



Ottawa, Thursday, January 13, 1994

**Appeal No. AP-92-240**

IN THE MATTER OF an appeal heard on June 9 and August 6, 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 October 30, 1992, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**HONDA CANADA INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Desmond Hallissey  
Desmond Hallissey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-240**

**HONDA CANADA INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act of determinations of the Minister of National Revenue. The issue in this appeal is whether the respondent correctly disallowed the appellant's applications, under section 68.1 of the Excise Tax Act, for a refund of federal sales tax which it paid at the time of importation of certain motorcycles which were subsequently exported by two, now bankrupt, motorcycle dealerships.*

**HELD:** *The appeal is dismissed. Section 68.1 of the Excise Tax Act clearly and unambiguously provides that a refund of federal sales tax shall be paid to a person who has "exported the goods from Canada" provided the person meets certain conditions. It is undisputed that the two motorcycle dealerships, not the appellant, exported the motorcycles from Canada. The appellant, therefore, is not entitled, under section 68.1 of the Excise Tax Act, to a refund of federal sales tax paid in respect of the imported motorcycles.*

*Place of Hearing: Ottawa, Ontario*  
*Dates of Hearing: June 9 and August 6, 1993*  
*Date of Decision: January 13, 1994*

*Tribunal Members: Charles A. Gracey, Presiding Member*  
*Sidney A. Fraleigh, Member*  
*Desmond Hallissey, Member*

*Counsel for the Tribunal: Shelley Rowe*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: Donald J. Goodwin, for the appellant*  
*Brian Tittmore, for the respondent*

**Appeal No. AP-92-240**

**HONDA CANADA INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member  
SIDNEY A. FRALEIGH, 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 determinations of the Minister of National Revenue (the Minister) in which the appellant's refund applications, in the amount of \$199,940.45, were disallowed for the portion of federal sales tax (FST) paid in respect of imported motorcycles which were subsequently exported. In disallowing the appellant's applications, the Minister stated that, since the appellant was not the exporter of record as required under section 68.1 of the Act, it was not entitled to a refund of FST paid.

Section 68.1 of the Act provides as follows:

*Where tax under this Act has been paid in respect of any goods and a person has, in accordance with regulations prescribed by the Minister, exported the goods from Canada, an amount equal to the amount of that tax shall, subject to this Part, be paid to that person if he applies therefor within two years after the export of the goods.*

Both parties agreed that this appeal concerns the appellant's importation of motorcycles and payment of the requisite customs duty and FST. The appellant sold some of the motorcycles to two dealerships in Montréal, Quebec, Centre de la Moto Montréal Ltée (CdM) and Centre de Motocyclettes Kawasaki Ltée (MK), which exported a number of the motorcycles and thereafter applied, under section 68.1 of the Act, for refunds of FST paid in respect of the motorcycles. CdM and MK received refunds in an amount calculated by discounting the total amount of FST paid, as claimed, by 25 percent, under paragraph 8 of Excise Memorandum ET 313<sup>2</sup> (Memorandum ET 313).

On February 22, 1990, both CdM and MK made assignments in bankruptcy under the *Bankruptcy Act*<sup>3</sup> and, on February 26, 1990, Jean Fortin & Associés Syndics Inc. was appointed trustee in bankruptcy.

Following receipt of the refunds by CdM and MK, the appellant applied for refunds of the full amount of FST paid in respect of the imported motorcycles. These applications were disallowed on the basis that CdM and MK had already received refunds of the amount for which the appellant had applied. The appellant recognized that the full amount of FST paid had

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1. R.S.C. 1985, c. E-15.
  2. Refunds, Department of National Revenue, Customs and Excise, December 1, 1975, revised November 18, 1988.
  3. R.S.C. 1985, c. B-3.

not been refunded to CdM and MK and applied for the difference between the amount of FST actually paid at the time that the motorcycles were imported and the amount actually refunded. These applications were accompanied by two powers of attorney from CdM and MK, both dated March 15, 1991, after the date of assignment in bankruptcy by CdM and MK, and signed by Mr. Jacques Bergeron, purporting to give the appellant the right to receive the refunds. The Minister rejected these powers of attorney as not having been validly executed.

Counsel for the respondent stated that "[h]ad the power of attorney been executed properly ... then under the manner in which Revenue Canada administers section 68.1, likely the application for the difference in the sales tax would have been allowed."<sup>4</sup>

The issue in this appeal is whether the appellant is entitled, pursuant to section 68.1 of the Act, to a refund of FST paid.

In argument, the appellant's representative submitted that Honda Canada Inc. followed the advice and direction of Mr. Jacques Boudria, an excise officer with the Department of National Revenue (Revenue Canada), that it should prepare and submit an application for refund, following which the respondent would refund the difference between the amount previously refunded and FST actually paid. He further submitted that the appellant filed powers of attorney as required by paragraph 19 of Memorandum ET 313.

Counsel for the respondent argued that the appellant is not entitled to the refunds since it was not the exporter of the motorcycles, as stipulated under section 68.1 of the Act, and was not authorized to apply for the refunds on behalf of the exporters, CdM and MK, which, as bankrupts, did not have the authority to grant powers of attorney to the appellant. Counsel relied on the provisions of the *Bankruptcy Act* which, he submitted, provide that, when a person files an assignment in bankruptcy with the official receiver, the person ceases to have any capacity to dispose of or otherwise deal with his property and that such capacity vests in the trustee in bankruptcy. He further argued that property under the *Bankruptcy Act* has been held to include tax refunds, rebates or credits which become payable to the bankrupt either before or after the assignment in bankruptcy to the date of discharge.

Finally, counsel for the respondent argued that the appellant cannot rely on alleged misinformation from officials of Revenue Canada to obtain a refund to which it is not entitled under the Act.

The appellant's representative sought an adjournment of the hearing to allow for more time to obtain powers of attorney from the trustee in bankruptcy. The Tribunal granted an adjournment and issued an order on June 10, 1993, providing that the appellant had up to and including July 9, 1993, to "file with the Tribunal ... documentation authorizing the appellant to claim the refund subject of this appeal and any other documents relevant to the present appeal."

On July 9, 1993, subsequent to the oral hearing, the appellant's representative filed several documents with the Tribunal, one of which was a letter dated May 18, 1989, written by Mr. Bergeron of CdM and accepted by Mr. Arthur S. Thomas of Honda Canada Inc., concerning sales of certain motorcycles. The first listed condition in that letter provides that "Honda Canada retains all FST & Duty Claims."

The appellant's representative also filed a letter dated May 16, 1990, from Mr. Thomas to Mr. Bergeron "confirm[ing] [the] fax of June 2, 1989 and [their] understanding and acceptance as follows." Paragraph D) of the stated terms and conditions provides as follows:

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4. Transcript at 17.

*Centre De La Moto further agrees to provide Honda Canada Inc. prior to shipment leaving Canada all necessary and appropriate documentation for the purpose of claiming Duty and Federal Sales Taxes.*

The appellant, in its supplementary written submissions, argued that the documents were evidence of the agreement between it and CdM, prior to the latter's bankruptcy, to the effect that CdM assigned its rights to customs duty and FST refund to Honda Canada Inc. The appellant further submitted that, as a result of the assignment, it is the only entity which has the right to apply for customs duty and FST refund. In the appellant's view, CdM acted contrary to this agreement when it applied for and received a refund of a portion of FST paid.

Counsel for the respondent, in his supplementary brief filed with the Tribunal on July 19, 1993, submitted that section 68.1 of the Act does not authorize a person who exports FST-paid goods to assign his or her entitlement to any FST refund that may be payable. It was further argued that the documentation filed by the appellant was insufficient evidence of a legally binding assignment, in that it is not clear that any legal obligations were created with respect to any FST refund that might be payable.

After having considered the documents and submissions filed with the Tribunal prior to the oral hearing on June 9, 1993, the documents and submissions presented to the Tribunal at the oral hearing, and the documents and submissions filed with the Tribunal on July 9 and 19, 1993, the Tribunal is of the view that the appellant is not entitled, under section 68.1 of the Act, to a refund of FST paid in respect of the imported motorcycles in issue. In determining whether the appellant is entitled to the refunds that are the subject of this appeal, the Tribunal is bound by the provisions of section 68.1 of the Act, and not by the administrative provisions of Memorandum ET 313, which have no statutory or regulatory authority. Section 68.1 of the Act clearly and unambiguously provides that a refund of FST shall be paid to a person who has "exported the goods from Canada" where FST has been paid in respect of those goods and who has applied for a refund within two years after the export of the goods. It is undisputed that CdM and MK, and not the appellant, exported the motorcycles from Canada.

In the Tribunal's view, the appellant would have been entitled to the refunds if it had produced a power of attorney signed by the trustee in bankruptcy for CdM and MK authorizing the appellant to claim the refunds. The Tribunal adjourned the hearing of the appeal to give the appellant's representative, who had assured the Tribunal that he could obtain a power of attorney, the opportunity to seek a power of attorney from the trustee in bankruptcy. However, the appellant failed to produce a power of attorney.

Accordingly, the appeal is dismissed.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Desmond Hallissey  
Desmond Hallissey  
Member