CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, December 21, 1994

Appeal No. AP-93-320

IN THE MATTER OF an appeal heard on June 16, 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 October 29, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

TECHNESSEN LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
Raynald Guay
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
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

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-320

TECHNESSEN LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act of an assessment of the Minister of National Revenue that rejected the appellant's application for a federal sales tax inventory rebate in respect of one Mercedes-Benz and five Dodge Caravan motor vehicles. The issue in this appeal is whether the Mercedes-Benz and the Dodge Caravans were, on January 1, 1991, described in the appellant's inventory and held at that time for sale, lease or rental separately, for a price or rent in money, to others in the ordinary course of the appellant's commercial activity.

HELD: *The appeal is dismissed. The Tribunal concludes that the contract for the sale of the Mercedes-Benz was an unconditional contract for the sale of specific goods in a deliverable state and that the property in the Mercedes-Benz passed to the purchaser when the contract was made on December 20, 1990, pursuant to Rule 1 of section 19 of the Ontario Sale of Goods Act. Having determined that the appellant sold the Mercedes-Benz in December 1990, the Tribunal is of the view that the appellant did not hold the Mercedes-Benz in its inventory on January 1, 1991, "for sale" in the ordinary course of its commercial activity and is not, therefore, entitled to a federal sales tax inventory rebate in respect of the Mercedes-Benz.*

The Tribunal also concludes that the appellant is not entitled to a federal sales tax inventory rebate in respect of the Dodge Caravans. With respect to three of the vans, the Tribunal concludes that the appellant had not acquired any property rights in the vans and could not, therefore, be considered to have been holding the vans in its inventory for sale. With respect to the remaining two Dodge Caravans, which were converted to "easy access" vans, the Tribunal concludes that they were not held for sale separately in the ordinary course of the appellant's commercial activity.

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*June 16, 1994*
Date of Decision:	*December 21, 1994*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Raynald Guay, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Michael L. Lamont, for the appellant* *Brian Tittemore, for the respondent*

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-320

TECHNESSEN LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
RAYNALD GUAY, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of an assessment of the Minister of National Revenue (the Minister) that rejected, in part, the appellant's application for a federal sales tax (FST) inventory rebate in the amount of $130,917.78. The Minister initially paid the appellant the full amount for which it had applied, but later assessed the appellant for the amount of $58,424.34, plus interest and penalty, in respect of three Mercedes-Benz and five Dodge Caravan motor vehicles which were determined not to qualify for an FST inventory rebate. The appellant objected to the assessment and, by decision dated October 29, 1993, the Minister confirmed the assessment in respect of one Mercedes-Benz and all of the Dodge Caravans. The issue in this appeal is whether the appellant is entitled to an FST inventory rebate in respect of the Mercedes-Benz and the Dodge Caravans.

The appellant's witness, Mr. Wouter Van Essen, is part owner of a holding company which owns 100 percent of Technessen Ltd. and 60 percent of 816392 Ontario Limited, which carries on business under the name "Freedom Motors." He described the appellant as a wholesale trading company which purchases vehicles from dealers and distributors and resells the vehicles to dealers and distributors. Most of the dealers and distributors to which the appellant sells vehicles are located outside Canada. Freedom Motors markets, in Canada, vehicles that have been modified for wheelchair access, described as "easy access" vehicles. The appellant sells the "easy access" vehicles outside Canada.

Money is frequently transferred between the appellant and Freedom Motors to pay for vehicles purchased by Freedom Motors, but sold by the appellant, or to finance Freedom Motors' purchase of vehicles. However, Mr. Van Essen stated that the appellant and Freedom Motors do maintain separate financial records.

With respect to the Mercedes-Benz in issue, Mr. Van Essen stated that he received a purchase order from Mr. Johnny Kassem for the 1991 Mercedes-Benz 500SL, serial No. WDBFA66E6MF022843, which the appellant had acquired from a dealer in Canada. On December 20, 1990, the appellant issued an invoice which provided that the total price for the 1991 Mercedes-Benz 500SL, serial No. WDBFA66E6MF022843, was US$97,950, F.O.B. Los Angeles, California, and that US$10,000 had been received and US$87,950 was due,

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

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

as of December 20, 1990. Handwritten on the invoice, and initialled, are the words "paid in full." The photocopies of the cheques included in the respondent's brief confirm that Mr. Kassem provided the appellant with two cheques, one dated December 19, 1990, in the amount of US$10,000 and one dated December 21, 1990, in the amount of US$87,950, both of which were deposited in the appellant's account in December 1990.

Mr. Van Essen stated that, subsequent to the issuance of the invoice dated December 20, 1990, but prior to January 1, 1991, Mr. Kassem informed him by telephone that he wished to take delivery of the Mercedes-Benz in Toronto, Ontario, to "personally inspect the vehicle" and "make sure that there was not a single little scratch on it." He further stated that, once Mr. Kassem "checked the vehicle and found it in good order," a new invoice was issued to Mr. Kassem on January 2, 1991, showing the new delivery details and the new price, which was reduced by the freight cost from Toronto to Los Angeles.

Both invoices provide that the appellant's "sales conditions are applicable" and on the reverse side of the invoices are the "Technessen Conditions of Sale." Although there are five conditions stipulated, the following conditions are relevant for the purposes of this appeal:

> *No. 1 The title to the said motor vehicles shall remain with the vendor and shall not pass to the purchaser until the entire purchase price is paid in full.*
> *The vehicles shall be at the risk of the purchaser once delivery has been made. If the payment in full is not made within seven days from the date agreed upon, the vendor may repossess the vehicle(s) at any time without notice and without liability for any damages incurred by such repossession and the vendor may sell any such vehicle(s) repossessed and look to the purchaser for the balance of the purchase price.*
>
> *No. 2 There are no warranties or conditions or agreements, express or implied, statutory or otherwise, affecting the motor vehicle(s), the subject matter of this agreement or affecting the rights of the parties to this agreement nor is there any agreement supported by this agreement other than as specifically contained herein. There are no representations whatever on the part of the vendor which induced or supports this agreement.*

Mr. Van Essen stated that the Mercedes-Benz in issue was never registered in the appellant's name. Rather, the Mercedes-Benz was registered in the name "Roadster's Collision and Restoration Services" (Roadster's), as indicated in a letter dated February 18, 1993, from Mr. Kenneth A. VanHaaster of Roadster's to Mr. Van Essen. As described by Mr. Van Essen, the appellant sometimes purchases vehicles through other companies because those companies find the vehicles or because a manufacturer does not want to sell to the appellant because it is purchasing the vehicle for export. However, Mr. Van Essen stated that the Mercedes-Benz in issue was held in the appellant's inventory and referred to a document entitled "Schedule of Motor Vehicles (Held in Inventory)" attached to an auditor's report dated January 2, 1991, which showed the serial No. of the Mercedes-Benz, the invoice date of December 22, 1990, and an inventory value of CAN$116,900. A photocopy of the Ontario vehicle registration permit indicates that the Mercedes-Benz was registered in Mr. Kassem's name on January 2, 1991.

In response to questions from the Tribunal, Mr. Van Essen stated that the appellant normally reduces the amount charged to its customers by the amount of FST that would be payable on the sale of the vehicle since, as the exporter of record, it can claim a refund of FST.

As the Mercedes-Benz was originally to be shipped to California and the appellant would have been the exporter of record, the appellant did not include FST in the price of the Mercedes-Benz.

The issue as between the appellant and respondent is whether the Mercedes-Benz was held in inventory for sale by the appellant as of January 1, 1991, as required by the FST inventory rebate provisions under section 120[2] of the Act.

Counsel for the appellant submitted that the first agreement to sell the Mercedes-Benz for a price of US$97,950, F.O.B. Los Angeles, was rescinded when the delivery arrangements were changed, such that Mr. Kassem would pick up the Mercedes-Benz in Toronto and the price would be adjusted down by US$950. In this regard, counsel referred to the decision of the House of Lords in *Morris v. Baron and Company*.[3] This decision provides that, when there is rescission of a contract, a person "could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed.[4]" Counsel submitted that the second arrangement changed the first arrangement in such a way that it was rescinded. In counsel's view, pursuant to the second arrangement, Mr. Kassem had to accept the Mercedes-Benz in Toronto and, until that time, the vehicle remained in the appellant's inventory.

It was further argued by counsel for the appellant that the second arrangement between the appellant and Mr. Kassem was a sale on approval and that approval did not occur until January 2, 1991. Counsel referred to Rule 4 of section 19 of the Ontario *Sale of Goods Act*[5] (the SOGA), which provides that when goods are delivered to a buyer on approval, the property in those goods passes to that buyer when that buyer signifies approval or acceptance to the seller. Counsel submitted, based on Rule 4, that the property in the Mercedes-Benz did not pass to Mr. Kassem until he took delivery of and accepted the Mercedes-Benz on January 2, 1991. It was submitted by counsel that condition No. 1 of the "Technessen Conditions of Sale," which states that title does not pass until the entire purchase price is paid in full, does not mean that payment in full triggers the passing of title, as was stated in *Jerome v. Clements Motor Sales Ltd.*[6] In counsel's view, title did not pass until the vehicle registration was changed from Roadster's to Mr. Kassem on January 2, 1991.

It was submitted by counsel for the respondent that Mr. Kassem purchased the Mercedes-Benz prior to January 1, 1991, and, as a result, it was not held for sale by the appellant as of January 1, 1991, as required by subsection 120(1) of the Act. As proof that the Mercedes-Benz was sold prior to January 1, 1991, counsel pointed out that the invoice dated December 20, 1990, referred to a specific Mercedes-Benz for a specific price and that the full purchase price was paid by Mr. Kassem prior to January 1, 1991. In counsel's view, the second invoice dated January 2, 1991, was not a rescission of the first contract, but rather it was a variation of the terms of that contract. Counsel referred to *Morris* which gave, as an example of a variation, an engagement for three years at a certain salary, which salary was subsequently altered by a verbal arrangement. In counsel's view, the change in the terms of delivery is a

---

2. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27, s. 6.
3. [1918] A.C. 1 (H.L.).
4. *Ibid*. at 26.
5. R.S.O. 1990, c. S.1.
6. [1958] O.R. 738.

similar type of change to the change in salary and should, therefore, also be considered to be a variation.

Counsel for the respondent also referred to condition Nos. 1 and 2 of the "Technessen Conditions of Sale." Condition No. 2 provides that there are no warranties or conditions, express or implied, other than those contained in the agreement. Counsel submitted that, since there was no term added to the agreement concerning Mr. Kassem's acceptance of the Mercedes-Benz in "proper condition" nor any corroborating evidence from Mr. Kassem to that effect, there is no indication that any term was added to the agreement concerning the time that the Mercedes-Benz would be considered "accepted" by Mr. Kassem. Rather, counsel submitted that condition No. 1, which provides that title does not pass until the entire purchase price is paid in full, makes it clear that title passed to Mr. Kassem when he paid the full price for the Mercedes-Benz and not when Mr. Kassem "accepted" the vehicle.

Finally, counsel for the respondent stated that, pursuant to section 18 of the SOGA, property in goods is to pass to the buyer when the parties to the contract intend it to pass, and intention may be determined based on the terms of the contract, the conduct of the parties and the circumstances of the agreement. Counsel submitted that it is clear from the fact that there was a contract for a specific product, a Mercedes-Benz with serial No. WDBFA66E6MF022843, and the conduct of the appellant and Mr. Kassem that the intention was to pass property in the Mercedes-Benz prior to January 1, 1991.

In addition to the Mercedes-Benz, the following five Dodge Caravans are in issue: (1) a 1990 silver SKE13 with serial No. 1B7GK14R0LX250891; (2) a 1990 white SKE13 with serial No. 1B7GK14R9LX250887; (3) a 1990 silver ASKE13 with serial No. 1B6GK14R0LX184900; (4) a 1990 white "easy access" van with serial No. 1B6GK14R9LX193353; and (5) a 1990 blue "easy access" van for wheelchair access with serial No. 1B6GK14R3LX195020.

Three of the vans, serial Nos. 1B6GK14R9LX193353, 1B6GK14R3LX195020, and 1B6GK14R0LX184900, were purchased from Markham Dodge Chrysler in the name of Freedom Motors as indicated on the contracts of sale, one dated July 24, 1990, and the other two dated July 26, 1990. The fourth condition on the reverse side of the contracts provides that "[t]he title and right of property in the said motor vehicle shall not pass to the purchaser until the entire purchase price is paid in full."

As evidenced by photocopies of two cheques, these vans were paid for by the appellant. The first cheque dated November 1, 1990, is in the amount of $39,595.90. The photocopy of this cheque has handwritten on it the numbers 193353 and 195020. According to Mr. Van Essen, the appellant's accountant wrote these numbers on the page to indicate that the cheque was for the purchase of two of the vans in issue, namely, serial Nos. 1B6GK14R9LX193353 and 1B6GK14R3LX195020.

The second cheque dated January 11, 1991, is in the amount of $18,807. The photocopy of this cheque has handwritten on it the number 184900, which, according to Mr. Van Essen, corresponds to the van with serial No. 1B6GK14R0LX184900. When asked about the fact that the cheque is dated in 1991, Mr. Van Essen explained that the appellant took delivery of the vehicle and held it in inventory before January 1, 1991, but did not pay for the vehicle until January 1991.

As indicated by two contracts of sale dated April 4, 1990, Freedom Motors purchased the other two Dodge Caravans, serial Nos. 1B7GK14R0LX250891 and 1B7GK14R9LX250887, from Galt Chrysler Dodge Ltd. No documentary evidence was provided as to the payment for these vans.

Mr. Van Essen stated that, since the appellant does not deal directly with a Chrysler dealer and sells to the export market, it had to purchase the vans through another company, in this case, Freedom Motors.

The appellant filed with the Tribunal five Ontario vehicle registration permits corresponding to the five Dodge Caravans in issue which show that all of the vans were registered in the name of the appellant as of December 19, 1990.

Included in the respondent's brief are photocopies of five invoices from Vehicle Dynamics which show that the five vans in issue were converted for "easy access" prior to January 1, 1991. All but one of these invoices are addressed to Freedom Motors. The invoice for serial No. 1B6GK14R9LX193353 is addressed to Mr. Van Essen. According to Mr. Van Essen, Freedom Motors paid for the conversions, sold the vans and repaid the appellant from the proceeds of the sales. When asked by the Tribunal whether Freedom Motors was acting as an agent for the appellant in selling the vans, Mr. Van Essen replied that it was.

All of the vans were sold by Freedom Motors. The following table shows the serial Nos. of the vans, the purchasers and the contract dates.

Serial No.	**Purchaser**	**Date**
1B7GK14R0LX250891	St. Catharines Association for Community Living	February 9, 1991
1B7GK14R9LX250887	Pilgrim Transportation Services Ltd.	May 26, 1991
1B6GK14R9LX193353	Georgian Pontiac Buick	November 21, 1991
1B6GK14R3LX195020	Belleville Chrysler Dodge	September 11, 1991
1B6GK14R0LX184900	St. Catharines Association for Community Living	March 30, 1993

The appellant's "Schedule of Motor Vehicles (Held in Inventory)" provides that all of the vans were in the appellant's inventory as of January 1, 1991.

Counsel for the appellant submitted that, as of December 31, 1990, all the Dodge Caravans were available for sale, either to the export market or to the local market, after they were converted by Freedom Motors and sold by it as an agent for the appellant. Counsel acknowledged that registration may not be conclusive evidence of ownership, but submitted that it was compelling evidence of ownership. Since all five of the Dodge Caravans were registered in the appellant's name in December 1990 until they were sold by Freedom Motors subsequent to January 1, 1991, counsel submitted that they were in the appellant's inventory as of January 1, 1991.

It was the submission of counsel for the respondent that the five Dodge Caravans were described in Freedom Motors' inventory, held by it for conversion to "easy access" and then sold. Counsel based this submission on the following facts: (1) the vehicle registrations are in the name of Freedom Motors; (2) the contracts for sale were with Freedom Motors; (3) Freedom Motors arranged and paid for the conversions; and (4) Freedom Motors sold the Dodge Caravans. Counsel submitted that the two vans for which Freedom Motors paid and the van

for which Technessen paid after January 1, 1991, were clearly not in the appellant's inventory. For these reasons, counsel submitted that the Dodge Caravans were not described in the appellant's inventory on January 1, 1991, nor were they held by the appellant at that time for sale, lease or rental to others.

In order to qualify for an FST inventory rebate, the Mercedes-Benz and the Dodge Caravans must be considered "inventory" as defined under subsection 120(1)[7] of the Act, which states, in part, as follows:

> *"inventory" of a person as of any time means items of tax-paid goods*[8] *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.*

Thus, the Tribunal must determine if the Mercedes-Benz and Dodge Caravans were: (1) tax-paid goods; (2) described in the appellant's inventory as of January 1, 1991; and (3) held for sale separately in the ordinary course of a commercial activity of the appellant.

With respect to the Mercedes-Benz, the focus of the dispute between the parties is whether the appellant sold the Mercedes-Benz to Mr. Kassem prior to January 1, 1991, in which case, counsel for the respondent argued, it could not have been held by the appellant for sale.

The sale of the Mercedes-Benz is governed by the SOGA. Pursuant to section 18 of the SOGA, "[w]here there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred" and, in ascertaining intention, "regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case." Rule 1 of section 19 of the SOGA provides that, unless a different intention is evident, "[w]here there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed." Thus, for Rule 1 to apply, the contract for the sale of the Mercedes-Benz must be unconditional and be for a specific product in a deliverable state.

In the Tribunal's view, the terms of the agreement for the sale of the Mercedes-Benz are set out in the invoice dated December 20, 1990. The invoice provides that the appellant agrees to sell the Mercedes-Benz in issue to Mr. Kassem for US$97,950, F.O.B. Los Angeles, and subject to the "Technessen Conditions of Sale." Mr. Kassem complied with the terms of the agreement by paying the full amount of US$97,950 by December 21, 1990. The Tribunal is not persuaded

---

7. *Supra*, note 2. The amendments were deemed to have come into force on December 17, 1990.

8. *"[T]ax-paid goods" means goods, acquired before 1991 by a person, that have not been previously written off ... for the purposes of the Income Tax Act and that are, as of the beginning of January 1, 1991,*

   (a) new goods that are unused,

   (b) remanufactured or rebuilt goods that are unused in their condition as remanufactured or rebuilt goods, or

   (c) used goods

   and on the sale price or on the volume sold of which tax (other than tax payable in accordance with subparagraph 50(1)(a)(ii)) was imposed under subsection 50(1), was paid and is not, but for this section, recoverable.

that the change in the place and time of delivery and the refund of the amount included in the purchase price to cover freight costs constituted a rescission of this agreement for the sale of the Mercedes-Benz. Rather, this change in delivery was merely an alteration in the mode and manner of performance of the contract for the convenience of Mr. Kassem. Lord Atkinson describes this situation in *Morris* as one where "one party at the request of and for the convenience of the other forbears to perform the contract in some particular respect strictly according to its letter.[9]"

The Tribunal is not persuaded by the uncorroborated testimony of Mr. Van Essen that, pursuant to a telephone conversation with Mr. Kassem, the written agreement became conditional upon Mr. Kassem's inspection of the condition of the Mercedes-Benz in Toronto. Furthermore, condition No. 2 of the "Technessen Conditions of Sale" provides that "[t]here are no warranties or conditions or agreements, express or implied, statutory or otherwise ... other than as specifically contained herein."

The confusion as to when the Mercedes-Benz was sold, in other words, when the property in the Mercedes-Benz passed, arises from the fact that the Mercedes-Benz was paid for in December 1990, but not delivered to the purchaser until after January 2, 1991. The only indication provided as to the intention of Mr. Van Essen and Mr. Kassem regarding the passage of property is in condition No. 1 of the "Technessen Conditions of Sale" which provides that "title ... shall remain with the vendor ... until the entire purchase price is paid." What this condition means, in the Tribunal's view, is that it is not possible to pass title until the entire purchase price is paid. However, the payment of the entire purchase price does not, in and of itself, constitute passage of title.

The "Technessen Conditions of Sale" are silent with respect to the necessity for delivery, if at all, in order to transfer property rights in the Mercedes-Benz. The SOGA and the jurisprudence concerning the sale of goods confirm that delivery is not always a requirement for a sale to occur. Specifically, the definition of "sale" under section 1 of the SOGA contemplates that a sale "includes a bargain and sale as well as a sale and delivery." Furthermore, section 27 of the SOGA recognizes that parties may agree that payment of the price and delivery do not have to be concurrent. In *Pullman Trailmobile Canada Ltd. v. Hamilton Transport Refrigeration Ltd.*,[10] in considering the applicability of Rule 5 of section 19 of the SOGA[11] which covers contracts for the sale of unascertained or future goods, the Ontario High Court of Justice found that the property in refrigerated van trailers which were paid for by the purchaser, but which remained on the seller's premises, had passed to the purchaser. In reaching that conclusion, the Ontario High Court of Justice stated the following:

> *I am satisfied that the goods were in a deliverable state when they were received by the [seller from the manufacturer in the United States], and when the invoice therefor was sent out, in the sense that they were in a finished state and nothing further was required to be done by the [seller] to complete the contract of sale. The goods would also appear to have been appropriated to the contract by the seller with the assent of the buyer. The goods were crated under the name of the [purchaser], and were identified for delivery to*

9. *Supra*, note 3 at 31.
10. (1979), 96 D.L.R. (3d) 322.
11. R.S.O. 1970, c. 421.

> *the [purchaser]. The invoice described the goods in complete detail and the [purchaser] accepted that invoice and paid for the goods pursuant [to the contract].*[12]

The facts in this appeal are similar to those in *Pullman* in that the invoice to Mr. Kassem identifies the serial No. of the Mercedes-Benz, Mr. Kassem paid the full amount for the Mercedes-Benz in December 1990 and the Mercedes-Benz was in a deliverable state in December 1990, in that Mr. Van Essen did not have to do anything to it prior to it being delivered. All of these factors indicate, in the Tribunal's view, that the Mercedes-Benz was sold to Mr. Kassem prior to January 1, 1991.

The Tribunal finds that the facts in this appeal are distinguishable from the facts in *Jerome* in that the appellant was not required to make any repairs to the Mercedes-Benz as a condition of the sale.

The Tribunal acknowledges that a vehicle registration may, in some circumstances, be evidence of property rights. However, in the Tribunal's view, the vehicle registration for the Mercedes-Benz is not persuasive evidence of ownership or property rights, particularly since the vehicle registration was never in the appellant's name, although the evidence suggests that the appellant was the owner of the Mercedes-Benz before it was sold to Mr. Kassem.

Having determined that the appellant sold the Mercedes-Benz in December 1990, it cannot be said that the appellant held the Mercedes-Benz in its inventory as of January 1, 1991, "for sale" in the ordinary course of its commercial activity. The appellant is not, therefore, entitled to an FST inventory rebate in respect of the Mercedes-Benz.

In considering the appellant's entitlement to an FST inventory rebate for the five Dodge Caravans, the Tribunal notes that two of the vans, serial Nos. 1B7GK14R0LX250891 and 1B7GK14R9LX250887, were purchased, converted to "easy access" and sold to St. Catharines Association for Community Living and Pilgrim Transportation Services Ltd., respectively, by Freedom Motors. These facts demonstrate, in the Tribunal's view, that Freedom Motors, and not the appellant, held these vans for sale. Although the vans were registered in the appellant's name in December 1990 and appear in the appellant's "Schedule of Motor Vehicles (Held in Inventory)" as of January 1, 1991, there is no evidence that the appellant paid Freedom Motors for these vans nor any other evidence to indicate that the appellant acquired any property rights in the vans. Accordingly, the Tribunal is not persuaded that the appellant held these vans in its inventory. Rather, it was Freedom Motors that held these vans. The appellant is not, therefore, entitled to an FST inventory rebate for these two vans.

The van with serial No. 1B6GK14R0LX184900 was purchased from Markham Dodge Chrysler in the name of Freedom Motors, but was paid for by the appellant by cheque dated January 11, 1991. The Tribunal observes that the fourth condition on the reverse side of the

---

12. *Supra*, note 10 at 330. See, also, *Ferguson v. Eyer* (1918), 43 O.L.R. 190 at 199; and *Dixon v. Yates* (1833), 110 E.R. 806 (K.B.) at 816: "where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods ... The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

contract with Markham Dodge Chrysler provides that "[t]he title and right of property in the said motor vehicle shall not pass to the purchaser until the entire purchase price is paid in full." Since this van was not paid for before January 1, 1991, according to the terms of the agreement, title and right to that van could not pass. Therefore, the Tribunal concludes that the appellant did not hold this van in inventory for sale prior to January 1, 1991, and is not entitled to an FST inventory rebate.

Finally, with respect to the two Dodge Caravans with serial Nos. 1B6GK14R9LX193353 and 1B6GK14R3LX195020, which were paid for by the appellant and which were, prior to January 1, 1991, converted to "easy access" vehicles, the issue, in the Tribunal's view, is whether these Dodge Caravans were held by the appellant for sale separately in the ordinary course of its commercial activity as required by the definition of "inventory" under section 120 of the Act.

The Tribunal observes that, in two recent decisions, *Harry M. Gruenberg, Synoda Co. Reg'd v. The Minister of National Revenue*[13] and *Jostens Canada Ltd. and Jostens of Quebec Ltd. v. The Minister of National Revenue*,[14] it found that goods held for use in producing or assembling other goods were not held for sale separately to others in the ordinary course of the commercial activities of those respective companies. In the Tribunal's view, by extension, goods which have been used to produce or assemble other goods are not held for sale separately in the ordinary course of a commercial activity. Applying this view to the facts of this appeal, the Tribunal finds that, once the appellant had changes made to the Dodge Caravans, such as lowering the floor and adding ramps to convert them to "easy access" vans, it no longer held the Dodge Caravans in its inventory for sale separately in the ordinary course of its commercial activity. Rather, what the appellant held in its inventory for sale separately in the ordinary course of its commercial activity were "easy access" vans. The appellant is not, therefore, entitled to an FST inventory rebate in respect of these vans.

Accordingly, the appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
Raynald Guay
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

13. Canadian International Trade Tribunal, Appeal No. AP-92-252, April 5, 1994.
14. Canadian International Trade Tribunal, Appeal No. AP-92-195, April 28, 1994.