and parts should not preclude them, on their own, from being sold as finished goods."

In the respondent's supplementary submission, it is stated that the appellant's evidence does not indicate whether the goods held in inventory were held for sale, lease or rental separately and that, based on the appellant's inventory list (Exhibit A-7), many of the goods were held in inventory for further manufacture, assembly or incorporation with other goods to make computers.

In reaching its decision, the Tribunal has reconsidered the documents and submissions filed with the Tribunal prior to the oral hearing on May 21, 1993, the documents and submissions presented to the Tribunal at the oral hearing, and considered the submissions filed with the Tribunal on November 25 and December 10, 1993, concerning the amendments to the Act.

The Tribunal observes that it is a long-standing principle of Canadian law that legislation enacted after a case is commenced is to apply to such a case when it is clear from the language of that legislation that it is to have a retroactive effect when it is adopted.[9] Section 6 of *An Act to amend the Excise Tax Act*[10] concerns FST inventory rebates and is, therefore, relevant for the purposes of this appeal. Subsection 6(7) of that act states that "[s]ubsections (1) to (6) shall be deemed to have come into force on December 17, 1990." In the Tribunal's view, it is clear, from the language of subsection 6(7), that the amendments are to have a retroactive effect to December 17, 1990, and that they must, therefore, be applied in this appeal.

The definition of "inventory" under subsection 120(1) of the Act is the focus of the dispute between the parties. Prior to the amendments to the Act, "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.*

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9. 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.
10. *Supra*, note 3.

This definition was amended by subsection 6(1) of *An Act to amend the Excise Tax Act* and reads 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 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.*

Based on this amended definition, in order for the appellant to be entitled to an FST inventory rebate, the goods held in inventory must have been held for sale separately, for a price, to others in the ordinary course of the appellant's commercial activity.

At the oral hearing, the appellant was asked by the Tribunal if he had incorporated any of the electronic components in inventory into other finished goods. He testified that approximately 80 percent of the inventory was sold separately "as is," and was not subject to further assembly prior to being sold. Of the remaining 20 percent, he testified that it was also "ready for sale." The appellant did not provide any further evidence on this point in his subsequent submission.

The Tribunal finds that the portion of the appellant's inventory held for sale, "as is" and not subject to further assembly prior to being sold, is held for sale separately, for a price, in the ordinary course of the appellant's business. Relying on the appellant's testimony that 80 percent of the inventory in issue was sold "as is" and was not subject to further assembly prior to being sold, the Tribunal finds that 80 percent of the appellant's inventory value qualifies for an FST inventory rebate.

Accordingly, the appeal is allowed in part and the matter is referred back to the Minister to determine the amount of the rebate.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Arthur B. Trudeau
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