CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, February 9, 1995

Appeal No. AP-93-380

IN THE MATTER OF an appeal heard on September 27, 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 December 17, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

HEALEY MOTORS LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Raynald Guay
Raynald Guay
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-380

HEALEY MOTORS LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is a dealership which sells and services new and used motor vehicles. The issue in this appeal is whether two vehicles owned by the appellant constitute tax-paid goods other than used goods, pursuant to subsections 120(1) and (3) of the Excise Tax Act for the purposes of a federal sales tax inventory rebate. If so, the Tribunal must determine whether the appellant is entitled to a refund of penalty and interest charges assessed against the amount of federal sales tax previously determined as owing.

HELD: *The appeal is dismissed. The Tribunal finds that the two vehicles in issue were "used" goods as opposed to "new" goods on January 1, 1991. The Tribunal bases its opinion on the fact that the vehicles were registered and licensed to the appellant prior to January 1, 1991, and subsequently used as demonstration vehicles, thereby registering a significant distance in kilometres by January 1, 1991.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*September 27, 1994*
Date of Decision:	*February 9, 1995*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Anthony T. Eyton, Member* *Raynald Guay, Member*
Counsel for the Tribunal:	*Heather A. Grant*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Donald Healey, for the appellant* *Lyndsay K. Jeanes, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-380

HEALEY MOTORS LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
ANTHONY T. EYTON, Member
RAYNALD GUAY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of an assessment of the Minister of National Revenue dated March 31, 1993, with regard to an application for a federal sales tax (FST) inventory rebate. The appellant is a dealership which sells and services new and used motor vehicles. On February 11, 1991, the appellant applied for an FST inventory rebate in the amount of $68,986.55 for tax-paid goods held in inventory as at January 1, 1991. A pre-payment audit was attempted in April 1991 for the business period to January 1, 1991, but was discontinued. On May 10, 1991, the appellant received the total amount of the FST inventory rebate claimed, as well as $1,341.19 in interest, subject to an audit. In January 1993, an audit was conducted and completed, pursuant to which the amount of the rebate was adjusted and reduced by $7,306.71. The Department of National Revenue subsequently applied, in part, an amount submitted by the appellant against its Goods and Services Tax (GST) remittance against the amount of FST outstanding. The amount of FST outstanding included penalty and interest charges assessed against the appellant in the amounts of $865.03 and $1,076.67, respectively.

In the assessment, the respondent disallowed the amount of $7,306.71 on the basis that three of the vehicles listed in the appellant's inventory were not "tax-paid goods ... other than used goods" and, consequently, they did not qualify for a rebate under the Act. On June 15, 1993, the appellant objected to the respondent's assessment in respect of two of the three vehicles, as well as the corresponding penalty and interest charges. However, the respondent subsequently confirmed the assessment by notice of decision dated December 17, 1993.

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

The issue in this appeal is whether the two vehicles in issue owned by the appellant constitute tax-paid goods other than used goods, pursuant to subsections 120(1) and (3) of the Act.[2] If so, the Tribunal must determine whether the appellant is entitled to a refund of penalty and interest charges assessed against the amount of FST previously determined as owing.

The relevant statutory provisions of the Act in respect of an FST inventory rebate read, in part, as follows:

> *120. (1) In this section,*
> *"tax-paid goods" means goods ... that are, as of the beginning of January 1, 1991,*
> *(a) new goods that are unused.*
>
> *(3) Subject to this section, where a person who, as of January 1, 1991 ... has any tax-paid goods in inventory at the beginning of that day,*
> *(a) where the tax-paid goods are goods other than used goods, the Minister shall, on application made by the person, pay to that person a rebate in accordance with subsections (5) and (8).*

Mr. Donald Healey appeared at the hearing on behalf of the appellant. Mr. Healey was the owner of Healey Motors Limited until it was sold in 1991. In his testimony, Mr. Healey provided the Tribunal with a number of details pertaining to the vehicles in issue. The first vehicle, identified as stock no. 3594, was acquired by the appellant on October 23, 1990, and sold on August 31, 1991. On September 24, 1991, the odometer read 24,840 km. The second vehicle, identified as stock no. 3625, was acquired by the appellant on October 6, 1990, and sold on May 9, 1991. At the time of sale, its odometer read 13,125 km.

Mr. Healey provided the Tribunal with a service history for the first vehicle, which indicated the following odometer readings at various dates: October 29, 1990 - 753 km; November 2, 1990 - 1 km; November 29, 1990 - 1 km; and February 1, 1991 - 2,034 km. Mr. Healey was unable to provide a similar history for the second vehicle.

Mr. Healey suggested that the considerable distance in kilometres registered on the vehicles prior to their sale was due to their use as demonstration vehicles, although he seemed to suggest that they were not necessarily used as such prior to January 1, 1991. He stated that the vehicles were sometimes given to prospective buyers who might drive the vehicles from Pembroke to Ottawa in order to assess them. Mr. Healey explained that some vehicles on his lot would be registered and licensed with the Ontario Ministry of Transportation (the Ministry) in order that prospective customers could test-drive them without interference from the police. Further to questions from the Tribunal, Mr. Healey explained that, at the time of registration, a vehicle's "New Vehicle Information Statement" (NVIS) is submitted to the Ministry, and the vehicle is issued a white licence plate to replace the yellow dealer plate.

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2. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27, s. 6.

Mr. Healey stated that, in the automotive industry, a vehicle is not considered "used" until its odometer reads 5,000 km. In support of this statement, Mr. Healey testified that the Ministry only requires that a safety check be performed on a vehicle prior to a transfer of ownership if the vehicle's odometer reads more than 5,000 km. Similarly, conditions of financing will also vary depending on whether a vehicle's odometer reads more than 5,000 km.

Mr. Healey further stated that it is generally understood and accepted in the industry that the odometer of new vehicles may read some distance in kilometres prior to sale, but that the vehicles are still considered "new" at the time of sale. As an example, Mr. Healey referred to situations where a vehicle is transferred from one lot to another in order to fill customer specifications. Moreover, a profit was made on the vehicles in issue, in spite of the vehicles' odometers indicating a significant distance in kilometres at the time of sale.

Counsel for the respondent called three witnesses at the hearing. Ms. Gita Bhatt was called as the first witness. Ms. Bhatt testified that she had attempted to conduct an audit of the appellant on April 19, 1991, but that the audit was never completed. Ms. Bhatt testified that, pursuant to her request for copies of the appellant's financial statements, she was referred to Mr. Healey. Ms. Bhatt also testified that, while on a visit of the premises with the appellant's manager, the manager brought three vehicles to her attention which, he said, were converted to demonstration vehicles in 1990. Once again, upon requesting substantiating documents, she was referred to Mr. Healey. Ms. Bhatt explained that, despite her request to speak with Mr. Healey, he did not meet with her that day. Therefore, she was unable to obtain certain necessary documents while on-site in order to complete the audit.

According to Ms. Bhatt, after her on-site visit, she sent Mr. Healey a written request for the documents, but technical difficulties during transmission of the request resulted in Mr. Healey receiving a considerable number of copies of the request, which led Mr. Healey to contact Ms. Bhatt's supervisor to lodge a complaint.

Counsel for the respondent called Ms. Andrée Nadeau as the second witness. Ms. Nadeau was in charge of the FST Inventory Rebate Program in the Ottawa Region and was supervisor to Mr. Barry D. Casselman, Ms. Bhatt's acting supervisor at the time of the first audit. Ms. Nadeau testified that she spoke with Mr. Healey after he had spoken with Mr. Casselman, who had been unable to settle Mr. Healey's complaint.

Ms. Nadeau testified that Mr. Healey requested the immediate release of his rebate cheque. Ms. Nadeau explained that she gave Mr. Healey a choice, either that the appellant receive its cheque immediately for the full amount of the claim and be subject to a post-payment audit, which could result in the application of penalty and interest charges if the full amount were not allowed by the respondent pursuant to the audit, or that the appellant could await payment subsequent to completion of an audit, in which case interest would be calculated on the amount of the resulting payment. According to Ms. Nadeau, Mr. Healey chose the former option.

Mr. Casselman appeared as the third witness for the respondent. Mr. Casselman became the post-payment auditor of the appellant's rebate claim. Mr. Casselman explained that his audit was conducted at the same time as another audit, the second audit being conducted with respect to the appellant's GST returns.

Mr. Casselman testified that, at the time of the audit, Mr. Healey admitted that the appellant's FST inventory rebate claim in respect of the two vehicles had also been claimed as an input tax credit on the appellant's GST returns. Mr. Casselman stated that he deemed the two vehicles in issue to be "used" on the basis that, according to Ms. Bhatt's notes on file, the second vehicle was converted to a demonstration vehicle on October 31, 1990, while the first vehicle was converted to a demonstration vehicle on October 23, 1990. Also, there was a significant distance in kilometres on the odometers at the time of their sale. And, finally, both vehicles had been registered and licensed with the Ministry. Mr. Casselman provided the Tribunal with licensing information with respect to the two vehicles which indicated that the second vehicle was licensed on November 2, 1990, while the first vehicle was licensed on October 25, 1990. Mr. Casselman seemed to suggest that, as a result of the joint audit, the two vehicles did not qualify for an FST inventory rebate, but were consequently allowed a GST notional input tax credit.

In argument, the appellant's representative contended that the vehicles were not "used," but "new" and, therefore, ought to qualify for an FST inventory rebate. The representative argued that licensing a vehicle does not necessarily make it a "used" vehicle and that, therefore, the Ministry's licensing records are irrelevant. Furthermore, since the first vehicle only registered 753 km on October 29, 1990, it would still have been a new vehicle as at January 1, 1991. Moreover, the sale price of that particular vehicle would seem to indicate that the purchaser accepted the vehicle as "new," as it was purchased at full price. Similarly, the second vehicle was also sold for a profit. The representative further submitted that the evidence had shown that the vehicles would be considered "new" as opposed to "used" according to industry standards. The representative also argued in the appellant's brief that it had been misinformed about the "rules" regarding FST inventory rebates.

Counsel for the respondent argued that it is accepted law that the appellant must not only establish that it meets all the criteria to be entitled to a rebate under the Act but must also prove that the respondent's assessment is incorrect. Counsel submitted that the appellant did not provide any evidence establishing the distance in kilometres on the vehicles as at January 1, 1991. With respect to the second vehicle, the only evidence establishing that the distance in kilometres is for May 9, 1991, the date of sale, when the odometer read approximately 13,000 km. Counsel further argued that, although common sense might suggest that the vehicle registered 2,500 km per month and, therefore, would have registered approximately 5,000 km as at January 1, 1991, this would be mere speculation.

In reference to the first vehicle, counsel for the respondent argued that the service history provided by the appellant is generally inaccurate and unreliable, given the sequence of the odometer readings. In counsel's view, the only accurate evidence establishing the distance in kilometres is the figure which indicates that the odometer read 24,840 km on September 24, 1991.

Counsel for the respondent argued that the significant distance in kilometres to the date of sale must have resulted from the use of the vehicles as demonstrators or from personal use of the vehicles by the appellant's employees, in spite of Mr. Healey's assertions to the contrary. Therefore, these vehicles were not "new," but rather "used." Counsel further submitted that the fact that the Ministry only requires a safety check at the time of sale if the vehicle's odometer reads at least 5,000 km is irrelevant to the issue of whether the vehicle is "used" within the meaning of the Act. Any arguments with respect to profit put forth by the appellant are, in counsel's view, irrelevant, particularly since the information submitted by the appellant on this issue is not sufficient for the Tribunal to make any determinations with respect to profit.

Counsel for the respondent further relied on the Tribunal's decision in *Rutherford Auto Sales Ltd. v. The Minister of National Revenue*[3] to argue that, where a vehicle is registered and licensed with the Ministry, it automatically becomes "used." With respect to the appellant's allegations of misinformation provided to it by the Department of National Revenue, counsel submitted that the responsibility to obtain correct information on the application of the law rests with the taxpayer. Finally, on the issue of penalty and interest, counsel relied on the Tribunal's decisions in *Les Presses Lithographiques Inc. v. The Minister of National Revenue*[4] and *The Kingston Brewing Company Limited v. The Minister of National Revenue*[5] to submit that the Tribunal has no jurisdiction to waive or alter penalty and interest imposed under section 79 of the Act.

With regard to the issue in this appeal, whether the goods are "new goods that are unused," the Tribunal is of the view that the goods are "used" as opposed to "new." The Tribunal bases its opinion primarily on the fact that each vehicle was registered and licensed with the Ministry and that each vehicle was subsequently used as a demonstration vehicle, thereby registering a significant distance in kilometres by January 1, 1991.

In reaching its decision, the Tribunal took into account the *Rutherford* decision, in which it held that certain demonstration vehicles were in fact "unused," within the meaning of the Act, because they were sold to the dealership's customers along with their NVIS. According to the Tribunal, the fact that the NVIS was given to the customers at the time of sale indicated that "title to each car ha[d] not previously been transferred prior to relevant sale and subsequent registration of the form [at the provincial motor vehicle licensing bureau].[6]" In contrast to the situation in the *Rutherford* case, the appellant submitted the vehicles' NVIS to the Ministry in order to register the vehicles and obtain white licence plates for them. Therefore, in view of the *Rutherford* decision, the fact that the vehicles were registered and licensed to the appellant before January 1, 1991, provides a basis for concluding that the vehicles were "used" as opposed to "new" on January 1, 1991.

However, in making its decision, the Tribunal also took into account the fact that the vehicles were used as demonstration vehicles subsequent to their purchase by the appellant. In this respect, the appellant

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3. Appeal No. AP-92-057, May 5, 1993.
4. Appeal No. 2997, June 26, 1989.
5. Appeal No. AP-93-073, March 7, 1994.
6. *Supra*, note 3 at 4.

used the vehicles in order to sell prospective buyers on the merits of the vehicles. That the two vehicles were used heavily for this purpose prior to January 1, 1991, is supported by the fact that the vehicles were made demonstrators shortly after their purchase by the appellant in October 1990 and that, by the date of sale, or re-sale in the case of the first vehicle, both vehicles had registered a significant distance in kilometres. The appellant was unable to provide any evidence of the specific distance in kilometres registered on either vehicle on January 1, 1991, in order to suggest otherwise. As the appellant did not succeed on the issue, the question with respect to the refund of penalty and interest charges is moot.

Accordingly, the appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Raynald Guay
Raynald Guay
Member