

Ottawa, Wednesday, March 6, 1996

Appeal No. AP-94-198

IN THE MATTER OF an appeal heard on May 16, 1995, 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 March 12, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

MAURICE JACOB INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Raynald Guay
Raynald Guay
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-198

MAURICE JACOB INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether the respondent erred in rejecting an application for a federal sales tax inventory rebate. According to the respondent's decision, the examination of the appellant's relevant financial statements revealed the absence of inventory in the appellant's statement of assets. The evidence shows that the goods belonged to the appellant, were tax-paid and were intended for sale. The Tribunal considers that the beer purchased by the appellant and whose price included federal sales tax was part of the appellant's inventory on January 1, 1991.

HELD: *The appeal is allowed. The Tribunal concludes that the appellant met the requirements of section 120 of the Excise Tax Act and that it is entitled to a federal sales tax inventory rebate.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 16, 1995
Date of Decision: March 6, 1996

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

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Anne Jamieson

Appearances: Alain Gauthier, for the appellant
Anick Pelletier, for the respondent

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MAURICE JACOB INC.

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and

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TRIBUNAL: DESMOND HALLISSEY, Presiding Member
RAYNALD GUAY, 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 dated July 8, 1991, which rejected an application for a federal sales tax (FST) inventory rebate filed by Maurice Jacob Inc.²

The issue in this appeal is whether the respondent erred in rejecting the appellant's application for an FST inventory rebate filed pursuant to section 120³ of the Act. According to the respondent's decision, the examination of the appellant's financial statements as of March 31, 1990, and March 31, 1991, revealed the absence of inventory in the appellant's statement of assets. However, pursuant to the definition of "inventory" under subsection 120(1) of the Act, tax-paid goods must be described in the inventory in order to qualify for a rebate.

Mr. Pierre Jacob appeared on behalf of the appellant. Mr. Jacob, who has been working in the beer industry since 1968 and who is President of Maurice Jacob Inc., became an independent agent for O'Keefe Brewing Company Limited (O'Keefe) in 1973. Following the merger of Molson's Brewery Quebec Limited and O'Keefe at the beginning of 1991, the appellant was only an independent distributor, in other words, it was no longer involved, as it had been during the period preceding the merger, in the purchase, sale and marketing of beer in its territory.

During cross-examination, Mr. Jacob explained the appellant's payment arrangements with regard to the beer purchased from O'Keefe. These arrangements were based on the agreement signed in 1973 (the 1973 agreement) between Mr. Pierre Jacob and O'Keefe, pursuant to which the agent would make the payments [translation] "on or before the last day of each month for all the beer which could have been sold by the agent up to and including the last day of the preceding calendar month." Thus, at the time when the appellant acted as an independent agent, each monthly payment made to O'Keefe was based on the actual sales for the preceding month. In reply to a question by the Tribunal, Mr. Jacob acknowledged that the beer held in inventory was paid for at the time of its subsequent sale to the agent's customers. He also pointed out that FST was included in the purchase price of the beer purchased by the appellant from O'Keefe: "[c]'était un prix complet que la brasserie nous faisait"⁴ ([translation] The brewery charged us an all-inclusive price). According to Mr. Jacob, the amount indicating goods on consignment, that is, \$313,329, as shown in explanatory note 6 of the appellant's financial statements for the year ending March 31, 1990, includes the

1. R.S.C. 1985, c. E-15.
2. Now called Les Distributions Molson-O'Keefe Beauce Inc.
3. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27, s. 6.
4. Transcript of Public Session, May 16, 1995, at 35.

various taxes. Mr. Jacob noted, in passing, that the inventory was taken regularly, twice a week, and recorded monthly on the financial statements. Finally, Mr. Jacob pointed out to the Tribunal that, following the merger of the two breweries, credit notes for inventory held by the appellant had been set up for the appellant's benefit by the new company resulting from this merger.

Mr. Raymond Renaud, Mr. Jacob's financial advisor, also appeared on behalf of the appellant. Mr. Renaud admitted that the financial statements containing note 6 had been attached to the tax returns prepared for the federal and provincial governments. When questioned by the Tribunal on the significance of note 6, Mr. Renaud said that he considered the goods on consignment "*comme un actif en dépôt*"⁵ ([translation] to be an asset on deposit). He pointed out that these goods could have been in the appellant's statement of assets, in which case, there would have then been a liability of a higher amount. On the other hand, Mr. Renaud mentioned that the amount of \$313,329 was treated as an account receivable by O'Keefe and as an account payable by the appellant.

Finally, Mr. Ghislain Bourbeau appeared on behalf of the respondent. Mr. Bourbeau, an appeals officer with the Department of National Revenue, handled the notice of objection served by the appellant. He noted that he had checked to establish whether independent agents had been entitled to an FST inventory rebate. In this context, he said that he remembered that some of them had received rebates. Mr. Bourbeau assumed that this was because the inventory had been recorded as part of the assets of these agents.

After having briefly reviewed certain provisions of section 120 of the Act, the appellant's representative related the position of Molson-O'Keefe Brewery (Molson-O'Keefe), according to which the beer delivered to the appellant was, without a doubt, considered to be beer sold by the brewer. As a result, according to the representative, "*pour eux [Molson O'Keefe] c'était une vente, avec un compte à recevoir. Et pour eux à ce moment-là l'inventaire n'était plus dans leurs états financiers*"⁶ ([translation] for Molson-O'Keefe, it was a sale with an account receivable. And for them, at that time, the inventory was no longer on their financial statements). The representative added that it would have been possible to present the figures in the financial statements differently, but that the choice had been made by the appellant's auditors, Blanchette Vachon et Associés, and that, moreover, this choice may have been unfortunate. The representative claimed that the sales by O'Keefe to the appellant constituted conditional sales. According to him, in order to understand the meaning of "inventory" under subsection 120(1) of the Act, one should refer to the accounting concept, not the legal one. The same applies to understanding the meaning of "sale." Finally, he recalled the respondent's refusal to grant a rebate to O'Keefe as a result of an FST payment made in error.

Counsel for the respondent also pointed out the requirements of section 120 of the Act, that is, to obtain an FST inventory rebate, the appellant must show the existence of inventory in which there are tax-paid goods. The term "inventory," she noted, is defined as "items of tax-paid goods." However, according to counsel, no inventory is included in the appellant's financial statements for the year 1990. In view of this absence, she added that the appellant is not entitled to an FST inventory rebate under section 120. This absence of inventory, according to counsel, very accurately reflects the legal situation which existed at that time and which was governed by the 1973 agreement. In this context, counsel expressly mentioned section 3 of the 1973 agreement, pursuant to which O'Keefe owned the beer delivered to the appellant right up to the point of its sale to third parties. O'Keefe also maintained a right of management and control over the beer. According to counsel, the financial statements clearly illustrate the fact that the appellant did not own the beer held in inventory. In her opinion, the "ownership" of goods is a legal issue, even if section 120 refers to accounting concepts. On the other hand, counsel claimed that the accounting

5. *Ibid.* at 59.

6. Transcript of Argument, May 16, 1995, at 4.

method chosen by Molson-O'Keefe for dealing with the goods delivered to the appellant has no relevance to the case in point and that the only issue is whether the appellant met the requirements of section 120.

After having reviewed all the evidence and having considered the arguments of both parties, the Tribunal is of the opinion that the appeal should be allowed. First, the Tribunal notes that the business transactions between O'Keefe and the appellant, when the latter operated as an independent agent, undoubtedly constituted sales of beer. On the other hand, the testimony of Mr. Jacob shows that the price of the beer sold to the appellant included FST and that the appellant had, undoubtedly, paid this tax. No evidence was provided to contradict this precise point. In this context, the Tribunal refers to the letter dated September 13, 1993, from Molson Breweries to the Department of National Revenue, which is attached as Appendix H to the respondent's brief. This letter clearly indicates that Molson-O'Keefe "has accounted for FST on shipments of goods delivered to independent agents or wholesalers including Maurice Jacob Inc. ... Coincident with the generation of the sales invoice, an FST liability is recorded in M.O'K.'s books for that month." Furthermore, the Tribunal has read with interest the letter dated March 2, 1994, from Molson-O'Keefe, signed by Mr. Serge Fortier and addressed to Mr. Renaud, in which it is stated that the beer held in inventory by the appellant did not constitute [translation] "the property of O'Keefe and that, consequently, it was not included, on our books, as part of our inventory."

The evidence submitted to the Tribunal shows that the goods belonged to the appellant, were tax-paid and were intended for sale, even if, in the opinion of the Tribunal, the financial statements could have been presented differently. In fact, the evidence indicates that inventory of the beer was taken twice a week and recorded monthly on the financial statements. The Tribunal believes that, although the beer may have been considered by Mr. Renaud as "*un actif en dépôt*"⁷ ([translation] an asset on deposit), the beer purchased by the appellant and whose price included FST was part of the appellant's inventory on January 1, 1991. In light of the above, the Tribunal concludes that the appellant met the requirements of section 120 of the Act and that it is entitled to an FST inventory rebate.

Accordingly, the appeal is allowed.

Desmond Hallissey

Desmond Hallissey

Presiding Member

Raynald Guay

Raynald Guay

Member

Lise Bergeron

Lise Bergeron

Member

7. *Supra*, note 4 at 60.