

Ottawa, Thursday, November 24, 1994

Appeal No. AP-93-348

IN THE MATTER OF an appeal heard on July 5, 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 February 3, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

MONTANA ELECTRIC INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lise Bergeron

Lise Bergeron
Presiding Member

Raynald Guay

Raynald Guay
Member

Desmond Hallissey

Desmond Hallissey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-348

MONTANA ELECTRIC INC.

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, in part, an application for a federal sales tax inventory rebate made under section 120 of the Excise Tax Act. The Minister of National Revenue disallowed the rebate in respect of certain tools and drop sheets on the basis that they were for the appellant's use in its business and not for "sale" in the ordinary course of business. Certain supplies and lighting were also excluded on the basis that they were building materials which had already been delivered to a construction job site at the time that the inventory was taken. The issue in this appeal is whether the goods described above meet the definition of "inventory" within the meaning of the Excise Tax Act and, therefore, qualify for a federal sales tax inventory rebate.

HELD: *The appeal is dismissed. The appellant agreed at the hearing that the tools and drop sheets in issue were used in providing electrical contracting services to customers and not sold or held for sale in the ordinary course of business. With respect to certain supplies and lighting, the Tribunal finds that the evidence provided by the appellant does not clearly establish that these goods had not, in fact, been delivered to a construction job site as of January 1, 1991. Therefore, in the Tribunal's view, the supplies and lighting in issue do not meet the definition of "inventory" and do not qualify for a rebate under the Excise Tax Act.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 5, 1994
Date of Decision: November 24, 1994

Tribunal Members: Lise Bergeron, Presiding Member
Raynald Guay, Member
Desmond Hallissey, Member

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

Appearances: Mario Napoli, for the appellant
Brian Tittimore, for the respondent

Appeal No. AP-93-348

MONTANA ELECTRIC INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member
RAYNALD GUAY, Member
DESMOND HALLISSEY, 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) that rejected, in part, an application for a federal sales tax (FST) inventory rebate made under section 120² of the Act. In a notice of decision dated February 3, 1993, the Minister disallowed the rebate in respect of certain tools and drop sheets on the basis that they were for the appellant's use in its business and not for "sale" in the ordinary course of business. Certain supplies and lighting were also excluded on the basis that they were building materials which had already been delivered to a construction job site at the time that the inventory was taken.

The issue in this appeal is whether the goods described above, specifically, tools, drop sheets, supplies and lighting, meet the definition of "inventory" within the meaning of the Act and, therefore, qualify for an FST inventory rebate.

Under subsection 120(3) of the Act, a person may apply for an FST inventory rebate on tax-paid goods held in inventory as of January 1, 1991. The relevant provisions under subsection 120(1) of the Act define "inventory" as:

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, or*
(b) *building materials held at that time for use by the person in a business of constructing, renovating or improving buildings or structures carried on by the person, but not including any such goods that before that time have been incorporated into new construction or a renovation or improvement or have otherwise been delivered to a construction, renovation or improvement job site.*

(Emphasis added)

Subsection 120(2.1) of the Act adds the following to the definition above:

(2.1) For the purposes of paragraph (a) of the definition "inventory" in subsection (1), that portion of the tax-paid goods that are described in a person's inventory in Canada

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.

at any time that can reasonably be expected to be consumed or used by the person shall be deemed not to be held at that time for sale, lease or rental.

(Emphasis added)

The appellant is in the business of providing electrical contracting services on construction projects. Mr. Mario Napoli, President of Montana Electric Inc., appeared on behalf of the appellant. With respect to the supplies and lighting in issue, Mr. Napoli testified that these materials were for the installation of lights outside a large housing complex, known as Edgeley Village. He further stated that these materials were always delivered to the appellant's office or warehouse in Toronto, Ontario, and not to the construction job site. Mr. Napoli stated that he did not know why the detailed inventory list, which was submitted to the Department of National Revenue in support of the appellant's rebate application, indicated these materials as being "ON SITE." He stated that such materials would not have been left at a construction job site because of the possibility of theft. The appellant entered a sample of invoices and freight bills, allegedly pertaining to the supplies and lighting for which a rebate was disallowed. During cross-examination, Mr. Napoli agreed that the tools and drop sheets in issue were used by the appellant in providing electrical contracting services to its customers. However, Mr. Napoli again denied that the supplies and lighting in issue were located on site at the time that the inventory was taken.

Upon questioning by the Tribunal, Mr. Napoli testified that all building materials were shipped to the appellant's warehouse and that the identification of the supplies and lighting as "ON SITE – EDGELEY VILLAGE" on the inventory list was a mistake. However, when the Tribunal pointed out that a number of the invoices indicated delivery addresses at Driftwood Avenue, namely, the Edgeley Village site, Mr. Napoli admitted that it was possible that some of the supplies and lighting in issue were, in fact, delivered to the construction job site. Mr. Napoli testified that there was not a full-time worker at the appellant's office or warehouse. Therefore, since, occasionally, he had to wait for days for deliveries to arrive, he sometimes arranged for suppliers to meet him or one of his employees at the construction job site. Mr. Napoli or the employee would then either accompany the delivery truck to the warehouse and unlock it, or have the materials moved to one of the appellant's trucks and transport them to the warehouse. However, Mr. Napoli also admitted that some materials may have been left in the appellant's trucks and may not have been transferred for off-site storage.

In its brief, the appellant argued that the larger portion of the materials for which it was denied a rebate had not been delivered to the construction job site, but were held in the warehouse at the time that the inventory was taken. Furthermore, a lower bid was submitted on the Edgeley Village contract as an FST inventory rebate was expected on all the materials for which a rebate was claimed. The appellant also stated that, had it known that it would encounter a problem recovering the FST claimed on these materials, it would have waited until after January 1, 1991, to purchase these materials.

Counsel for the respondent argued that the onus is on the appellant to show that the Minister's determination is incorrect and that it satisfies every condition required to be entitled to a rebate. Counsel submitted that the evidence shows that the tools and drop sheets in issue were used by the appellant in providing electrical contracting services and not actually sold or held to be sold in the ordinary course of business. Therefore, these goods are expressly excluded from the definition of "inventory" under subsection 120(2.1) of the Act. Counsel further submitted that building materials, which include the supplies and lighting in issue, are expressly excluded from the definition of "inventory" under paragraph 120(1)(b) of the Act where they have been

delivered to a construction job site. As such, the onus is on the appellant to show that these materials had not been delivered to the construction job site at the time that the inventory was taken in order for them to qualify for a rebate. Counsel submitted that it is unclear whether the invoices and freight bills in fact pertain to the supplies and lighting for which a rebate was disallowed. Moreover, it is unclear which materials may or may not have been delivered to the construction job site. Consequently, the Tribunal must look to the most reliable evidence in this case, which, in the opinion of counsel, is the inventory list that was submitted with the notice of objection and which Mr. Napoli, on behalf of the appellant, certified was true and correct to the best of his knowledge.

Having considered the evidence in this appeal, the Tribunal is of the view that the appellant has not established its entitlement to an FST inventory rebate for either (1) the tools and drop sheets or (2) the supplies and lighting. With respect to the tools and drop sheets in issue, the appellant agreed that these goods were used in providing electrical contracting services. Therefore, they were not held for "sale, lease or rental" in the ordinary course of business and, consequently, do not meet the definition of "inventory" and do not qualify for a rebate under the Act. With respect to the supplies and lighting in issue, the Tribunal finds that the evidence provided by the appellant does not clearly establish that the Minister's determination is incorrect and that these materials meet the criteria for a rebate. In the Tribunal's opinion, the best evidence before it as to whether the goods in issue were delivered to the construction job site as of January 1, 1991, is the detailed inventory list. As argued by counsel for the respondent, it is unclear whether the invoices and freight bills pertain specifically to the materials for which a rebate was disallowed. However, more importantly, since some invoices list the delivery address as the construction job site, in the Tribunal's view, this tends to support the fact that these materials were delivered to the construction job site as of January 1, 1991, and not otherwise. Therefore, the Tribunal finds that the supplies and lighting in issue do not qualify as "inventory" for the purposes of an FST inventory rebate.

Accordingly, the appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member