CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, October 17, 1994

Appeal No. AP-93-363

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

BETWEEN

JAMES GEORGE PALING **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

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-363

JAMES GEORGE PALING **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 that rejected the appellant's application for a federal sales tax inventory rebate in the amount of $1,620 in respect of plush toys, mirrors and posters used as prizes at carnivals. The appellant's application was initially rejected on the basis that the appellant was not registered for Goods and Services Tax purposes on January 1, 1991. However, in the notice of decision dated January 25, 1994, in addition to that reason, it is stated that the claim is denied on the basis that the goods in issue do not meet the requirements for claiming a federal sales tax inventory rebate as outlined in section 120 of the Excise Tax Act.

HELD: *The appeal is dismissed. The Tribunal is not persuaded that the appellant sells goods to customers who pay to play his games or that the appellant holds goods for sale. The appellant is providing entertainment or amusement for his customers, which includes the opportunity to play a game and the chance to win a prize. Although the appellant does sell goods to customers who wish to purchase them, but who do not want to play a game, the ordinary course of the appellant's business is to use goods as prizes for his games and not to hold goods in inventory for sale to customers who have neither paid to play one of his games nor won at one of his games.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*July 21, 1994*
Date of Decision:	*October 17, 1994*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Raynald Guay, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*James G. Paling, for the appellant* *Lyndsay Jeanes, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-363

JAMES GEORGE PALING **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, 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 that rejected the appellant's application for a federal sales tax (FST) inventory rebate in the amount of $1,620 in respect of plush toys, mirrors and posters used as prizes at carnivals. The appellant's application was initially rejected on the basis that the appellant was not registered for Goods and Services Tax (GST) purposes on January 1, 1991. However, in the notice of decision dated January 25, 1994, in addition to that reason, it is stated that the claim is denied on the basis that the goods in issue "do not meet the requirements for claiming an FST Inventory Rebate as outlined in section 120 of the Act."

The appellant operates games of chance, such as "Whackamo," which may be played by two or more customers. One of the customers always wins a prize from the appellant's selection of goods. However, the number of people playing the game determines the size and value of the prize. The appellant also operates other games which involve only one customer throwing darts at a board displaying small and large objects. In order to win a prize from the appellant's selection of goods, a customer must hit one of the objects with a dart. The games cost between $2 and $3 per person, and the amount that the appellant collects for each game directly determines the value of the prize obtained by the winning customer. The more it costs to play a game or the more the appellant collects per play, the higher the value of the prize which the customer can win. Generally, the prize that a customer wins is worth about one third of the total amount that the customers paid to play the game.

Should people wish to buy goods without playing a game, they can do so. Since there are no set prices, the appellant determines the price of the goods according to their value. However, he does not advertise goods for sale, since this would not be conducive to getting people to play the game.

The application of the following definition of "inventory" under section 120[2] of the Act is the focus of the dispute between the parties:

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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. These amendments were deemed to have come into force on December 17, 1990.

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> *"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.*

Under this definition, in order for the goods in issue to be considered "inventory," they must be (1) tax-paid goods,[3] (2) described in the person's inventory, (3) held for sale and (4) held for sale separately in the ordinary course of a commercial activity of the appellant.

The appellant submitted that all of the above requirements have been met. First, he stated that he acquired the goods in issue before 1991 and paid FST in respect of those goods, which was undisputed by the respondent.

Second, the appellant asserted that the goods in issue were described in his inventory. He stated that they were specifically identified and were valued according to their original cost. The appellant referred to his "Statement of Year End Earnings" for 1991. The statement showed that the appellant held $63,704.16 in stock, including $15,000.00 from 1989 and $5,000.00 from 1990. The appellant also produced an inventory list for 1990, showing each item purchased, the company from which each item was purchased, the number of each item in inventory and the cost per item.

Finally, the appellant submitted that the goods in issue were held for sale separately for a price by way of conditional sale. The appellant referred to the decision in *Rex v. Disappearing Propeller Boat Co. Ltd.*[4] which dealt with the meaning of "sales" in the *Special War Revenue Act, 1915*.[5] The High Court of Justice for Ontario determined that the word "sales" should be "construed in its widest sense, and includes a sale in which the transfer of the title to the thing sold is made dependent upon the payment of the price in full ... notwithstanding that the sale is conditional.[6]" The appellant also referred to the following definition of a "conditional sale" in the Black's Law Dictionary:[7] "one in which the transfer of title is made to depend on the performance of a condition, usually the payment of the price." The appellant submitted that there is a conditional sale because, in order to obtain goods at one of his games, each customer must satisfy two conditions: (1) pay money to play the game; and (2) win at the game.

The appellant submitted that, if he is denied the FST inventory rebate, he will be subjected to double taxation and will be put at a disadvantage relative to other competitors in the business, since he has already paid FST on the goods in issue and cannot offset this amount with the GST collected from his customers when they pay to play his games.

Counsel for the respondent agreed with the appellant's description of a conditional sale, but submitted that there is no conditional sale between the appellant and the people who play

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3. "Tax-paid goods" is defined as follows under section 120 of the Act:
   goods, acquired before 1991 by a person, that have not been previously written off in the accounting records of the person's business 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.
4. (1924), 26 O.W.N. 305 (H.C.).
5. S.C. 1915, c. 8.
6. *Supra*, note 4 at 306-7.
7. Sixth ed. (Minnesota: West Publishing Co., 1990) at 1338.

his games because the transfer of money is not conditional. The customer must pay the money in order to be given an opportunity to play the game. She argued that what is sold, if anything, is the chance to win one of the goods in issue. In counsel's view, the goods are held as an enticement for people to play the game and as a prize for winning at the game, and not for resale. Counsel submitted that the facts at issue were analogous to those in *Esso Petroleum Co. Ltd. v. Customs and Excise Commissioners*[8] in which the House of Lords found that coins being given away with purchases of certain amounts of gasoline were not produced for "sale." The House of Lords was equally divided in its reasons for deciding that Esso Petroleum Co. Ltd. did not produce the coins for "sale." Half of the majority found that there was an absence of a contractual obligation in relation to the coins. The other half of the majority found that the consideration for the transfer of the coins was not money, but was the undertaking by the customer to enter into a collateral contract to buy the appropriate amount of gasoline.

To further support her position that there was no sale of the goods in issue, counsel for the respondent referred to the appellant's GST registration form dated November 2, 1990, and signed by Ms. Darlene Paling, the appellant's wife. There is a check mark in the box marked "No" in response to question 13, which reads: "Do you have goods for resale?"

Notwithstanding the mathematical errors in the appellant's 1991 "Statement of Year End Earnings" and 1990 inventory list identified at the hearing, counsel for the respondent conceded that there was no issue as to whether the goods in issue were "tax-paid goods" or held in "inventory." As a result, the Tribunal only considered the remaining issue between the parties, that is, whether the goods in issue were held "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 [appellant]."

The Tribunal observes that the phrase "for sale" is not defined in the Act. The Ontario *Sale of Goods Act*[9] (the Ontario Act), which essentially codifies previous decisions of the courts relating to the sale of goods,[10] does provide some guidance to the Tribunal in interpreting the phrase "for sale." Section 2 of the Ontario Act provides that a "[s]ale and agreement to sell" is defined as "a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price;" this contract may be either absolute or conditional. There are, thus, two general features of a "sale" or "agreement to sell:" (1) the transfer of property in the goods; and (2) the payment of money for such goods.

After having considered the appellant's description of the nature of his business in light of section 2 of the Ontario Act, the Tribunal is not persuaded that the appellant sells goods to customers who pay to play his games or that the appellant holds goods for sale. In the Tribunal's view, one of the main elements, the payment of money for goods, is absent. The appellant is providing entertainment or amusement for his customers, which includes the opportunity to play a game and the chance to win a prize from the appellant's selection of goods. All customers must pay the appellant in order to play a game. However, only those customers who actually win at a game receive a prize. Given that only those customers who win at a game receive a prize in exchange for their money, it cannot be said that customers are paying to purchase goods.

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8. [1976] 1 W.L.R. 1 (H.L.).
9. R.S.O. 1990, c. S.1.
10. See, for example, *Mason & Risch Ltd. v. Christner* (1918), 46 D.L.R. 710 (O.H.C.), affirmed by (1920), 54 D.L.R. 653 (O.C.A.); and *Rex v. Gold Seal Limited* [1922] 2 W.W.R. 1219 (B.C.C.A.), reversing (1922), 63 D.L.R. 657 (B.C.S.C.).

The Tribunal cannot agree with the appellant's submission that there is a conditional sale between him and his customers and that the conditions for the sale of goods are that the customers pay the money and win at the game. In the Tribunal's view, if that were the case, then it would follow that, if a customer did not fulfil the conditions, that is, pay the money and win at the game, there would be no sale, and that customer would be reimbursed.

Although the appellant does sell goods to customers who wish to purchase them, but who do not want to play a game, he readily admits that he only sells a very small percentage of goods in this manner and does not encourage or promote such sales. Based on this evidence, the Tribunal concludes that the ordinary course of the appellant's business is to use goods as prizes for his games and not to hold goods in inventory for sale to customers who have neither paid to play one of his games nor won at one of his games.

Accordingly, the appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member