CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, March 6, 1996

Appeal No. AP-94-265

IN THE MATTER OF an appeal heard on May 10 and June 19, 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 September 16, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

SUPER GÉNÉRATEUR 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

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-94-265

SUPER GÉNÉRATEUR 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 dated June 30, 1992, that rejected the appellant's application for a federal sales tax inventory rebate filed under section 120 of the Excise Tax Act, on the basis that the application was not filed before 1992. The application was dated December 22, 1991; however, the Department of National Revenue received it on January 15, 1992. The appellant's activities involve the reconditioning of generators, starters and alternators. In order to do this, the appellant purchases a variety of parts and materials and incorporates these into the units provided by the customers. The appellant never becomes the owner of these units. In other words, the appellant only replaces defective parts. It does not sell the parts separately. However, it sells generators as finished products, but does not hold any of them in inventory. The issue in this appeal is whether the appellant filed its rebate application before 1992. If so, the Tribunal must determine whether the goods in issue qualified as the appellant's inventory under the Excise Tax Act.

HELD: *The appeal is dismissed. The Tribunal did not have a postmarked envelope. It, therefore, examined the evidence presented by the appellant in order to determine whether the rebate application was mailed before 1992. After carefully examining the evidence, the Tribunal is of the opinion that the appellant undoubtedly filed the application before 1992, that is, that the application was mailed on December 22, 1991. The Tribunal is also of the opinion that the goods in issue did not qualify as inventory under the Excise Tax Act. More precisely, the Tribunal is of the opinion that the goods must be sold "as is" to qualify for a federal sales tax inventory rebate. In addition, the requirement, according to which the goods must be "held ... for sale ... separately, for a price," excludes cases where the goods are secondary to the appellant's provision of a service to its customers.*

Place of Hearing:	*Ottawa, Ontario*
Dates of Hearing:	*May 5 and June 19, 1995*
Date of Decision:	*March 6, 1996*
Tribunal Members:	*Lise Bergeron, Presiding Member* *Raynald Guay, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Joël J. Robichaud*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Yvan Guérin, for the appellant* *Stéphane Lilkoff and Pascale O'Bomsawin, for the respondent*

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-265

SUPER GÉNÉRATEUR 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 dated June 30, 1992, that rejected the appellant's application for a federal sales tax (FST) inventory rebate filed under section 120[2] of the Act, on the basis that the application was received beyond the time limit prescribed by the Act. The application was dated December 22, 1991; however, the Department of National Revenue (Revenue Canada) received it on January 15, 1992. The appellant served a notice of objection which was received by the respondent on January 6, 1993. On September 16, 1994, the respondent issued a notice of decision confirming the determination.

During the hearing, the appellant was represented by its accountant, Mr. Yvan Guérin. Mr. Guérin and Mr. Benoît Lessard, President of Super Générateur Inc., appeared on behalf of the appellant. Mr. Lessard explained that the appellant's activities involve the reconditioning of generators, starters and alternators. In order to do this, the appellant purchases a variety of parts and materials and incorporates these into the units provided by the customers. The appellant never becomes the owner of these units. In other words, the appellant only replaces defective parts. It does not sell the parts separately. However, it sells generators as finished products, but does not hold any of them in inventory. Mr. Lessard stated that he completed an application for an inventory rebate on December 22, 1991, and mailed it on the same day. He testified that he put all the mail in the mailbox at the end of the day, as was his normal practice every evening on working days. The respondent did not present any evidence to refute this testimony.

The issue in this appeal is whether the appellant filed its application for an FST inventory rebate within the time limit prescribed by the Act. If so, the Tribunal must determine whether the goods in issue qualified as the appellant's inventory under the Act.

The appellant's representative submitted that the Tribunal must accept Mr. Lessard's testimony, according to which he mailed the rebate application on December 22, 1991. In addition, he submitted that the goods in issue were sold separately for a price in money in the ordinary course of a commercial activity.

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.

In support of this proposition, he noted that the parts were identified separately on the customer's final invoice.

Counsel for the respondent submitted that the goods in issue could not qualify as inventory on January 1, 1991, because they were not being held "for sale, lease or rental separately, for a price or rent in money," but were rather being held to be consumed in fulfilment of a service for the appellant's customers.

For the purposes of this appeal, the relevant legislative provisions regarding the FST inventory rebate are set out in subsections 120(1), (2.1), (3) and (8) of the Act and provide, in part, as follows:

> *120.(1) In this section,*
>
> *"inventory" of a person as of any time means items of tax-paid goods that are described in the person's inventory in Canada at that time and that are*
>
> *(a) held at that time for sale, lease or rental separately, for a price or rent in money, to others in the ordinary course of a commercial activity of the person, or*
>
> *(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 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.*
>
> *(3) Subject to this section, where a person who, as of January 1, 1991, is registered ... 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);*
>
> *(8) No rebate shall be paid under this section unless the application therefor is filed with the Minister before 1992.*

The Tribunal has already referred to Revenue Canada's departmental policy and to section 79.2 of the Act to decide that, according to subsection 120(8) of the Act, an application is deemed as having been filed by the appellant on the date of mailing, as evidenced by the postmark.[3] In this appeal, the Tribunal did not have a postmarked envelope. It, therefore, examined the evidence filed by the appellant, more particularly, Mr. Lessard's testimony, in order to determine whether the application was mailed before 1992. After carefully examining the evidence, the Tribunal is of the opinion that the appellant undoubtedly filed the application before 1992, that is, that the application was mailed on December 22, 1991. Therefore, the appellant filed its rebate application within the time limit prescribed by the Act. The Tribunal must then determine whether the parts and materials that the appellant incorporated into generators, starters and alternators qualified as inventory under the Act.

In *Light Touch Stenographic Services Ltd. v. The Minister of National Revenue*,[4] the appellant, in addition to being a wholesaler of parts and supplies for stenotype machines, also repaired those machines.

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3. *Lakhani Gift Store v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-92-167, November 15, 1993.
4. Canadian International Trade Tribunal, Appeal No. AP-91-182, March 8, 1994.

A customer might purchase one of three maintenance agreements, depending on the desired degree of protection against the cost of replacement parts, labour and maintenance. The issue was whether the goods held by the appellant for use in fulfilment of its preventive maintenance agreements qualified as inventory for purposes of an FST inventory rebate under section 120 of the Act.

The Tribunal, in *Light Touch Stenographic*, was of the view that it had always ruled that a person was entitled to an FST inventory rebate for goods provided to a customer when providing a service to that customer.[5] However, this reasoning was modified by retroactive amendments to the provisions of the Act governing the FST inventory rebate. More precisely, the Tribunal indicated that the definition of "inventory" had been amended and that it now deemed that goods must be "held ... for sale, lease or rental separately, for a price ... in money." In addition, section 120 of the Act had been amended by the addition of subsection 120(2.1), which deems that the portion of the tax-paid goods that are described in a person's inventory which "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."

The Tribunal interpreted the requirement, according to which the goods must be "held ... for sale ... separately, for a price," in a way that excluded cases where the title to goods is transferred to a customer during the provision of services for a fixed price. In addition, the Tribunal considered the goods used by the appellant under its maintenance agreements to be goods consumed or used in fulfilment of those agreements. The Tribunal noted that, as such, subsection 120(2.1) of the Act deems those goods not to be held for sale, lease or rental.

In *Harry M. Gruenberg, Synoda Co. Reg'd. v. The Minister of National Revenue*[6] and *Jostens Canada Ltd. and Jostens of Quebec Ltd. v. The Minister of National Revenue*,[7] the Tribunal was of the opinion that only the goods in issue in those appeals held for sale separately to others in the ordinary course of the commercial activities of the appellants fell within the amended definition of "inventory" under section 120 of the Act. More precisely, the Tribunal concluded that the goods had to be sold "as is" to qualify for an FST inventory rebate.

In this appeal, the Tribunal is of the opinion that the parts and materials that the appellant incorporated into generators, starters and alternators did not qualify as inventory under the Act. It bases its reasoning on the cases mentioned above. More precisely, the Tribunal is of the opinion that the goods must be sold "as is" to qualify for an FST inventory rebate. In addition, the requirement, according to which the goods must be "held ... for sale ... separately, for a price," excludes cases where the goods are secondary to the appellant's provision of a service to its customers.

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5. The Tribunal referred to the following decisions: *Northern Aircool Engines Co. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-92-104, September 21, 1993; and *P.R.E.P. Consulting Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-92-002, March 19, 1993.
6. Canadian International Trade Tribunal, Appeal No. AP-92-252, April 5, 1994.
7. *Ibid.*, Appeal No. AP-92-195, April 28, 1994.

Accordingly, the appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding member

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member