CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 10, 1995

Appeal No. AP-92-277

IN THE MATTER OF an appeal heard on October 25, 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 December 31, 1991, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BARRY RODKO GOLDSMITHS LTD. **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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lyle M. Russell
Lyle M. Russell
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-92-277

BARRY RODKO GOLDSMITHS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant manufactures, repairs and sells articles of jewellery from its inventory of precious and semi-precious stones and findings. The issue in this appeal is whether the appellant is entitled to a federal sales tax inventory rebate. More specifically, the Tribunal must determine whether the goods in issue qualify as tax-paid goods held in inventory on January 1, 1991, for taxable supply by way of sale to others in the ordinary course of the appellant's business.

HELD: *The appeal is allowed in part. In the Tribunal's opinion, only those items of jewellery that were sold to the appellant's customers in the state in which they were acquired were held for sale separately to others in the ordinary course of the appellant's commercial activities and, thus, qualify for a federal sales tax inventory rebate. The evidence shows that approximately 10 percent of the appellant's business involved such sales. The Tribunal, therefore, finds that the appellant is entitled to 10 percent of the amount claimed in its rebate application.*

Place of Hearing:	*Saskatoon, Saskatchewan*
Date of Hearing:	*October 25, 1994*
Date of Decision:	*March 10, 1995*
Tribunal Members:	*Charles. A. Gracey, Presiding Member* *Arthur B. Trudeau, Member* *Lyle M. Russell, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Barry Rodko, for the appellant* *Christopher Rupar, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-277

BARRY RODKO GOLDSMITHS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ARTHUR B. TRUDEAU, Member
LYLE M. RUSSELL, 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) that rejected the appellant's application for a federal sales tax (FST) inventory rebate under section 120 of the Act.[2]

The appellant manufactures, repairs and sells articles of jewellery. Under the FST regime, the appellant purchased its inventory, which consisted of precious and semi-precious stones, findings, necklaces, etc., on a tax-paid basis. The fact that FST was paid at the time of purchase is not at issue in this appeal.

On February 28, 1991, the appellant applied for an FST inventory rebate in the amount of $5,256.43 in respect of its inventory on January 1, 1991. Of the amount claimed, $553.10 was allowed, but the balance of $4,703.33 was disallowed on the basis that the goods in inventory were being held by the appellant for further manufacture.

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

As a result of recent amendments to the Act, "inventory" is defined, 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..*

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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In addition, subsection 120(2.1) of the Act further qualifies the definition of "inventory" as follows:

> *(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.*

The appellant was represented by its President, Mr. Barry Rodko, who testified on its behalf. Mr. Rodko stated that, before the introduction of the Goods and Services Tax, he had been planning to increase the appellant's manufacturing operations and had sought a manufacturer's licence. He also stated that his accountant had advised him that, without a manufacturer's licence, the appellant may have a problem in successfully claiming an FST inventory rebate.

Despite Mr. Rodko's efforts, the appellant was not granted a manufacturer's licence on the basis that it was a retailer and not a manufacturer. Mr. Rodko indicated that he found it strange that, since the appellant was not considered to be a manufacturer when it sought a manufacturer's licence, its application for an FST inventory rebate was rejected on the grounds that the goods in inventory were being held for further manufacture.

During his testimony, Mr. Rodko sought to describe the nature of the appellant's business and, in particular, the use of the goods in inventory. His testimony and responses to questions from the Tribunal indicate that the appellant's activities include the following:

1) the repair of jewellery, being the most significant activity, which consists of receiving articles of jewellery from other jewellers and repairing same. The appellant effects such repairs by removing damaged parts and adding new parts from its inventory of stones and findings;

2) the fashioning or manufacture of new articles of jewellery by combining various items from the tax-paid inventory; and

3) the retail sale of goods in inventory in the same condition as acquired. That is to say, the goods are sold "as is" and are not further worked or manufactured by the appellant.

In response to further questioning by the Tribunal, Mr. Rodko stated that 65 percent of the appellant's business falls in the repair category, 25 percent involves the manufacture of new jewellery using goods in inventory and the remaining 10 percent is accounted for as sales of goods in inventory in their original state, that is to say, in the same condition as acquired. Mr. Rodko produced no detailed breakdown of the disposition of inventory to substantiate this distribution .

Counsel for the respondent contended that the appellant was not granted a manufacturer's licence because it maintained a retail outlet that was not physically separated from its manufacturing operations. In addition, counsel argued that the matter of granting a licence was at the discretion of the Minister and that, in any case, reasons were given to the appellant for a licence not being granted.

Counsel for the respondent submitted that the goods in inventory in respect of which the appellant sought an FST inventory rebate could only be considered to be "inventory" within the meaning of section 120 of the Act if they were sold "as is." He also submitted that the "repair" aspect of the appellant's business should be treated in the same manner as the "manufacture" aspect because the goods that are used in repairing a particular article of jewellery leave the appellant's premises in a different form from when they entered the appellant's inventory. With respect to the amendments to the Act that affect this case, counsel directed the Tribunal to its comments made in two previous decisions.[3]

Although the Tribunal appreciates the appellant's concerns about its unsuccessful attempt to receive a manufacturer's licence, this matter is not directly relevant to the issue before the Tribunal. With respect to the appellant's belief that the respondent's decision not to grant it a manufacturer's licence is inconsistent with the respondent's position that goods held in its inventory are intended for further manufacture, the Tribunal notes that small manufacturers were not required to obtain a manufacturer's licence and that the granting of a licence was, in any event, subject to certain conditions (especially in the case of jewellery manufacturers that also sold goods at retail), which again is not directly relevant to the question of whether a manufacturer's inventory contains goods for further manufacture for purposes of section 120 of the Act.

The Tribunal accepts the appellant's breakdown of its activities into three general categories, namely, 1) jewellery repair, 2) jewellery manufacture and 3) direct sales of items of jewellery in an "as acquired" condition. With regard to whether any of the goods in inventory held by the appellant in each of these categories is held for sale separately to others in the ordinary course of the appellant's commercial activities, the evidence reveals that the goods in inventory in both the first and second categories (i.e. repair and manufacture of new articles of jewellery) are held for further work, which constitutes a process of manufacture. Indeed, section 43 of the Act specifically deems such an activity to be manufacture. Thus, these goods cannot be said to be held separately for sale "as is," and this portion of the appeal must be dismissed.

The Tribunal notes that, prior to the amendments to the Act, the Tribunal had, in several cases, taken the view that the further manufacture of goods in inventory was not relevant to the question of entitlement to a rebate. However, the amendments to the Act have clearly changed the matter.

The remaining issue is the 10 percent or so of the appellant's business that involves the sale of goods in inventory "as is." This portion of the appellant's claim should clearly be allowed on the basis that the goods were held separately for sale in the ordinary course of the appellant's commercial activities. The Tribunal, therefore, finds that the appellant is entitled to 10 percent of the amount claimed in its rebate application.

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3. *Jostens Canada Ltd. and Jostens of Quebec Ltd. v. The Minister of National Revenue*, Appeal No. AP-92-195, April 28, 1994; and *Harry M. Gruenberg, Synoda Co. Reg'd v. The Minister of National Revenue*, Appeal No. AP-92-252, April 5, 1994.

Accordingly, the appeal is allowed in part.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lyle M. Russell
Lyle M. Russell
Member