CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, February 21, 1997

Appeal No. AP-95-179

IN THE MATTER OF an appeal heard on November 13, 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 September 27, 1995, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

GERALD THE SWISS GOLDSMITH **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Susanne Grimes
Susanne Grimes
Acting 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-95-179

GERALD THE SWISS GOLDSMITH **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* of an assessment of the Minister of National Revenue in which it was determined that the appellant owed $2,772.24 (representing $2,282.46 in unpaid taxes, $274.68 in interest and $215.10 in penalty). The assessment followed a determination that allowed an application for a federal sales tax inventory rebate in the amount of $2,419.88. The issue in this appeal is whether the goods in issue described as various jewellery items are "inventory" within the meaning of section 120 of the *Excise Tax Act*. More specifically, the Tribunal must determine whether the inventory constitutes "tax-paid goods" held "at that time for sale, lease or rental separately ... to others in the ordinary course of a commercial activity of the person," as required under section 120 of the *Excise Tax Act*, in order for the goods to qualify for a federal sales tax inventory rebate.

HELD: The appeal is allowed in part. The evidence shows that the appellant was in the business of assembling certain items to produce articles of jewellery. The evidence also shows that the appellant's business was comprised of some direct sales of certain jewellery items in an "as acquired" condition and also of some jewellery repair. In the Tribunal's view, only the goods in issue that were held for sale separately "as is" in the same condition as acquired were held for sale separately in the ordinary course of the appellant's commercial activities, and they, therefore, qualify for a federal sales tax inventory rebate. The Tribunal is of the opinion that the goods in issue held in inventory by the appellant for the purpose of being assembled in order to create articles of jewellery different from the ones which were purchased by the appellant were held for consumption or use by the appellant and were not, therefore, held for sale, lease or rental separately. The Tribunal is of the view that approximately 22 percent of the appellant's business involves the sale of goods in inventory "as is." This portion of the appellant's claim should, therefore, be allowed on the basis that the goods were held separately for sale in the ordinary course of the appellant's commercial activities.

Places of Video Conference Hearing:	Hull, Quebec, and Vancouver, British Columbia
Date of Hearing:	November 13, 1996
Date of Decision:	February 21, 1997
Tribunal Member:	Arthur B. Trudeau, Presiding Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerks of the Tribunal:	Anne Jamieson and Margaret Fisher
Appearances:	Gerald Wyler, for the appellant Holly Holtman and Anne Turley, 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-95-179

GERALD THE SWISS GOLDSMITH **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act), heard by one member of the Tribunal[2] by way of a video conference, of an assessment of the Minister of National Revenue dated August 6, 1992, in which it was determined that the appellant owed $2,772.24 (representing $2,282.46 in unpaid taxes, $274.68 in interest and $215.10 in penalty). The assessment followed a determination dated March 8, 1991, that allowed an application for a federal sales tax (FST) inventory rebate in the amount of $2,419.88 filed by the appellant on January 2, 1991. The appellant served a notice of objection dated August 19, 1992, which was disallowed by the respondent in a decision dated September 27, 1995.

The issue in this appeal is whether the goods in issue described as various jewellery items are "inventory" within the meaning of section 120 of the Act.[3] More specifically, the Tribunal must determine whether the inventory constitutes "tax-paid goods" held "at that time for sale, lease or rental separately ... to others in the ordinary course of a commercial activity of the person," as required under section 120 of the Act, in order for the goods to qualify for an FST inventory rebate. For purposes of this appeal, the relevant provisions of section 120 of the Act read 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.
>
> "tax-paid goods" means goods, acquired before 1991 by a person, that have not been previously written off in the accounting records of the person's business for the purposes of the *Income Tax Act* and that are, as of the beginning of January 1, 1991,
>
> (*a*) new goods that are unused,

---

1. R.S.C. 1985, c. E-15.
2. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to section 81.19 of the Act in respect of an application for a rebate under section 120 of the Act.
3. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27.

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

> (*b*) remanufactured or rebuilt goods that are unused in their condition as remanufactured or rebuilt goods, or
> (*c*) used goods
>
> and on the sale price or on the volume sold of which tax (other than tax payable in accordance with subparagraph 50(1)(*a*)(ii)) was imposed under subsection 50(1), was paid and is not, but for this section, recoverable.
>
> (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.

At the hearing, Mr. Gerald Wyler, sole proprietor of Gerald The Swiss Goldsmith, appeared and testified on behalf of the appellant. Mr. Wyler testified that he is a goldsmith by trade. He explained that all the items listed in the appellant's inventory as of December 31, 1990, which included rings, pendants, necklaces, chains, brooches, pins, earrings, estate jewellery, stones, gold and findings, were all tax-paid goods for which the appellant should have been granted a rebate. He said that, in his view, he is not a manufacturer. He said that he sells all of the items listed in the appellant's inventory "as is." He admitted, however, that most of his business consists of assembling some of those items to make various articles of jewellery. He showed the Tribunal invoices which indicated that he sold certain items, for example, diamonds and "earring findings" "as is." Mr. Wyler testified that he is also in the business of jewellery repair. In answering questions from the Tribunal, Mr. Wyler went through the list of items in the appellant's inventory and identified approximately what percentage of the goods are sold "as is" and what percentage of the goods are assembled by him before being sold.

Mr. Wyler argued that the respondent's audit should not be considered legal by the Tribunal, as it was done by telephone. Furthermore, he was not aware that he was being audited by the respondent. He was simply asked to provide a detailed list of the appellant's inventory on December 31, 1990. Mr. Wyler argued that, in his view, all of the appellant's goods were held for sale "as is" because he does not consider himself a jewellery manufacturer.

Counsel for the respondent argued that the goods in issue are not "inventory" within the meaning of section 120 of the Act and that the appellant was rightfully denied the rebate claimed in respect of those goods. They argued that the evidence shows that the appellant is in the business of manufacturing jewellery. Accordingly, the goods in issue were held for the purpose of further manufacture and were to be used or consumed in the ordinary course of the appellant's business. Counsel argued that the goods in issue were not held for sale, lease or rental separately for a price or rent in money within the meaning of section 120 of the Act. In support of their argument, counsel relied on the Tribunal's decision in *Barry Rodko Goldsmiths Ltd.* v. *The Minister of National Revenue*.[4]

Subsection 120(1) of the Act provides, in part, that, in order for goods held in inventory to qualify for an FST inventory rebate, FST must have been paid on the sale price or on the volume sold of the goods and that the goods must be described in the person's inventory in Canada and held 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. Subsection 120(2.1) of the Act further provides that tax-paid 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.

---

4. Appeal No. AP-92-277, March 10, 1995.

The Tribunal finds no merit in Mr. Wyler's argument that the respondent's audit was illegal. The evidence shows that the appellant was in the business of assembling certain items to produce articles of jewellery. The evidence also shows that the appellant's business was comprised of some direct sales of certain jewellery items in an "as acquired" condition and also of some jewellery repair. In the Tribunal's view, only the goods in issue that were held for sale separately "as is" in the same condition as acquired were held for sale separately in the ordinary course of the appellant's commercial activities, and they, therefore, qualify for an FST inventory rebate. The Tribunal is of the opinion that the goods in issue held in inventory by the appellant for the purpose of being assembled in order to create articles of jewellery different from the ones which were purchased by the appellant were held for consumption or use by the appellant and were not, therefore, held for sale, lease or rental separately.[5]

Having reviewed the evidence, in particular, the testimony of Mr. Wyler and the list of the appellant's inventory as of December 31, 1990, the Tribunal is of the view that approximately 22 percent[6] of the appellant's business involves the sale of goods in inventory "as is." This portion of the appellant's claim should, therefore, be allowed on the basis that the goods were held separately for sale in the ordinary course of the appellant's commercial activities. As such, the Tribunal finds that the appellant should have been entitled to 22 percent of the amount claimed in its rebate application, instead of the approximate 6 percent which was allowed by the respondent in the assessment. This means that the amount owed by the appellant to the respondent would be reduced from $2,282.46 to $1,877.35, plus the appropriate interest and penalty.

Accordingly, the appeal is allowed in part.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

5. See, for example, *Light Touch Stenographic Services Ltd.* v. *The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-91-182, March 8, 1994.

6. This percentage was derived by adding $800.00 for rings, $492.00 for pendants, $3,096.00 for necklaces, $552.00 for chains, $1,497.50 for earrings and $260.40 for diamonds, for a total of $6,697.90, which represents approximately 22 percent of the amount claimed by the appellant in its rebate application.