CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, February 15, 1994

Appeal No. AP-92-335

IN THE MATTER OF an appeal heard on September 29, 1993, 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 November 25, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

MERCEDES-BENZ CANADA INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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UNOFFICIAL SUMMARY

Appeal No. AP-92-335

MERCEDES-BENZ CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is deemed a manufacturer under the Excise Tax Act. During the period at issue, motor vehicles, which it imported, were placed on the premises of its dealership division for sale directly to consumers. In order to calculate its sales tax liability, the appellant elected to use a value set forth in a departmental memorandum. Sales tax was calculated on the sale price to independent dealers and remitted at the time of transfer of the vehicles to its dealership division, i.e. at the wholesale price, rather than calculated on the sale price to consumers and remitted at the time of the retail sale, as provided under the Excise Tax Act. Some vehicles were still on the premises of the dealership division when the Goods and Services Tax came into force. The appellant filed an application for a federal sales tax (FST) inventory rebate and obtained a rebate based on an 11.1-percent tax factor, as prescribed under the Federal Sales Tax Inventory Rebate Regulations. The appellant filed another application, this time under section 68 of the Excise Tax Act, claiming the difference between the sales tax that it remitted at the rate of 13.5 percent and the sales tax that was refunded using the 11.1-percent tax factor for an FST inventory rebate. The issue in this appeal is whether the appellant is entitled to a refund of moneys paid in error, whether by reasons of mistake of fact or law or otherwise, under section 68 of the Excise Tax Act.

HELD: *The appeal is dismissed. There is no proof whatsoever that the appellant's officers had the mistaken belief that tax was owed when they remitted sales tax at the time of the transfer of the vehicles to the appellant's dealership division in accordance with Excise Memorandum ET 202. The appellant's officers voluntarily and knowingly chose to elect an advantageous method of tax remittance different from the strict language of the Excise Tax Act. After receiving the rebate under the FST inventory rebate provision of the Excise Tax Act, they realized that the decision, once advantageous, was suddenly less appealing. That, however, is not sufficient to allow a refund under section 68 of the Excise Tax Act for moneys paid in error.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*September 29, 1993*
Date of Decision:	*February 15, 1994*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Michèle Blouin, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Michael Kaylor, for the appellant* *John B. Edmond, for the respondent*

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-335

MERCEDES-BENZ CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
MICHÈLE BLOUIN, Member
LISE BERGERON, 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 issue in this appeal is whether the appellant is entitled to a refund of moneys paid in error, whether by reasons of mistake of fact or law or otherwise, under section 68 of the Act.

At the hearing, Mr. David L. Leigh, CMA, who is Director, Finance and Administration, for Mercedes-Benz Canada Inc., testified on behalf of the appellant. During the period at issue, Mr. Leigh was the appellant's controller. Mr. Leigh explained that the appellant, which imports motor vehicles and parts thereof, is deemed a manufacturer under paragraph (*g*) of the definition of "manufacturer or producer" in subsection 2(1) of the Act. During the period at issue, vehicles imported and owned by the appellant were placed on the premises of its dealership division for sale directly to consumers. In order to calculate its sales tax liability, the appellant elected to use an established value set forth in Excise Memorandum ET 202[2] (Memorandum ET 202). In accordance with paragraph 13 of Memorandum ET 202, sales tax was calculated on the sale price to independent dealers and remitted at the time of transfer of the vehicles to its dealership division, i.e. at the wholesale price, rather than calculated on the sale price to consumers and remitted at the time of the retail sale as provided under the Act. Mr. Leigh acknowledged that the decision to pay sales tax using the established value was an advantageous business decision, as the appellant's net gain was between $400 and $500 per vehicle during the period at issue.

Mr. Leigh further testified that some vehicles were still on the premises of the appellant's dealership division on January 1, 1991, when the Goods and Services Tax came into force. The appellant, therefore, filed an application for a federal sales tax (FST) inventory rebate under section 120 of the Act.[3] On May 10, 1991, the application was allowed on the basis of an 11.1-percent tax factor, as provided by the *Federal Sales Tax Inventory Rebate Regulations*.[4] On April 11, 1991, the appellant filed another application, this time under section 68 of the Act, claiming, in essence, the difference between the sales tax that it remitted at the rate of

1. R.S.C. 1985, c. E-15.
2. Values for Tax, Department of National Revenue, Excise, December 1, 1975.
3. S.C. 1990, c. 45, s. 12.
4. SOR/91-52, December 18, 1990, Canada Gazette Part II, Vol. 125, No. 2 at 265.

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13.5 percent and the sales tax that was refunded using the 11.1-percent tax factor for an FST inventory rebate. This refund application is now the subject of this appeal.

In his brief, counsel for the appellant argued that the appellant remitted moneys in accordance with the provision of Memorandum ET 202, that Memorandum ET 202 is an administrative concession and not law, and that moneys were paid under the appellant's mistaken belief that it owed sales tax. In oral argument, counsel added that any moneys paid on the basis of Memorandum ET 202 rather than on the basis of the Act are taxes paid in error because they were remitted on an improper base and at an improper time. Counsel further added, relying on *Jack Herdman Limited v. The Minister of National Revenue*,[5] that the appellant paid the sales tax under the mistaken belief that it was legally obliged to pay it.

The Tribunal disagrees with counsel for the appellant. It is clear that, in order to succeed, the appellant had the burden of proving that it committed an error, whether by mistake of law or fact or otherwise. As illustrated by the Supreme Court of Canada's decision in *The Queen v. Premier Mouton Products Inc.*[6] and by the Federal Court of Appeal's decision in the *Jack Herdman* case, the very essence of the mechanism set forth in section 68 of the Act is that the taxpayer must establish his mistaken belief that he paid the moneys in error at the time that he remitted the moneys in order to prove that payments were made in error.

In the *Premier Mouton* case, one of the questions at issue was whether the officers of the company had committed a mistake of law or fact under former subsection 46(6) of the Act because they accepted to pay the tax, even though they were convinced that the company did not owe the tax and the payment was made under protest. As the officers were fully aware of their position as to the company's liability and because they knew that other companies had refused to pay the sales tax, the majority of the Supreme Court of Canada found that the officers were not mistaken when they authorized payment of the money. And while Abbott J. and the Chief Justice concluded, on the other hand, that the officers had paid the tax in the mistaken belief that the company was obliged to do so, the result, nevertheless, is that the Supreme Court of Canada was unanimous in concluding that a mistaken belief at the time of payment or remittance must be established.

The *Jack Herdman* case has the same effect. Moreover, it can be distinguished from the present case, as Thurlow C.J. and Le Dain J. both pointed out, in concurring reasons, that the Department of National Revenue had made representations to the taxpayer that it was liable for the tax,[7] hence explaining Le Dain J.'s conclusion that "[t]he applicant paid the tax under the mistaken belief that it was legally obliged to pay it.[8]"

In the case at hand, the testimony of Mr. Leigh is quite clear; the appellant's decision to use the established value set forth in Memorandum ET 202 was a business decision from which flowed a monetary advantage, as the appellant saved hundreds of dollars in taxes for each motor vehicle placed on the premises of its dealership division. There is no proof whatsoever that the appellant's officers formed a mistaken belief that sales tax was owed when the appellant remitted the tax at that time, in accordance with Memorandum ET 202. Rather, it seems that the appellant's officers voluntarily and knowingly chose to elect an advantageous method of tax

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5. 48 N.R. 144 (F.C.A.).
6. 61 D.T.C. 1105 (S.C.C.).
7. *Supra*, note 5 at 150 and 154.
8. *Supra*, note 5 at 154.

remittance different from the strict language of the Act. According to the testimony of Mr. Leigh, although the company was only liable to pay sales tax at the time of the sale, it continued to remit moneys as tax under the Act, using the method set forth in Memorandum ET 202, even after it received the information that an FST inventory rebate would be payable at a tax factor of 11.1 percent. After receiving the rebate under the FST inventory rebate provision of the Act, the company's officials realized that the decision, once advantageous, was suddenly less appealing. That realization, however, is not sufficient to allow a refund under section 68 of the Act for moneys paid in error.

In light of the foregoing, the appeal is dismissed.

Sidney A. Fraleigh
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Presiding Member

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