CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, March 22, 1995

Appeal No. AP-93-333

IN THE MATTER OF an appeal heard on September 22, 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 20, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

MICHELIN TIRES (CANADA) LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Desmond Hallissey
Desmond Hallissey
Member

Lise Bergeron
Lise Bergeron
Member

Nicole Pelletier
Nicole Pelletier
Acting Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-333

MICHELIN TIRES (CANADA) LTD. **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 an application for refund of federal sales tax. In order to obtain a full refund of federal sales tax paid on the purchase of imported tires, the appellant entered into an agreement with Uniroyal Goodrich Canada Inc., a licensed manufacturer, for the sale of the imported tires. The transaction took effect on December 28, 1990. On January 2, 1991, Uniroyal Goodrich Canada Inc. resold the imported tires to the appellant. The Minister of National Revenue rejected the appellant's refund application on the basis that it did not meet the requirements of the Excise Tax Act. The issue in this appeal is whether the appellant is entitled to a refund of federal sales tax paid on the imported tires as a result of the December 1990 transaction. More particularly, the Tribunal must determine whether the December 1990 transaction constitutes a "sale." If it is a "sale," the Tribunal must then determine whether it has jurisdiction to consider the applicability of the general anti-avoidance rule under section 274 of the Excise Tax Act to the circumstances of this case. If the Tribunal finds that it does have jurisdiction to consider the issue, it must then determine whether the general anti-avoidance rule applies to deny the appellant its refund under section 68.2 of the Excise Tax Act.

HELD: *The appeal is dismissed. The Tribunal is of the view that the December 1990 transaction was, in law, fully complete and that the imported tires were legitimately sold by the appellant to Uniroyal Goodrich Canada Inc. on December 28, 1990. As such, the December 1990 transaction constitutes a legally effective sale for purposes of section 68.2 of the Excise Tax Act. More particularly, in the Tribunal's view, a transaction may still be effectual although it has no business purpose other than a tax purpose. Furthermore, the December 1990 transaction was not a sham transaction. There was a true vendor-purchaser relationship between the appellant and Uniroyal Goodrich Canada Inc. The December 1990 transaction was clearly not a bailment. Furthermore, the evidence does not support a decision that the appellant and Uniroyal Goodrich Canada Inc. were so closely related that they constituted one economic entity and that they were not capable of giving, freely, a mutual assent.*

The Tribunal finds that it does have jurisdiction to consider the applicability of the general anti-avoidance rule to the circumstances of this case. Although there was a sale of the imported tires by the appellant to Uniroyal Goodrich Canada Inc., the Tribunal is of the opinion that all of the necessary conditions of section 274 of the Excise Tax Act have clearly been met and that the general anti-avoidance rule applies to the circumstances of this case to deny the appellant its refund under section 68.2 of the Excise Tax Act.

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Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*September 22, 1994*
Date of Decision:	*March 22, 1995*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Desmond Hallissey, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Joël J. Robichaud*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Dalton J. Albrecht and Richard B. Thomas, for the appellant* *Frederick B. Woyiwada, for the respondent*

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-333

MICHELIN TIRES (CANADA) LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
DESMOND HALLISSEY, 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 Minister) dated January 3, 1992, that rejected an application for refund of federal sales tax (FST) made on February 19, 1991, in the amount of $2,265,929.10. On March 12, 1992, the appellant served a notice of objection, which was disallowed by the Minister in a notice of decision dated October 20, 1993. At the hearing, counsel for the appellant and counsel for the respondent filed an agreed statement of facts.

The appellant, Michelin Tires (Canada) Ltd. (Michelin), is a Canadian corporation engaged in the business of manufacturing and distributing motor vehicle tires. Until August 1994, the appellant's head office was located in Dorval, Quebec. It is now located in Laval, Quebec.

Uniroyal Goodrich Canada Inc. (Uniroyal Goodrich) is a Canadian corporation that was formed by the amalgamation, in 1986, of Uniroyal Tire Ltd. and Uniroyal Goodrich Canada Inc. Uniroyal Goodrich is also engaged in the business of manufacturing and distributing motor vehicle tires. Its head office is located in Kitchener, Ontario.

On September 22, 1989, an affiliate of the appellant entered into an acquisition agreement to acquire the Uniroyal Goodrich group of companies in Canada, the United States and Mexico. This transaction was completed on May 2, 1990. As a result, Uniroyal Goodrich became an affiliate of the appellant.

Prior to 1991, the appellant imported finished motor vehicle tires for resale and remitted FST at the applicable rate, which, in 1990, was 13.5 percent. The sale price to the appellant's customers usually included an amount for FST, which was included in the cost of the tires.

The imported tires were physically different from the domestically manufactured tires. For example, the country of origin was imprinted on the goods. The imported tires were kept in a separate inventory for internal record-keeping purposes and were, therefore, easily identifiable.

In anticipation of the implementation of the Goods and Services Tax (GST), the federal government opened a GST Consumer Information Office. This office released a report on September 20, 1990, that

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

discussed the replacement of the FST with the GST and provided information to help consumers understand the effect that the transition might have on prices. A chart estimating the potential savings to consumers was included in the report.

During 1990, letters were sent to the appellant by its customers, providing instructions with respect to bidding procedures for the supply of merchandise as a result of the transition from the FST to the GST. The appellant responded by sending letters to its customers indicating the average FST included in the prices of its products in 1990. On December 14, 1990, the appellant announced that the price of its tires would be reduced across its entire product line in 1991 by the amount of tax saved as a result of the announced transition. On June 1, 1990, the federal government announced that it would issue inventory rebates of only 8.1 percent.

In order to obtain a full refund of FST paid on the imported tires, the appellant decided to sell them to Uniroyal Goodrich. Uniroyal Goodrich applied, under section 48 of the Act, for permission to expand its manufacturer's licence to be considered the manufacturer of tires marketed under the appellant's brand name and to be able to import or purchase these tires on an FST-exempt basis. The application was approved. On the application, it was stated that, during 1990, Uniroyal Goodrich could purchase approximately 180,000 tires from the appellant on a tax-exempt basis for the purpose of resale to the appellant or to third parties on the appellant's behalf in 1991. It also stated that the appellant would subsequently apply for a refund of FST based on the sale of the imported tires to Uniroyal Goodrich.

The appellant and Uniroyal Goodrich, therefore, entered into an agreement on November 16, 1990. It was signed by the respective parties on December 14 and 18, 1990, to be effective on December 28, 1990 (the December 1990 transaction). In consideration of $30,000 a week, the imported tires were held at the appellant's warehouses. Uniroyal Goodrich obtained insurance coverage for the period from December 27, 1990, to about January 3, 1991.

On January 2 and 4, 1991, Uniroyal Goodrich entered into a second agreement with the appellant to sell the imported tires back to the appellant as of the opening of business on January 2, 1991 (the January 1991 transaction). The parties filed an election made jointly under subsection 156(2) of the Act. As a result, the taxable supply made between them was deemed to have been made for no consideration and, therefore, no GST was collected on the sale of the imported tires from Uniroyal Goodrich to the appellant

On February 19, 1991, the appellant applied for a refund of FST in the amount of $2,265,929.10, which it had remitted as a result of the importation of the tires that it eventually sold to Uniroyal Goodrich. In December 1991, the appellant was informed by a representative of the Minister that its application for refund of FST would be rejected on the basis that the sale by the appellant to Uniroyal Goodrich was not a *bona fide* sale. On December 19, 1991, the appellant and Uniroyal Goodrich both filed applications for FST inventory rebates in the amount of $1,438,140.06. On April 7, 1992, the Minister allowed the appellant's application in the amount of $1,465,407.90, which included the amount of FST plus interest, and rejected Uniroyal Goodrich's application.

On January 19, 1994, Michelin appealed the Minister's decision dated October 20, 1993, that disallowed the appellant's objection and confirmed the determination that rejected the appellant's application for a refund. The appellant claims that it is entitled to the refund of $2,265,929.10 rather than the rebate of $1,465,407.90.

The issue in this appeal is whether the appellant is entitled, under section 68.2 of the Act, to a refund of FST paid on the imported tires as a result of the December 1990 transaction between the appellant and Uniroyal Goodrich. More particularly, the Tribunal must determine whether the December 1990 transaction constitutes a "sale" for the purposes of section 68.2 of the Act. In the event that the Tribunal decides that the December 1990 transaction does constitute a "sale," the Tribunal must then determine whether it has jurisdiction to consider the applicability of the general anti-avoidance rule (the GAAR) under section 274 of the Act to the circumstances of this case. If the Tribunal finds that it does have jurisdiction to consider the issue, it must then determine whether the GAAR applies to deny the appellant its refund under section 68.2 of the Act.

The Tribunal must first determine whether the December 1990 transaction constitutes a "sale" for the purposes of section 68.2 of the Act. Subsection 68.2(1)[2] of the Act provides as follows:

> *(1) Where tax under Part III or VI has been paid in respect of any goods and subsequently the goods are sold to a purchaser in circumstances that, by virtue of the nature of that purchaser or the use to which the goods are to be put or by virtue of both such nature and use, would have rendered the sale to that purchaser exempt or relieved from that tax under subsection 23(6), paragraph 23(8)(b) or subsection 50(5) or 51(1) had the goods been manufactured in Canada and sold to the purchaser by the manufacturer or producer thereof, an amount equal to the amount of that tax shall, subject to this Part, be paid to the person who sold the goods to that purchaser if the person who sold the goods applies therefor within two years after he sold the goods.*

Counsel for the appellant argued that all of the conditions of section 68.2 of the Act having been met, the appellant is entitled to a refund of FST on the sale of the imported tires to Uniroyal Goodrich. More specifically, FST was paid in respect of the imported tires on which the application for refund was based; the imported tires were legitimately sold to Uniroyal Goodrich on an FST-exempt basis; and the application was filed within two years of the sale.

Both parties agreed, and the Tribunal concurs, that two of the three conditions have been met. The controversy surrounds the second condition, i.e. whether the imported tires were legitimately sold by the appellant to Uniroyal Goodrich. The Tribunal is of the view that the onus is clearly on the appellant to establish that this condition has been met and that it is entitled to the refund claimed.[3]

The issue was characterized by counsel for the appellant as being whether the December 1990 transaction was a "sale at law" or whether it was a legally effective or legally completed sale, while counsel for the respondent suggested that the issue is whether the December 1990 transaction was a "genuine sale" and argued that there are certain formal and substantial factors that must be considered in resolving the issue. The Tribunal is of the view that, although counsel may have used different terminology, they have essentially addressed the same issue. In order to properly resolve the issue, the Tribunal relied on the decision of the Supreme Court of Canada in *Stubart Investments Limited. v. Her Majesty the Queen*.[4]

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2. S.C. 1993, c. 27.
3. *Assessment Commissioner v. Mennonite Home Association* (1972), [1973] S.C.R. 189 at 194.
4. [1984] 1 S.C.R. 536.

In *Stubart*, the Supreme Court of Canada had to determine whether a corporate taxpayer, with the avowed purpose of reducing its taxes, could establish an arrangement whereby future profits were routed through a sister subsidiary in order to avail itself of the latter's loss carry forward. The facts were quite straightforward and were well summarized in the judgment of Estey J. which read, in part, as follows:

> *The holding company, Finlayson Enterprises Limited, ... the 'parent company', incorporated the appellant in 1951. In 1962, the appellant purchased the assets of Stuart Brothers Company Limited which carried on the business of manufacturing and selling food flavourings and related products.... The appellant, at the time of this purchase, changed its original name to Stuart Brothers Limited in order to take advantage of the value of that name and the associated goodwill in the market. In 1969, the appellant again changed its name to the present name, Stubart Investments Limited.*
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> *The parent company, amongst its other subsidiaries, owned all of the shares of Grover Cast Stone Co. Ltd. (... 'Grover') which carried on the business of manufacturing and selling precast concrete products. By 1965, Grover had incurred substantial losses which were recognized as losses under the Income Tax Act.... In 1966, the tax advisers of the parent company established a plan whereby the assets of the appellant would be sold to Grover with effect January 1, 1966. Concurrent with the agreement of purchase and sale of these assets, Grover would appoint, by a separate agreement, the appellant as its agent to carry on the business for and to the account of Grover.*
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> *After [the] agreement of purchase and sale had been ... performed and closed, the appellant proceeded to carry on the business on behalf of Grover, and at the end of each of the fiscal years 1966, 1967 and 1968, the appellant paid over to Grover the net income realized from the business. Grover, in turn, reported this income under the Income Tax Act in its corporate tax returns for these three years. The Department of National Revenue subsequently reassessed the appellant, setting aside the entry transferring the net income to Grover, and charging such net income back to the taxable income of the appellant. It is from these assessments that this appeal was taken.*[5]

The Tax Appeal Board (now the Tax Court of Canada) had rejected the appeal on the ground that the transaction in question was a sham. The Federal Court-Trial Division dismissed the appeal because it was of the view that, when Grover's tax loss had been fully utilized, the business carried on by Stuart Brothers would have been sold back to Stuart Brothers by Grover. The Federal Court of Appeal dismissed the appeal on the basis that the sale between Grover and Stubart was incomplete and found it, therefore, unnecessary to determine whether the transaction was a sham.

The first question considered by the Supreme Court of Canada was whether the transaction between Stubart and Grover was an incomplete transaction. The Court noted that it was acknowledged by the parties that Stubart and Grover had completed 30 legal steps in the transfer of the business to Grover. The Court considered each of the matters to which the respondent asserted had not been attended in relation to the transfer of assets between the parties to the contract and found that none of these matters were sufficient to

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5. *Ibid*. at 541-42.

affect the commercial reality of the sale. As such, the Court held that the transaction had been legally completed.

The Tribunal must, therefore, determine whether the December 1990 transaction between the appellant and Uniroyal Goodrich was legally completed. Counsel for the appellant argued that the applicable law was that of the province of Quebec. As such, counsel referred the Tribunal to article 1472 of the *Civil Code of Lower Canada* (the Civil Code) and argued that all of the conditions of that article having been met, the December 1990 transaction was a legally completed sale. Counsel mentioned that the transaction would be considered a legally completed sale whether it occurred under the civil law jurisdiction of Quebec or under the common law jurisdiction of any of the other provinces, where the sale of goods legislation is virtually identical.

Clause 10 of the December 1990 agreement between the appellant and Uniroyal Goodrich provided that the "agreement shall be governed by and construed in accordance with the laws of the province of Quebec." The agreement was drafted and signed by the appellant in Montréal, Quebec. However, the agreement was signed by Uniroyal Goodrich at its head office in Kitchener. The imported tires were stored in different warehouses across the country.

Article 1472 of the Civil Code, provides that a "[s]ale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay for it." It also provides that a sale "is perfected by the consent alone of the parties, although the thing sold be not then delivered." There is a similar provision in the Ontario *Sale of Goods Act*[6] (the Ontario Act). Subsection 18(1) of the Ontario Act provides that "[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."

The evidence shows that the parties entered into an agreement for the sale of the imported tires on November 16, 1990. It was signed by the respective parties on December 14 and 18, 1990. The sale was to take effect on December 28, 1990. Uniroyal Goodrich leased warehouse space for storage purposes from the appellant, for which it paid $30,000 a week. It also obtained insurance coverage for the imported tires. A payment was made by Uniroyal Goodrich to the appellant in accordance with the terms of the agreement. A resolution of the appellant's board of directors was passed authorizing the sale of the imported tires, and a resolution of the board of directors of Uniroyal Goodrich was passed authorizing their purchase. The transaction was recorded as a sale in both parties' books of account. The imported tires were, at all material times, easily identifiable, both physically and in the parties' books of account.

The Tribunal is of the view that it was clearly the intention of the parties that property in the imported tires be transferred from the appellant to Uniroyal Goodrich on December 28, 1990. The legislation does not require that there be a physical transfer of the property from the vendor to the purchaser. In the Tribunal's view, the December 1990 transaction would, therefore, meet the requirements of both article 1472 of the Civil Code and subsection 18(1) of the Ontario Act. In the Tribunal's view, the documentation relating to the December 1990 transaction was prepared, executed and delivered as required.

As noted above, the Federal Court-Trial Division dismissed the appeal in *Stubart* because it was of the view that, when Grover's tax loss had been fully utilized, the business carried on by Stuart Brothers

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6. R.S.O. 1990, c. S.1.

would have been sold back to Stuart Brothers by Grover. The Federal Court-Trial Division found that "the directors of both companies never contemplated the transaction as a transfer of the Stuart assets nor a genuine sale." Estey J. of the Supreme Court of Canada made the following comment with respect to the finding of the Federal Court-Trial Division:

> *This reference is apparently to the memo of the solicitor for the appellant company to which reference has already been made, and which stated in part that when the tax loss has been fully utilized, "the business carried on by Stuart Brothers will be sold by Grover to Stuart Brothers". There is nothing in the record which amounts to an enforceable agreement or undertaking to reverse the sale, or even a commitment by an officer of either the appellant or Grover to do so. In the event, no such transfer occurred as the business was sold by Grover to an independent third party.*[7]

Faced with this commercial reality, the Supreme Court of Canada found that it was difficult to see how the transaction between Grover and Stubart was incomplete.

The December 1990 agreement between the appellant and Uniroyal Goodrich did not provide that the appellant was under any obligation to repurchase the imported tires from Uniroyal Goodrich. The application filed by Uniroyal Goodrich with the Department of National Revenue (Revenue Canada) for permission to expand its manufacturer's licence simply indicated that "[i]t is anticipated that during 1990 Uniroyal Goodrich could purchase approximately 180,000 tires from Michelin with an estimated value of $15.6 million.... Tires purchased by Uniroyal Goodrich from Michelin would either be resold to Michelin or sold to third parties on their behalf in 1991." In the Tribunal's view, this document did not create any obligation on the part of the appellant to repurchase the imported tires. The Tribunal is also of the view that the fact that Uniroyal Goodrich obtained insurance coverage for the imported tires for the period from December 27, 1990, to about January 3, 1991, did not create such an obligation. Finally, the resolutions of the boards of directors of the appellant and Uniroyal Goodrich did not indicate that the appellant was under any obligation to repurchase the imported tires or that Uniroyal Goodrich was under any obligation to resell them to the appellant.

In the Tribunal's view, there is nothing in the record which amounts to an enforceable agreement or undertaking to reverse the December 1990 transaction between the appellant and Uniroyal Goodrich, or even a commitment by an officer of either the appellant or Uniroyal Goodrich to do so. The only difference between the decision of the Supreme Court of Canada in *Stubart* and this case is that Michelin actually did repurchase the imported tires from Uniroyal Goodrich. However, the Tribunal is of the opinion that the fact that there was a repurchase does not affect the commercial reality of the December 1990 transaction nor does it render the December 1990 transaction incomplete.

As such, the Tribunal finds that the December 1990 transaction between the appellant and Uniroyal Goodrich was, in law, fully complete. It is, however, clear from the decision of the Supreme Court of Canada in *Stubart* that a transaction may still be found to be legally ineffective although it was, in law, fully complete.

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7. *Supra*, note 4 at 550-51.

Counsel for the appellant argued that although the Tribunal may be faced with a tax avoidance situation, it cannot ignore the fact that the December 1990 transaction was a legally effective sale. Relying on Lord Tomlin's decision in *Inland Revenue Commissioners v. Duke of Westminster*,[8] counsel argued that a taxpayer is allowed to arrange his or her affairs in order to pay the least amount of tax. Notwithstanding the fact that a taxpayer's sole motivation is tax avoidance, courts will not re-characterize a transaction in order to defeat its legal effect. Relying on the *Stubart* decision, counsel argued that a transaction may still be effectual although it has no business purpose other than a tax purpose. To rule otherwise would be a complete rejection of the principle enunciated by Lord Tomlin in *Inland*. Relying on the decision of the Tax Court of Canada in *Continental Bank of Canada and Continental Bank Leasing Corporation v. Her Majesty the Queen*,[9] counsel argued that, in tax law, form matters. It is the true relationship between parties that must govern.

Relying on comments of Dickson C.J. of the Supreme Court of Canada in *Her Majesty the Queen v. Phyllis Barbara Bronfman Trust*,[10] counsel for the respondent argued that the true commercial and practical nature of a taxpayer's transaction is to be ascertained through a common-sense appreciation of all the guiding features, rather than through tests based on the form of a transaction. The actual commercial and economic realities of a situation take precedence over the manipulation of a sequence of events to achieve the appearance of compliance with apparent prerequisites. This would be so even where deciding on the characterization of a transaction according to its true commercial and practical nature, rather than on some hypothetical characterization based on formalism that does not favour the taxpayer.

Relying on the Federal Court-Trial Division decision in *Haro Pacific Enterprises Limited v. Her Majesty the Queen*,[11] counsel for the respondent argued that, where assessment of a transaction in accordance with its commercial and economic realities leads to some characterization that is widely at odds with the formal appearance of the transaction, the characterization in accordance with the formal appearance might be considered artificial in the extreme and should be avoided.

As such, and in light of the commercial, economic and practical realities surrounding the December 1990 transaction, counsel for the respondent argued that to characterize the December 1990 transaction as a genuine sale, even though the formal requirements of a sale may have been met, would be artificial in the extreme.

Counsel for the respondent referred the Tribunal to several factors surrounding the December 1990 and the January 1991 transactions in support of his argument: (1) the appellant and Uniroyal Goodrich were closely related companies; (2) Uniroyal Goodrich applied for an expansion of its manufacturer's licence just three months before the end of the FST program; (3) the December 1990 transaction took effect on December 28, 1990, essentially the last business day of that year; (4) the profit realized by the appellant as a result of this transaction was purely nominal; (5) the board of directors of both parties passed resolutions authorizing the January 1991 transaction on December 31, 1990; (6) the January 1991 transaction took effect on January 2, 1991, the first business day of that year; (7) the funds for both transactions appeared to have

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8. [1936] A.C. 1.
9. Unreported, Court File Nos. 91-683(IT)G and 91-684(IT)G, August 4, 1994.
10. [1987] 1 S.C.R. 32.
11. 90 D.T.C. 6583, Court File No. T-2059-86, September 5, 1990.

been transferred on the same day, i.e. January 2, 1991; and (8) the profit realized by Uniroyal Goodrich as a result of the January 1991 transaction was also purely nominal.

Counsel for the respondent identified the following additional factors, which he characterized as factors relating to the intervening period between the December 1990 transaction and the January 1991 transaction, that should be taken into account by the Tribunal: (1) the same imported tires were the subject of both transactions; (2) Uniroyal Goodrich had the imported tires insured by simply endorsing an existing insurance policy; and (3) the endorsement stated that the policy covered $20,000,000 worth of tires that Uniroyal Goodrich purchased from the appellant for the period from December 27, 1990, to about January 3, 1991.

In *Stubart*, although Wilson J. agreed with the majority, she wrote separate reasons, which read, in part, as follows:

> *I am also of the view that the business purpose test and the sham test are two distinct tests. A transaction may be effectual and not in any sense a sham (as in this case) but may have no business purpose other than the tax purpose. The question then is whether the Minister is entitled to ignore it on that ground alone. If he is, then a massive inroad is made into Lord Tomlin's dictum that "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be": Inland Revenue Commissioners v. Duke of Westminster, [1936] A.C. 1, at p. 19. Indeed, it seems to me that the business purpose test is a complete rejection of Lord Tomlin's principle.*
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> *I think Lord Tomlin's principle is far too deeply entrenched in our tax law for the courts to reject it in the absence of clear statutory authority. No such authority has been put to us in this case.*[12]

Estey J. conducted a detailed review of the jurisprudence in this area of tax law and came to the same conclusion as Wilson J. He stated the following:

> *I would therefore reject the proposition that a transaction may be disregarded for tax purposes solely on the basis that it was entered into by a taxpayer without an independent or bona fide business purpose.*[13]

As such, the Tribunal is of the opinion that it is clearly established in Canadian law that a transaction may still be effectual although it has no business purpose other than a tax purpose. No authority brought to the Tribunal's attention suggests that the law, in Canada, has changed since the decision of the Supreme Court of Canada in *Stubart*.

The Tribunal is of the view that the sole purpose of the appellant and Uniroyal Goodrich in entering into the December 1990 transaction was to allow the appellant to obtain a full refund of FST paid on the imported tires. There was absolutely no *bona fide* business purpose to this transaction. This conclusion is

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12. *Supra*, note 4 at 540.
13. *Supra*, note 4 at 575.

supported by the factors, to which counsel for the respondent referred, surrounding the December 1990 and January 1991 transactions and by the factors relating to the intervening period between these two transactions. However, the fact that the December 1990 transaction had no purpose other than a tax purpose does not render it legally ineffective. To rule otherwise would be a complete rejection of the principle enunciated by Lord Tomlin in *Inland* that "[e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be."

In the Tribunal's view, the comments of Dickson C.J. of the Supreme Court of Canada in *Bronfman*, to which counsel for the respondent referred, were incidental. Furthermore, Dickson C.J. did not refer specifically to the business purpose test nor to the *Stubart* case. In the Tribunal's view, the comments of Dickson C.J. related more to the issue of "substance over form," i.e. whether courts should consider the substance rather than the form of a transaction in determining whether it is legally effective. Recently, in *Continental Bank*, Bowman J. of the Tax Court of Canada conducted a detailed review of the jurisprudence in this area of tax law and concluded the following:

> *The principle to be deduced from these authorities is simply this: the essential nature of a transaction cannot be altered for income tax purposes by calling it by a different name. It is the true legal relationship, not the nomenclature that governs. The Minister, conversely, may not say to the taxpayer "You used one legal structure but you achieved the same economic result as that which you would have had if you used a different one. Therefore I shall ignore the structure you used and treat you as if you had used the other one".*[14]

The Tribunal is of the view that, in this case, there was a true vendor-purchaser relationship between the appellant and Uniroyal Goodrich. Therefore, the Minister should not be able to call the December 1990 transaction by a different name in order to deny the appellant its refund under section 68.2 of the Act.

Counsel for the appellant argued that the December 1990 transaction was not a "sham transaction." In support of this argument, counsel referred the Tribunal to the definition of "sham" enunciated by Lord Diplock in *Snook v. London and West Riding Investments Ltd.*[15] and adopted by the courts in Canada on many occasions. Counsel argued that, in the present case, there is no evidence to support a conclusion by the Tribunal that the December 1990 transaction between the appellant and Uniroyal Goodrich was a sham.

Counsel for the respondent argued that the December 1990 transaction was a sham. According to counsel, the *Stubart* case set out certain guidelines in determining whether a transaction should be considered a sham. Counsel argued that, when considering all of the facts in the present case in light of these guidelines, the Tribunal should find that the December 1990 transaction was a sham. According to counsel, in addition to the December 1990 transaction not having a *bona fide* business purpose, beneficial ownership in the imported tires was not, in fact, transferred to Uniroyal Goodrich because it was clearly the intention of the parties to transfer them back to the appellant. Furthermore, the transaction was very shortly thereafter reversed by the January 1991 transaction, and the purported tax benefits arose immediately upon the completion of the December 1990 transaction.

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14. *Supra*, note 9 at 27-28.
15. [1967] 2 Q.B. 786.

Both the Supreme Court of Canada in *Stubart* and the Tax Court of Canada in *Continental Bank* quoted from the judgment of Lord Diplock in *Snook* to determine the appropriate standard to be applied in deciding whether a transaction constitutes a sham transaction. Lord Diplock enunciated the principle as follows:

> *[A] "sham," ... means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.*[16]

The Supreme Court of Canada applied this definition to the facts of the case in *Stubart* and concluded the following:

> *The transaction and the form in which it was cast by the parties and their legal and accounting advisers cannot be said to have been so constructed as to create a false impression in the eyes of a third party, specifically the taxing authority. The appearance created by the documentation is precisely the reality. Obligations created in the documents were legal obligations in the sense that they were fully enforceable at law. The courts have thus far not extended the concept of sham to a transaction otherwise valid but entered into between parties not at arm's length. The reversibility of the transaction by reason of common ownership likewise has never been found, in any case drawn to the Court's attention, to be an element qualifying or disqualifying the transaction as a sham.... There is, in short, a total absence of the element of deceit, which is the heart and core of a sham. The parties, by their agreement, accomplish their announced purpose. The transaction was presented by the taxpayer to the tax authority for a determination of the tax consequence according to the law. I find no basis for the application in these circumstances of the doctrine of sham as it has developed in the case law of this country.*[17]

Similarly, the Tax Court of Canada in *Continental Bank* applied the definition of "sham" enunciated by Lord Diplock to the facts before it and concluded that the transaction, in that case, did not constitute a "sham transaction." Bowman J. made the following comment:

> *If the legal relationships are binding and are not a cloak to disguise another type of legal relationship they are not a sham, however much the tax result may offend the Minister or, for that matter, the court, and whatever may be the overall ulterior economic motive. When something is a sham the necessary corollary is that there is behind the legal facade*

16. *Ibid*. at 802; *supra*, note 8 at 19-20; and, in part, *supra*, note 4 at 572.
17. *Supra*, note 4 at 572-73.

> *a different real legal relationship. If the legal reality that underlies the ostensible legal relationship is the same as that which appears on the surface, there is no sham.*[18]

In the present case, the Tribunal is clearly of the view that the December 1990 transaction between the appellant and Uniroyal Goodrich was not a sham transaction. There existed a legal vendor-purchaser relationship between the appellant and Uniroyal Goodrich on December 28, 1990, and, again, on January 2, 1991. There was a total absence of deceit involved. Indeed, the letter sent by Uniroyal Goodrich to Revenue Canada requesting an expansion of its manufacturer's licence indicated the likely intention of the parties. The fact that the appellant repurchased the imported tires from Uniroyal Goodrich does not render the transaction a sham. Furthermore, the fact that the parties to the transaction were closely related companies is of no consequence. As mentioned by Wilson J. in *Stubart*, "the business purpose test and the sham test are two distinct tests." As such, although the Tribunal was of the view that the factors, to which counsel for the respondent referred, established that the December 1990 transaction had no *bona fide* business purpose, they do not establish that the December 1990 transaction was a sham.

Counsel for the respondent submitted that, where the parties' intention is to have precisely the same goods returned to the original vendor, there is no legal transfer of property and, therefore, there is no sale. Relying on the Ontario Court of Appeal decision in *Crawford v. Kingston and Johnston*,[19] counsel argued that such a transaction is more properly regarded as a bailment agreement rather than a sale agreement.

In *Crawford*, Mackay J.A. of the Ontario Court of Appeal enunciated the principle that must be applied in order to determine whether a transaction constitutes a bailment. It reads, in part, as follows:

> *Whenever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject-matter in its original or altered form, this is a transfer of property for value - - it is a sale and not a bailment.*
>
> *When the original chattel delivered is to be returned in the same or an altered form the title does not pass but the transaction constitutes a bailment with the title in the bailor, but if the transaction as made by the contract between the parties does not require the party receiving the chattel to return it in its original or an altered form but permits the possessor to return another chattel of equal value or to pay the money value thereof, the relation of vendor and purchaser is created and the title to the property passes to him and is in him.*[20]

The December 1990 agreement between the appellant and Uniroyal Goodrich did not provide that Uniroyal Goodrich had to return the imported tires in any form to the appellant or that the appellant had to repurchase them from Uniroyal Goodrich. The Tribunal is, therefore, of the view that property in the imported tires passed from the appellant to Uniroyal Goodrich on December 28, 1990, and that the transaction was clearly not a bailment.

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18. *Supra*, note 9 at 21-22.
19. [1952] O.R. 714.
20. *Ibid*. at 717.

The Tribunal notes that, recently, the Federal Court of Appeal, in *Gay Lea Foods Co-operative Ltd. v. Her Majesty the Queen*,[21] found that a contract for the purchase of butter by the Canadian Dairy Commission from a taxpayer, where the taxpayer covenanted to repurchase the butter at a later date, constituted a sale for purposes of the *Income Tax Act*.[22] The Court held that the wording of the contract was clear and unequivocal, in that title in the butter passed from the taxpayer to the Canadian Dairy Commission. The Court did not consider whether the transaction was a bailment. As such, the Tribunal is not convinced that, even if the December 1990 agreement between the appellant and Uniroyal Goodrich had provided that the imported tires would be repurchased by the appellant at a later date, this would have rendered the December 1990 transaction a bailment instead of a sale.

Counsel for the respondent also argued that the appellant and Uniroyal Goodrich were so closely related that they constituted one economic entity. As such, no real sale can be said to have taken place. In support of this argument, counsel referred to the Tribunal's decision in *The Geo. Cluthé Manufacturing Company Limited v. The Minister of National Revenue*.[23]

In *Cluthé*, the Tribunal relied on the decision of the Supreme Court of Canada in *Colgate-Palmolive-Peet Company, Limited v. His Majesty the King*,[24] where Cannon J. said that: "[i]n order to effect a sale, it is manifest from the general principles which govern all contracts that it requires two parties capable of giving, freely, a mutual assent.[25]" The Tribunal held that there was an abundance of evidence to indicate that Cluthé Sales (Waterloo) Ltd. (Cluthé Sales) and The Geo. Cluthé Manufacturing Company Limited (Cluthé Manufacturing), the two parties to the transaction, were in fact one and the same company. For example, they shared the same premises, phone numbers and address; Cluthé Manufacturing produced T4/T4A slips for employees of both companies; Cluthé Manufacturing insured the assets of both companies; and, if Cluthé Manufacturing purchased supplies, Cluthé Sales often paid for those goods. There were also several other factors to which the Tribunal referred in support of its conclusion. As such, although Cluthé Manufacturing and Cluthé Sales were two separate legal entities, they were not, for purposes of determining whether sales occurred between them, two parties capable of giving, freely, a mutual assent.

Counsel for the respondent referred to the fact that the appellant and Uniroyal Goodrich had one director in common when the December 1990 transaction took place. The evidence also shows that, as a result of a transaction completed on May 2, 1990, Uniroyal Goodrich became an affiliate of the appellant. In the Tribunal's view, this evidence does not support a finding that the appellant and Uniroyal Goodrich were so closely related that they constituted one economic entity and that they were not capable of giving, freely, a mutual assent. The evidence that was before the Tribunal in *Cluthé* was much more convincing than what was brought to the Tribunal's attention in the present case in support of such a proposition.

The Tribunal notes that, recently, in cases such as *Stubart, Her Majesty the Queen v. Irving Oil Limited*[26] and *Consolidated-Bathurst Limited v. The Queen*,[27] the courts have found that transactions can be

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21. 94 D.T.C. 6285, Federal Court - Trial Division, Court File No. T-2179-87, February 10, 1994.
22. R.S.C. 1985 (5th Supp.).
23. Appeal No. 3031, June 5, 1989.
24. [1933] S.C.R. 131.
25. *Ibid*. at 138.
26. 91 D.T.C. 5106, Federal Court of Appeal, Court File No. A-592-88, February 18, 1991.
27. (1986), [1987] 2 F.C. 3.

legally effective notwithstanding the fact that they have taken place between closely related parties. For example, in *Stubart*, the Supreme Court of Canada held that the transaction between Stubart and Grover was a legally effective sale, even though both parties were subsidiaries of the same parent company.

Finally, relying on *Bronfman* and *Continental Bank*, counsel for the respondent argued that, if the Tribunal does not find any of the above arguments conclusive, it is entitled to consider all of them together to determine whether the December 1990 transaction was a genuine sale for purposes of section 68.2 of the Act. More specifically, counsel referred to the following passage of Bowman J. in *Continental Bank*:

> *In cases of this type expressions such as sham, cloak, alias, artificiality, incomplete transaction, simulacrum, unreasonableness, object and spirit, substance over form, bona fide business purpose, step transaction, tax avoidance scheme and, no doubt, other emotive and, in some cases, pejorative terms are bandied about with a certain abandon. Whatever they may add, if anything, to a rational analysis of the problem, apart from a touch of colour in an otherwise desiccated landscape, they do not exist in separate watertight compartments. They are all merely aspects of an attempt to articulate and to determine where "acceptable" tax planning stops and fiscal gimmickry starts.*[28]

In the Tribunal's view, this passage does not support the proposition that it may consider all of the arguments raised by counsel for the respondent together to determine whether the December 1990 transaction was a legally effective sale for purposes of section 68.2 of the Act. Bowman J. certainly did not address the issue in *Continental Bank* in any such manner. Rather, Bowman J. considered each of the arguments raised by counsel for the respondent individually in determining that the transaction between the parties was legally effective for purposes of the *Income Tax Act*. The Tribunal has also found no support for this proposition in *Bronfman*.

For all of the above reasons, the Tribunal finds that the imported tires were legitimately sold by the appellant to Uniroyal Goodrich on December 28, 1990. As such, the December 1990 transaction constitutes a legally effective sale for purposes of section 68.2 of the Act.

Having determined that the December 1990 transaction between the appellant and Uniroyal Goodrich does constitute a legally effective sale for purposes of section 68.2 of the Act, the Tribunal must now determine whether it has jurisdiction to consider the applicability of the GAAR under section 274 of the Act to the circumstances of this case and, if so, whether the GAAR applies to deny the appellant its refund under section 68.2 of the Act.

Subsection 68.2(2) of the Act provides as follows:

> *(2) Section 274 applies, with such modifications as the circumstances require, to any transaction*
>
> *(a) that is a sale of goods that would give rise to the application of, or that is the basis of an application under, subsection (1), and*
>
> *(b) that takes place after December 17, 1990 and before 1991,*

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28. *Supra*, note 9 at 19.

and for that purpose, every reference in that section to "an assessment, a reassessment or an additional assessment" shall be read as a reference to "an assessment, a reassessment, an additional assessment, a determination or a redetermination".

For clarity, the Tribunal finds it necessary to reproduce all of section 274 of the Act, which provides as follows:

(1) In this section,

"tax benefit" means a reduction, an avoidance or a deferral of tax or other amount payable under this Part or an increase in a refund or rebate of tax or other amount under this Part;

"tax consequences" to a person means the amount of tax, net tax, input tax credit, rebate or other amount payable by, or refundable to, the person under this Part, or any other amount that is relevant to the purposes of computing that amount;

"transaction" includes an arrangement or event.

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that include that transaction.

(3) An avoidance transaction means any transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or

(b) that is part of a series of transactions, which series, but for this section, would result directly or indirectly in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

(4) For greater certainty, subsection (2) does not apply in respect of a transaction where it may reasonably be considered that the transaction would not result, directly or indirectly, in a misuse of the provisions of this Part or in an abuse having regard to the provisions of this Part (other than this section) read as a whole.

(5) Without restricting the generality of subsection (2),

(a) any input tax credit or any deduction in computing tax or net tax payable may be allowed or disallowed, in whole or in part,

(b) any such credit or deduction or a part thereof may be allocated to any person,

(c) the nature of any payment or other amount may be recharacterized, and

(d) the tax effects that would otherwise result from the application of other provisions of this Part may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

(6) Where, with respect to a transaction, a notice of assessment, reassessment or additional assessment involving the application of subsection (2) with respect to the transaction has been sent to a person, any person (other than a person to whom such a notice has been sent) shall be entitled, within one hundred and eighty days after the day of mailing of the notice, to request in writing that the Minister make an assessment, a reassessment or an additional assessment, applying subsection (2) with respect to that transaction.

(7) Notwithstanding any other provision of this Part, the tax consequences to any person following the application of this section shall only be determined through a notice of assessment, reassessment or additional assessment involving the application of this section.

(8) On receipt of a request by a person under subsection (6), the Minister shall, with all due dispatch, consider the request and, notwithstanding subsections 298(1) and (2), assess, reassess or make an additional assessment with respect to the person, except that an assessment, a reassessment or an additional assessment may be made under this subsection only to the extent that it may reasonably be regarded as relating to the transaction referred to in subsection (6).

Counsel for the appellant argued that, because the Minister did not indicate in the determination or in the decision that the appellant's application for a refund under section 68.2 of the Act was rejected on the basis of the GAAR, the Tribunal does not have jurisdiction to consider this issue. According to counsel, section 16 of the *Canadian International Trade Tribunal Act*[29] does not give the Tribunal the power to apply the GAAR. Counsel argued that the Tribunal can only agree or disagree with the Minister's assessment or determination and that it cannot take an administrative action on behalf of the Minister.

Section 68.2 of the Act was amended by legislation which was assented to on June 10, 1993.[30] The general rule is that legislation will not apply retroactively unless it is expressly provided in an act that it will have such application or that such application is necessary by implication.[31] It was expressly provided in the statute amending section 68.2 that subsection 68.2(2) was deemed to have come into force on December 17, 1990.[32] Paragraph 68.2(2)(*b*) limited the application of section 274 to transactions that took place after December 17, 1990, and before 1991. As indicated earlier, the December 1990 transaction

29. R.S.C. 1985, c. 47 (4th Supp.).
30. *Supra*, note 2.
31. *Gustavson Drilling (1964) Limited. v. The Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 at 279.
32. *Supra*, note 2, s. 2(2).

between the appellant and Uniroyal Goodrich, which is the alleged offensive transaction, took effect on December 28, 1990. It was, therefore, subject to the GAAR.

The notice of determination that rejected the appellant's application for refund was dated January 3, 1992. At that time, the Minister would not have been aware that the GAAR could be applied to deny the appellant its refund under section 68.2 of the Act. It would, therefore, have been impossible to make reference to the GAAR in the determination. The Minister could have done so, however, on October 20, 1993, the date on which the notice of decision was issued. The Tribunal must, therefore, determine whether the Minister is precluded from raising the GAAR at this stage of the proceedings because the notice of decision did not indicate that the appellant's application for refund was being rejected on the basis of the GAAR.

In *Louis Riendeau v. Her Majesty the Queen*,[33] the Minister reassessed the taxpayer under subsection 74(5) of the *Income Tax Act*. In disallowing the notice of objection served by the taxpayer, the Minister acknowledged that subsection 74(5) had been repealed and purported to rely on other sections of the *Income Tax Act*. The Tax Court of Canada vacated the Minister's reassessment. The Federal Court-Trial Division found that, as a matter of law, in the absence of some substantial and fundamental error on the Minister's part, the Minister was entitled to confirm his reassessment as he had done, even though it had originally been based upon a repealed subsection of the *Income Tax Act*.

The taxpayer appealed to the Federal Court of Appeal. The taxpayer's appeal was dismissed. The Court found that a taxpayer's liability to pay tax is just the same whether a notice of assessment is mistaken or is never sent at all. Furthermore, it matters little under what section of the *Income Tax Act* an assessment is made. What does matter is whether tax is due. The Court was of the view that the Minister's mental process in making an assessment cannot affect a taxpayer's liability to pay the tax imposed by the *Income Tax Act* itself and that the Minister may correct a mistake.[34]

In this case, the Minister rejected the appellant's application for a refund on the basis that it did not meet the requirements of the Act. Relying on *Riendeau*, the Tribunal is of the view that the Minister's mental process in determining whether an application for refund of FST should be allowed cannot affect the appellant's obligation to remit FST imposed by the Act. This obligation is created by the Act, not by a notice of determination or assessment. The Tribunal is, therefore, of the view that the Minister is not precluded from raising the GAAR at this stage of the proceedings simply because the determination or decision did not indicate that the appellant's application for a refund was rejected on the basis of the GAAR.

Counsel for the appellant argued that the situation with respect to the GAAR is different and that, under subsection 274(7) of the Act, there is a legislated obligation on the Minister to inform the taxpayer at the time of the assessment or reassessment (or under subsection 68.2(2) of the Act at the time of the determination or re-determination) that he is applying the GAAR. The Tribunal is not persuaded that subsection 274(7) of the Act creates an obligation on the Minister that is any different from his normal obligation to inform the taxpayer of the reason why an application for refund is being rejected. Subsection 274(7) of the Act simply indicates that, if the GAAR is to be applied, it must be done by means of a notice of assessment, reassessment, determination or re-determination. In the Tribunal's view, this

33. 91 D.T.C. 5416, Federal Court of Appeal, Court File No. A-639-89, June 17, 1991.
34. *Ibid*. at 5417.

obligation is no different from the obligation to determine tax liability through such means under other sections of the Act. In any event, as noted earlier, the Minister could not have been aware at the time of the notice of determination that the GAAR could be applied to deny the appellant its refund. Furthermore, subsections 274(7) and 68.2(2) of the Act do not provide that the Minister might have such an obligation when issuing a notice of decision.

Counsel for the appellant also argued that, under subsection 274(6) of the Act, there is an obligation on the Minister to inform persons, other than the taxpayer, at the time of the assessment or reassessment (or under subsection 68.2(2) of the Act at the time of the determination or re-determination) that the GAAR is being applied, so that such persons may request that the Minister make a reassessment (or, under subsection 68.2(2) of the Act, a re-determination) applying the GAAR. According to counsel, because such a notice was not given in this case, the Tribunal does not have jurisdiction to consider whether the GAAR can apply to deny the appellant its refund.

In *Sonko v. Canada (Employment and Immigration, Adjudicator)*,[35] the applicant challenged a deportation order made against him by the adjudicator. His only argument was that the adjudicator was not competent to resume the inquiry because it was not shown that the Minister had informed the senior immigration officer, who conducted the examination under oath, of the determination, as required by subsection 45(5) of the *Immigration Act, 1976*.[36] The Federal Court of Appeal found that notification of the Minister's determination was not a condition precedent to the exercise of the adjudicator's jurisdiction. Only the final determination on the claim for refugee status allowed the adjudicator to resume the inquiry. The Court held that, at most, the Minister's failure to give notice of the determination under subsection 45(5) of the *Immigration Act, 1976* might be a breach of one of the rules of natural justice, a breach on which a party who is not affected by it could not rely. The applicant was informed of the Minister's decision and could not complain of any alleged failure to notify the senior immigration officer.[37]

As such, the Tribunal is of the view that any failure on the part of the Minister to give notice to any person, other than the taxpayer, that the GAAR is being applied does not deprive the Tribunal of its jurisdiction to consider whether the GAAR should be applied to deny the appellant its refund. The notice to other persons is not a condition precedent to the exercise of the Tribunal's jurisdiction. Although this might be considered a breach of one of the rules of natural justice, the Tribunal is of the view that the appellant cannot rely on this possible breach, as the appellant is not the party that would be affected by it. The appellant was informed of the Minister's decision that its application for refund of FST had been rejected on the basis that the requirements of the Act had not been met. Furthermore, the appellant was given notice that the Minister was applying the GAAR to deny its refund when it received the respondent's brief. It was then given the opportunity to file a supplementary brief in order to address the arguments raised by the respondent. As such, the Tribunal is of the view that the appellant has not been prejudiced in any way.

For all of the above reasons, the Tribunal is of the view that it does have jurisdiction to consider the applicability of the GAAR to the circumstances of this case. The Tribunal must now determine whether the GAAR applies to deny the appellant its refund under section 68.2 of the Act.

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35. Federal Court of Appeal, Court File No. A-545-87, October 15, 1987.
36. S.C. 1976-77, c. 52.
37. *Supra*, note 35.

Counsel for the appellant argued that the GAAR is not applicable to the circumstances of this case because: (1) the appellant would not have obtained any tax benefit, the refund having been passed to the appellant's clients; (2) the transaction had a *bona fide* business purpose; and (3) there was no misuse of section 68.2 of the Act or abuse of the Act as a whole. Counsel for the respondent argued that the December 1990 transaction was an avoidance transaction within the meaning of section 274 of the Act. As such, the refund was rightfully denied.

As indicated earlier, the impugned transaction is clearly the December 1990 transaction between the appellant and Uniroyal Goodrich. The January 1991 transaction is but one of many factors to be considered in determining the purpose of the December 1990 transaction. The December 1990 transaction took effect on December 28, 1990. It therefore falls within the provisions of subsection 68.2(2) of the Act and is subject to the GAAR.

Section 274 of the Act provides that a transaction will be an avoidance transaction if it is a transaction or one of a series of transactions that, except for that section, would result in a tax benefit, unless it may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

The evidence shows that the appellant imported tires and remitted FST at the applicable rate of 13.5 percent. As early as June 1, 1990, the appellant was informed by the federal government that, as a result of the transition from the FST to the GST, licensed manufacturers would be granted inventory rebates of only 8.1 percent. This meant that the appellant would not obtain the full refund of FST paid on the purchase of the imported tires. Notwithstanding this, on December 14, 1990, the appellant announced to its customers that it would be reducing its prices in 1991. The appellant, a licensed manufacturer, therefore, entered into an agreement to sell its entire inventory of imported tires to another licensed manufacturer, Uniroyal Goodrich. Presumably, the appellant knew that such a transaction would entitle it to a 13.5 percent refund rather than to an 8.1 percent inventory rebate.

The Tribunal is of the view that the December 1990 transaction would clearly have resulted in a tax benefit to the appellant, i.e. it would have obtained a refund of 13.5 percent, instead of a rebate of 8.1 percent, representing a difference of over $800,000. The appellant chose to reduce its 1991 prices knowing that it would only obtain an 8.1 percent inventory rebate. Although other information provided by the federal government might have indicated otherwise, in light of this evidence, the Tribunal finds it difficult to accept the argument put forward by counsel for the appellant that the appellant was induced by the federal government to reduce its 1991 prices and that it would not have obtained a tax benefit as a result of the December 1990 transaction because the proceeds of the refund would have been passed to its customers. At the end of December 1990, the appellant, as a licensed manufacturer, would have been in the same position as other licensed manufacturers that held goods in inventory.

As indicated earlier, the Tribunal is of the view that the sole purpose of the appellant in entering into the December 1990 transaction was to allow it to obtain a full refund of FST paid on the imported tires. There was absolutely no *bona fide* business purpose to this transaction other than to obtain a tax benefit. In the Tribunal's view, there is an abundance of evidence to support this conclusion. Counsel for the respondent referred to this evidence as factors surrounding the December 1990 and the January 1991 transactions and factors relating to the intervening period between these two transactions. As indicated earlier, the Tribunal is of the view that the evidence shows that, although there was no legal obligation to do so, it was the intention

of the parties, when they entered into the December 1990 transaction, to have the imported tires resold to the appellant. The December 1990 transaction was, therefore, clearly an avoidance transaction.

Counsel for the appellant argued that there is a legal onus on the respondent to show that there has been a misuse of section 68.2 of the Act or an abuse of the Act as a whole and that the respondent has not met this onus. In support of their argument, counsel for the appellant referred the Tribunal to such cases as *Wally Fries v. Her Majesty the Queen*[38] and *Johns-Manville Canada Inc. v. Her Majesty the Queen*.[39] According to counsel for the respondent, such an onus is on the appellant. However, to the extent that there might be an onus on the respondent, counsel for the respondent argued that it had been met.

Having reviewed the *Wally Fries* and the *Johns-Manville* cases, the Tribunal is unable to find any clear support for the proposition of counsel for the appellant. It is settled law that the burden of proof in challenging an assessment or a determination of the Minister rests upon the taxpayer.[40] The Minister, typically, bases an assessment or a determination on some assumptions and, then, it is up to the taxpayer who has knowledge of the underlying facts to rebut these assumptions. The Tribunal notes, however, that recent case law suggests that the onus may sometimes shift to the Minister where no assumptions have been pleaded or where some or all of the pleaded assumptions have been successfully rebutted. In such a case, the Minister may bear the ordinary burden to prove the facts which support a position unless those facts have already been put in evidence by the taxpayer.[41]

In determining whether there was a misuse of sections 68.2 and 48 of the Act, or an abuse of the Act as a whole, the Tribunal referred to GST-Memorandum 500-6-9[42] (the Memorandum). Paragraph 14 of the Memorandum provides the following:

> *Where the tax consequence of a transaction is dependent upon an interpretation of specific provisions of the Act and this dependence is such that the overall intent of the provisions or the Act is not met, then the transaction is considered to be a misuse or abuse of the Act. Transactions that rely upon the strict wording of a provision to gain a tax benefit where none was intended and, therefore, defeat the purpose of the provision, would also be a misuse or abuse of the legislation.*

In the Tribunal's view, the purpose of section 68.2 of the Act is clearly to permit refunds of FST that would not otherwise be given. It allows refunds in cases where a manufacturer, wholesaler or importer, that has paid FST on the purchase of certain goods, subsequently sells these goods under tax-exempt circumstances. In this case, the Tribunal is of the view that, by allowing the appellant its refund, the overall intent of the provision of the Act would not be met. The Tribunal would have to rely on a strict interpretation of section 68.2 and of the Act as a whole. This, in the Tribunal's view, would be inconsistent with the intent of Parliament.

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38. [1990] 2 S.C.R. 1322.
39. [1985] 2 S.C.R. 46.
40. See, for example, *supra*, note 3.
41. See, for example, *Her Majesty the Queen v. Joseph Leung* (1993), [1994] 1 F.C. 482; and *John Arthur Pollock v. Her Majesty the Queen*, unreported, Federal Court of Appeal, Appeal Nos. A-75-90 and A-76-90, October 14, 1993.
42. General Anti-Avoidance Rule, Department of National Revenue, Customs and Excise, June 7, 1991.

Whether the onus is on the appellant or on the respondent, the Tribunal is of the view that the evidence clearly shows that there was a misuse of section 68.2 of the Act and an abuse of the Act as a whole. For similar reasons, the Tribunal is of the opinion that there has also been a misuse of section 48 of the Act, the purpose of which is to permit a manufacturer of certain goods to be considered the licensed manufacturer of similar goods that it wishes to sell in conjunction with its own goods. In this case, the Tribunal is of the view that the parties to the December 1990 transaction had no such intent.

As mentioned by Wilson J. in *Stubart*, "Lord Tomlin's principle is far too deeply entrenched in our tax law for the courts to reject it in the absence of clear statutory authority.[43]" Estey J. was of a similar view. He made the following comment:

> *The presence of a provision of general application to control avoidance schemes looms large in the judicial approach to the taxpayer's right to adjust his sails to the winds of taxation unless he thereby navigates into legislatively forbidden waters.... Where, as in this appeal, the Act expressly permits the application of accumulated losses to reduce taxes on current and future earnings, the tax collector must demonstrate a statutory bar to succeed.*[44]

It is true that any doubt that the Tribunal might have as to whether the GAAR should be applied to the circumstances of this case should be resolved in favour of the taxpayer.[45] However, in this case, although there was a sale of the imported tires by the appellant to Uniroyal Goodrich, the Tribunal finds that all of the necessary conditions of section 274 of the Act have clearly been met and that the GAAR applies to the circumstances of this case to deny the appellant its refund under section 68.2 of the Act.

Accordingly, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Desmond Hallissey
Desmond Hallissey
Member

Lise Bergeron
Lise Bergeron
Member

43. *Supra*, note 4 at 540.
44. *Supra*, note 4 at 557.
45. *Supra*, note 4.