CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, February 2, 1998

Appeal No. AP-94-282

IN THE MATTER OF an appeal heard on June 18, 1997, 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

GREYHOUND LINES OF CANADA LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
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-94-282

GREYHOUND LINES OF CANADA LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant carries on the business of transportation of goods and passengers and owns and operates a large fleet of buses in Canada. This appeal raises the issue of whether certain parts purchased by the appellant and used in the repair or rebuilding of its bus engines and transmissions may be said to fall within the exemption provision of section 10 of Part XVII of Schedule III to the *Excise Tax Act* so as to entitle the appellant to a refund under section 68.2 of the *Excise Tax Act*.

HELD: The appeal is dismissed. The Tribunal finds that the appellant is not a manufacturer for purposes of the exemption provision at issue. The Tribunal is also of the view that the goods in issue do not have a value exceeding $2,000 per unit and, thus, do not meet this requirement of the exemption; moreover, the circumstances of this case do not disclose a sale for purposes of section 68.2 of the *Excise Tax Act*.

Places of Video Conference Hearing:	Hull, Quebec, and Calgary, Alberta
Date of Hearing:	June 18, 1997
Date of Decision:	February 2, 1998
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Arthur B. Trudeau, Member Charles A. Gracey, Member
Counsel for the Tribunal:	Hugh J. Cheetham
Clerks of the Tribunal:	Margaret Fisher and Anne Jamieson
Appearances:	H. George McKenzie, Q.C., for the appellant Frederick B. Woyiwada, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-282

GREYHOUND LINES OF CANADA LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal pursuant to section 81.19 of the *Excise Tax Act*[1] (the Act) from a decision of the Minister of National Revenue dated September 16, 1994.

The appellant carries on the business of transportation of goods and passengers and owns and operates a large fleet of buses in Canada.

On October 24, 1990, the appellant filed an application to obtain payment of federal sales tax (FST) in the amount of $240,000 which was paid as part of the cost of the parts purchased to repair or rebuild its bus engines and transmissions. By notice of determination dated February 19, 1991, the appellant's application for refund was rejected. By notice of objection dated May 6, 1991, the appellant objected to the determination. By notice of decision dated September 16, 1994, the respondent upheld the determination on the basis that the appellant was not a manufacturer, but rather was operating a repair shop for its own vehicles, and that the value of each of the parts used to repair the engines and transmissions was less than $2,000.

This appeal raises the issue of whether the parts in issue fall within the exemption provision of section 10 of Part XVII of Schedule III to the Act so as to entitle the appellant to a refund under section 68.2 of the Act. Section 68.2 provides for persons to claim a payment of FST paid in respect of any goods subsequently sold in certain exempt situations. Section 68.2 provides as follows:

> 68.2 Where tax under Part III or VI has been paid in respect of any goods and subsequently the goods are sold to a purchaser in circumstances that, by virtue of the nature of that purchaser or the use to which the goods are to be put or by virtue of both such nature and use, would have rendered the sale to that purchaser exempt or relieved from that tax under subsection 23(6), paragraph 23(8)(*b*) or subsection 50(5) or 51(1) had the goods been manufactured in Canada and sold to the purchaser by the manufacturer or producer thereof, an amount equal to the amount of that tax shall, subject to this Part, be paid to the person who sold the goods to that purchaser if the person who sold the goods applies therefor within two years after he sold the goods.

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

The relevant portions of Part XVII of Schedule III to the Act provide, in part, as follows:

PART XVII

TRANSPORTATION EQUIPMENT

5. Motor vehicles and trackless train systems consisting of a towing unit and one or more towed units, designed and permanently equipped to carry twelve or more passengers, for use exclusively in the provision of such class or classes of passenger transportation services as the Governor in Council may by regulation prescribe.

10. Parts and equipment installed on the tax exempt goods mentioned in [section] … 5,… of this Part … where the sale price by the Canadian manufacturer or the duty paid value of the imported article exceeds two thousand dollars per unit; all parts and equipment installed on the tax exempt goods mentioned in [section] … 5,… of this Part prior to the first use of those tax exempt goods.

Prior to the hearing of this appeal, the parties submitted an agreed statement of facts[2] from which the following facts are taken. Pursuant to section 51 of the Act, the buses operated by the appellant are exempt from the tax imposed by section 50 of the Act, being goods mentioned in section 5 of Part XVII of Schedule III to the Act. Pursuant to section 10 of Part XVII of Schedule III to the Act, parts and equipment installed on the appellant's buses are exempt from the tax imposed by section 50 of the Act, where the sale price by the Canadian manufacturer exceeds $2,000 per unit.

As part of its bus transportation business, the appellant removes spent engines and transmissions from its buses and rebuilds them for re-installation on its buses. In the course of rebuilding an engine or a transmission, the appellant undertakes an extensive number of steps.[3] A spent engine or transmission is never re-installed on the bus from which it was removed, to minimize the "down time" of the bus. Engines and transmissions are removed from buses when either they do not function for their intended purpose or their useful life is exhausted. A rebuilt engine or transmission is stored by the appellant and subsequently installed on a bus as needed.

In the course of rebuilding an engine or a transmission, any replacement components are purchased by the appellant from third parties. The fair market value of a rebuilt engine is $20,000, and the fair market value of a rebuilt transmission is $8,000.[4] The sale price of each of the replacement components purchased by the appellant and used by it in rebuilding the engines and transmissions is under $2,000. A rebuilt engine or transmission has a useful operating life many times greater than that of the spent engine or transmission which is removed from a bus. For example, on the first rebuild, the rebuilt engine will have an expected life of 300,000 miles.

FST was paid by persons other than the appellant under subparagraph 50(1)(*a*)(i) of the Act and was included in the purchase price of some of the replacement components acquired by the appellant and used in rebuilding the engines and transmissions. This FST is the amount which the appellant seeks to have paid to it as a result of this appeal.

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2. Exhibit 12.1.

3. With respect to the procedure involved in rebuilding engines, paragraph 8 of the agreed statement of facts outlines some 40 steps in this procedure. With respect to the procedure involved in rebuilding transmissions, paragraph 9 of the agreed statement of facts outlines some 12 steps in this procedure.

4. Paragraph 7 of the agreed statement of facts states that, when they are removed from buses, the engines have a value of $2,000 each and the transmissions have a value of $2,500 each.

In argument, counsel for the appellant submitted that the rebuilt engines and transmissions are parts with a value in excess of $2,000, which are manufactured by the appellant and which become exempt from FST when they are installed on the appellant's buses. Pursuant to section 68.2 of the Act, the appellant is entitled to be paid an amount in respect of the FST paid on the components that it purchased for rebuilding the engines and/or transmissions, equal to the amount of FST included in the purchase price of those components. He also submitted that the argument made in the respondent's brief takes no issue with the application of section 68.2 of the Act in this case.

Counsel for the appellant submitted that a critical issue in the case was whether the appellant is a manufacturer of rebuilt engines and transmissions. In this regard, he submitted that the process by which the engines and transmissions are rebuilt is manufacture for FST purposes. The finished product of the rebuilding process is markedly different from what existed at the start of the process. As the agreed statement of facts indicates, the rebuilt engines and transmissions have new qualities and new properties and have significantly increased in value. These, he argued, are the criteria by which manufacture is determined to exist. He disputed the statement in the respondent's decision that, with respect to the appellant's activities involving the engines and transmissions, "[n]o new forms, qualities or properties, such as increased marketability or commercial value, are added.[5]" Clearly, commercial value and new properties are added to the engine, in that it can function for another 300,000 miles after repair, i.e. it has a new useful life and new value. Therefore, based on the respondent's own criteria, the appellant is a manufacturer.

Counsel for the appellant referred to the decision of the Supreme Court of Canada in *Biltrite Tire Company* v. *His Majesty the King*[6] and the decision of the Federal Court of Canada in *Myer Franks Ltd.* v. *Her Majesty the Queen*[7] in support of the argument that the appellant is a manufacturer. Counsel submitted that, in *Biltrite*, the Supreme Court found that the retreading of spent tires was manufacture and rejected the Crown's argument that, because old tires did not lose their original identity, the process was not manufacture. In *Myer Franks*, the Federal Court found that the reconditioning of oil drums was a process by which the drums were given new properties which allowed the reconditioned drums to be capable of any use to which a new drum could be made and, thus, that the reconditioning was manufacture. With respect to the memorandum regarding repairs and rebuilding, Excise Memorandum ET 208[8] (Memorandum ET 208), counsel submitted that the appellant's activities satisfy the definition of "rebuilding" because what the appellant does to the engines and transmissions prolongs their life and makes them more valuable and marketable. The rebuilt engines are worth 10 times what they were worth before being rebuilt, and the transmissions are worth over 3 times what they were worth before being rebuilt. Counsel submitted that, by the very wording of Memorandum ET 208, the respondent has acknowledged that rebuilding is manufacture. He distinguished between repair and rebuilding by stating that, when one repairs something, one does not add to the useful life of the item in question, but rather ensures that the useful life of the item can be achieved. When an item is rebuilt, its life is extended beyond its original useful life.

Counsel for the appellant submitted that the components used in the rebuilding process are installed on the rebuilt engines, not on a particular bus. Rather, it is the rebuilt engines or transmissions that are subsequently installed on the buses. It is these parts, i.e. the rebuilt engines or transmissions, that are referred to in section 10 of Part XVII of Schedule III to the Act. As it is agreed that the engines and transmissions have a fair market value exceeding $2,000, they qualify for an exemption from FST.

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5. Department of National Revenue, Customs and Excise, *Notice of Decision*, File No. ALB 9243, September 16, 1994, at 2.
6. [1937] S.C.R. 364.
7. [1974] C.T.C. 128, Federal Court - Trial Division, File No. T-3446-72, February 5, 1973.
8. *Repairs and Rebuilding*, Department of National Revenue, Customs and Excise, January 3, 1990.

Counsel for the appellant next addressed the issue of what "tax" the appellant had paid, that it wanted remitted or repaid. He noted that the amount sought was not tax paid by the appellant as a manufacturer, but rather the amount stipulated in section 68.2 of the Act. This amount was paid in respect of the rebuilt engines and rebuilt transmissions, which goods are exempt by virtue of being installed on one of the appellant's buses. Put differently, the amount sought is an amount equal to the tax paid on the components that were acquired by the appellant and used in rebuilding the engines and transmissions.

In interpreting the phrase "in respect of," counsel for the appellant referred the Tribunal to its decision in *J. & D. Trophies & Engraving* v. *The Minister of Revenue*.[9] He submitted that, in that case, there did not appear to be any issue as to whether the components in question lost their identity, once they were assembled into finished goods. Here, the components acquired by the appellant also lost their identity, once they were assembled into the rebuilt engines or rebuilt transmissions. In other words, this case deals with the incorporation of goods into a different product, not an aggregation. Furthermore, the rebate at issue in *J. & D. Trophies* was available for goods in respect of which FST had been paid, and section 68.2 of the Act deals with tax paid under Part VI in respect of any goods. Counsel noted that the Tribunal referenced the Supreme Court of Canada's decision in *Gene A. Nowegijick* v. *The Queen*,[10] in which the Supreme Court stated that the words "in respect of" are words of the widest possible scope. The Tribunal then went on to state that:

> As FST has been paid on the parts that were assembled into the finished goods, the majority of the Tribunal believes that this tax has been paid "in relation to" or "in connection with" the new goods that were made by the appellant. It is evident to the majority of the Tribunal that there is "some connection" between the tax paid on the parts that are incorporated in the finished goods and the finished goods themselves.[11]

Counsel for the appellant submitted that, for the same reasons, the Tribunal should conclude in this case that the tax has been paid under Part VI in respect of the rebuilt engines and transmissions, because tax has been paid on the components or parts assembled into the rebuilt engines and transmissions.

Prior to hearing argument from counsel for the respondent, the Tribunal asked counsel for the appellant how the installation of the rebuilt engines or transmissions on the appellant's buses was a "sale" for purposes of section 68.2 of the Act. Counsel submitted that it was a sale by virtue of the appropriation by the appellant at that particular time. He referred to section 52 of the Act and submitted that, although that section does not specifically speak of a sale, the appellant is a manufacturer and is clearly making an appropriation for its own use, and appropriation, in the context of the Act, is a sale.

Counsel for the respondent began by addressing the purpose of section 68.2 of the Act. He submitted that this section permits recovery by someone other than the person who actually paid FST and, in particular, permits recovery by the person who sold the goods to a tax-exempt purchaser. Counsel suggested that there are two reasons for this. First, it is not until the sale to the ultimate purchaser actually takes place that it can be determined whether the sale is exempt or not. Second, it must be assumed that the seller either paid the tax directly as the manufacturer or paid it indirectly as part of the price paid to the manufacturer. As an example of how section 68.2 of the Act is to work, counsel submitted that, where a manufacturer sells to person "A" on a tax-included basis and person "A" sells to person "B" on a tax-exempt basis, the sale price to person "B" does not need to include the tax paid by person "A" to the manufacturer. Person "A" can

9. Appeal No. AP-91-213, January 26, 1993.
10. [1983] 1 S.C.R. 29.
11. *Supra* note 9 at 3.

claim the amount of tax that it paid as part of the manufacturer's markup and, in recovering that amount, all parties, including the Department of National Revenue (Revenue Canada), come out even.

Turning to this case, counsel for the respondent submitted that what the appellant has to establish is that it sold the goods on which the tax was paid, not only in respect of section 68.2 of the Act but also with respect to section 10 of Part XVII of Schedule III to the Act, because, under that provision, it is the sale price by the Canadian manufacturer that is to be taken into account. Furthermore, the appellant must show that the goods themselves qualify for exemption, i.e. that they were parts and equipment with a sale price exceeding $2,000. Counsel submitted that the appellant's case should fail on all these grounds, i.e. that the appellant is unable to show that it is either the manufacturer or the seller of the goods and that it is unable to show that the goods in issue have a value exceeding $2,000.

Counsel for the respondent argued that the evidence indicates that the buses are owned by the appellant, that the engines are owned by the appellant and that it is the appellant itself that removes the engines from its own buses and rebuilds them. The repair operation is carried out with replacement parts purchased by the appellant, and each of these parts has a sale price of less than $2,000, including any FST paid by the manufacturer or distributor that sold them to the appellant. When rebuilt, the engines have a value of greater than $2,000. Counsel submitted that it is important to note that, when reinstalled on the buses, the engines perform exactly the same function as they did when they were new. No new function is added to them.

Counsel for the respondent submitted that it is clear that the appellant is not the seller in these circumstances. He noted that, in response to the Tribunal's questions in this regard, counsel for the appellant relied on provisions of the Act relating to appropriating goods for one's own use. He submitted that, in order for the appellant to argue that these provisions make it a seller, the appellant has to satisfy at least two conditions. First, the appellant has to satisfy the Tribunal that these provisions are meant to establish or define a manufacturer that appropriates things for its own use as a seller. Counsel for the respondent submitted that these provisions are simply not intended to have this effect. Rather, they are intended to impose tax in certain situations. In addition, he noted that these provisions have not been incorporated into section 68.2 of the Act. Second, the appellant must persuade the Tribunal that it was the manufacturer of the goods, which also relates to the exemption provision in Part XVII of Schedule III to the Act. He noted that the appellant had not had tax imposed on it or collected from it under these provisions. He submitted that this was because there is no manufacturing process involved in what the appellant does.

Counsel for the respondent submitted that, to qualify as a manufacturer of the rebuilt engines and transmissions, the appellant must show that it gave them new forms and qualities. In this regard, counsel noted that the appellant always owned the goods. It bought them new, with the buses presumably, and, therefore, never sold them or acquired them in used condition. The appellant simply restored them to their original function. In support of the position that the appellant repaired the goods instead of manufacturing them, counsel referred to the decision of the Federal Court of Appeal in *Enseignes Imperial Signs Ltée* v. *Minister of National Revenue*[12] in which the Federal Court distinguished between restoring something to its original function and an activity that results in something no longer performing the same role as it did before that activity.

Counsel for the respondent submitted that what the appellant does is restore something to its original function. This process is not manufacture, but repair. He submitted that this interpretation is reinforced by Memorandum ET 208, which states, in paragraph 1, that "[r]ebuilding of goods, to the extent that the design or function of the goods has changed, is considered to be manufacturing." Some of the criteria indicative of

12. (1990), 116 N.R. 235, File No. A-264-89, February 28, 1990.

manufacture set out in paragraph 3 are: (a) "the existence or identity of the original product is lost after the restoration"; and (b) "the original product is given new or enhanced capabilities which it did not initially possess." Counsel noted that, although excise memoranda are not themselves authority that must be considered persuasive by the Tribunal, they can assist the Tribunal. Counsel also directed the Tribunal to paragraph 8 of Memorandum ET 208 which states that "[r]estoration of goods by the replacement of worn, damaged or defective parts or components, or the repair of defective components, is considered a repair and not manufacturing or producing when the conditions of paragraph 3 are not present." Counsel submitted that no new or enhanced capabilities are given the engines and transmissions that they did not originally possess, nor is the existence or identity of the original product lost after the restoration process is carried out by the appellant. The appellant is not a manufacturer because it does not manufacture these goods, rather it repairs them.

With respect to the value of the goods in issue, counsel for the respondent submitted that the exemption that the appellant is claiming relates specifically to parts and that there is nothing in the provision which suggests that the total price of all of the parts, as opposed to the price of each part, can be used. In this case, the facts show that the value of each of the parts is less than $2,000 and, therefore, they are not exempt. In conclusion, counsel submitted that the appellant has not been able to show that the goods in issue have a value exceeding $2,000 and, further, it has not been able to show that it is a manufacturer of those goods for the purposes of section 68.2 of the Act and section 10 of Part XVII of Schedule III to the Act.

In reply, counsel for the appellant submitted that the respondent had not raised the issue of whether the appellant satisfied the requirements of section 68.2 of the Act or not. However, he submitted that it was the appellant's position that it was the manufacturer for purposes of this section, as well as the purchaser of the goods, by appropriation. The appellant also installs the goods and is the end user of the goods. And it is the installation of the goods on the appellant's buses which ultimately qualifies all of this for the payment of the amount on which this appeal is based. Counsel submitted that this was reinforced by Revenue Canada's policy regarding refunds, reflected in Excise Communiqué 149/TI[13] which states that "[r]efunds, in an amount equal to the tax paid, will be payable to the installer of qualifying parts and equipment, including owners/operators who purchase these goods on a tax paid basis and perform their own installation.[14]" Therefore, the appellant fits into section 68.2 of the Act because of this policy.

Turning to submissions of the respondent relating to the fact that the goods in issue are always owned by the appellant, counsel for the appellant noted that paragraph 2 of Memorandum ET 208 states that "[p]ersons are regarded as manufacturers when, as part of their business, they acquire title to used goods either through a purchase, barter, exchange or some other means, and subsequently sell these goods after they have been rebuilt." He submitted that the appellant acquired the engines and transmissions to be rebuilt by removing them from the buses. Again, there is a notional change from a functioning engine used in the appellant's business to the engine being appropriated to the rebuilding or manufacturing aspect of the appellant's business, and it is that rebuilding process which constitutes manufacture in these circumstances. Counsel reiterated his view that, in this case, the Tribunal is required to determine whether, on the facts of this case, the appellant is a manufacturer and whether it is entitled to the repayment that it seeks.

The Tribunal agrees with the parties that, to find for the appellant, the Tribunal has to be persuaded that the appellant is a manufacturer for purposes of the exemption set out in section 10 of Part XVII of Schedule III to the Act. In this regard, the Tribunal is of the view that the evidence shows that the appellant is not a manufacturer in the circumstances of this case. More specifically, the Tribunal is of the view that the

13. *Parts for Transportation Equipment*, Department of National Revenue, Customs and Excise, March 1987.
14. *Ibid.* at 2.

process that the engines and transmissions go through is a process of repair, not a process that can be considered manufacture. The Tribunal is of the view that what the case law referred to by counsel for both sides indicates is that each case must be decided on its own facts and that the line between repair and rebuilding can be a fine line. However, the Tribunal is persuaded, in this case, that the evidence shows that, while the process undertaken by the appellant may prolong the life of a particular engine or transmission, as the case may be, it does not impart any particular quality or property to that engine or transmission such that it can be said that the appellant has made or created a new product with functions or capabilities that are different from what the engine or transmission had originally. Put differently, the engine is still an engine or the transmission is still a transmission after being restored by the appellant.

Although the Tribunal's finding with respect to whether the appellant may be considered a manufacturer is sufficient to dispose of this appeal, the Tribunal also wishes to comment on the other requirements that the appellant would have had to meet to have been successful, namely, whether the goods in issue have a value exceeding $2,000 and whether there has been a sale for purposes of section 68.2 of the Act in the circumstances of this case. With respect to the question of the value of the goods in issue, in the Tribunal's view, section 10 of Part XVII of Schedule III to the Act clearly contemplates a sale per unit and, here, the units or items being purchased by the appellant for installation on the exempt buses are the parts or components used in repairing the engines or transmissions, not the engines or transmissions themselves. As indicated in the agreed statement of facts, the value of each of these is less than $2,000 and, therefore, they do not satisfy this requirement of the exemption. With respect to the issue of the sale for purposes of section 68.2 of the Act, the Tribunal agrees with counsel for the respondent that the appropriation provisions of the Act relied on by the appellant to establish a sale are not applicable to section 68.2 in the circumstances of this case. The Tribunal does not agree with the appellant that it can be said to be selling the goods in issue, i.e. the parts or components used in repairing the engines or transmissions, to itself for purposes of this provision.

Accordingly, the appeal is dismissed.

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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member