



Ottawa, Wednesday, September 11, 1996

Appeal No. AP-94-276

IN THE MATTER OF an appeal heard on March 5, 1996, 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 19, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**L.J. CHOPP AND ASSOCIATES**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Anita Szlazak  
Anita Szlazak  
Presiding Member

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member

Desmond Hallissey  
Desmond Hallissey  
Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-94-276**

**L.J. CHOPP AND ASSOCIATES**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

The appellant carries on business in Edmonton, Alberta, as a sandblasting, painting and coating contractor. The issue in this appeal is whether the appellant is entitled to a federal sales tax inventory rebate under section 120 of the *Excise Tax Act* for the coating products which were held in its inventory as of January 1, 1991, and which were to be used by the appellant in its sandblasting, painting and coating business.

**HELD:** The appeal is dismissed. Since the retroactive amendments to the federal sales tax inventory rebate provisions of the *Excise Tax Act*, the Tribunal has consistently held that it must distinguish between goods sold as is or “separately” and goods sold as part of a contract for the provision of services. The Tribunal has held in previous decisions that, where the goods are to be consumed or used by the appellant in providing a service, it is of the opinion that the goods are deemed not to be sold and, therefore, not held in inventory “separately” for sale. The evidence is clear that the appellant is in the business of providing a service and that the goods in issue are consumed in providing that service. As such, the Tribunal must conclude that the goods in issue were not held for sale separately in the ordinary course of the appellant’s business.

Place of Hearing:	Edmonton, Alberta
Date of Hearing:	March 5, 1996
Date of Decision:	September 11, 1996
Tribunal Members:	Anita Szluzak, Presiding Member Robert C. Coates, Q.C., Member Desmond Hallissey, Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerk of the Tribunal:	Anne Jamieson
Appearances:	John L. Chopp, for the appellant Frederick B. Woyiwada, for the respondent

**Appeal No. AP-94-276**

**L.J. CHOPP AND ASSOCIATES**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANITA SZLAZAK, Presiding Member  
ROBERT C. COATES, Q.C., Member  
DESMOND HALLISSEY, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of a determination of the Minister of National Revenue dated October 19, 1994, disallowing, in part, the appellant's application for a federal sales tax (FST) inventory rebate.

The appellant carries on business in Edmonton, Alberta, as a sandblasting, painting and coating contractor. On August 9, 1991, the respondent received the appellant's application for a rebate in the amount of \$5,360.62 for the coating products and coating repair kits that the appellant had in inventory on January 1, 1991. By notice of determination dated October 4, 1991, the respondent disallowed, in part, the application on the grounds that the coating products were not goods held for sale, lease or rental in the ordinary course of the appellant's business. The respondent allowed that portion of the application relating to the repair kits. On January 28, 1992, the appellant served a notice of objection and, by notice of decision dated October 19, 1994, the respondent confirmed the determination. The amount in issue is \$4,604.07.

The issue in this appeal is whether the appellant is entitled to an FST inventory rebate under section 120 of the Act<sup>2</sup> for the coating products which were held in its inventory as of January 1, 1991, and which were to be used by the appellant in its sandblasting, painting and coating business.

The appellant was represented by Mr. John L. Chopp. Mr. Chopp testified that the goods in issue, "Protegal 32-10 Urethane Tar," are urethane tar coating products used to protect underground pipes from corrosion. The appellant purchases the goods in issue in 45-gallon drums from a company in Germany. The appellant stores the goods in issue in its warehouse. The appellant contracts with its customers to protect pipes, usually by sandblasting and then by coating the pipes with the goods in issue. When this is done in the field, the appellant sends a crew of three men who operate a spray unit, which is housed in a 5-ton van. Mr. Chopp explained that it could take six months to train a new employee to operate the equipment. He also explained that the goods in issue had been treated as inventory for income tax purposes and that he billed customers on the basis of the total contract price because this is what they wanted. However, his estimates for a contract price were based on separate calculations for labour and materials. Mr. Chopp indicated that he had sold the goods in issue directly to two customers, although this was not during the period at issue.

Mr. Chopp submitted that, as FST had been paid on the goods in issue and the respondent had treated these goods as inventory in other circumstances, the appellant should be entitled to its rebate.

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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.

He noted that the appellant was not a manufacturer and that the goods in issue were held in inventory at the relevant time.

Counsel for the respondent submitted that section 120 of the Act is intended to cover inventory held by someone who is in the business of selling, leasing or renting that inventory. The evidence shows that the goods in issue used by the appellant were not held for sale separately but, rather, were held for the purpose of being used in the service that the appellant provided to its customers and, thus, cannot be considered to be inventory for the purposes of section 120 of the Act. Counsel submitted that the Tribunal had used a similar analysis in previous decisions. In particular, he cited the Tribunal's decision in *IGL Canada Limited v. The Minister of National Revenue*,<sup>3</sup> which, he stated, was very similar to this case. Counsel argued that the appellant's customers are purchasing the service of applying the goods in issue and that the goods are not sold as part of a contract of sale, but as ancillary to the service of applying the goods in issue. In this regard, counsel referenced the evidence relating to the specialized equipment and training needed to provide such a service.

Since the retroactive amendments to the FST inventory rebate provisions of the Act, the Tribunal has consistently held that it must distinguish between goods sold as is or "separately" and goods sold as part of a contract for the provision of services. Subsection 120(2.1) of the Act now specifically states that the "portion of the ... goods ... 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 Tribunal has stated not only in *IGL Canada* but also in other decisions that, where the goods are to be consumed or used by the appellant in providing a service, it is of the opinion that the goods are deemed not to be sold and, therefore, not held in inventory "separately" for sale.<sup>4</sup> The evidence is clear that the appellant is in the business of providing a service and that the goods in issue are consumed in providing that service. As such, the Tribunal must conclude that the goods in issue were not held for sale separately in the ordinary course of the appellant's business.

Accordingly, the appeal is dismissed.

Anita Szluzak  
Anita Szluzak  
Presiding Member

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member

Desmond Hallissey  
Desmond Hallissey  
Member

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3. Appeal No. AP-92-181, March 8, 1994.

4. See, for instance, *Light Touch Stenographic Services Ltd. v. The Minister of National Revenue*, Appeal No. AP-91-182, March 8, 1994.