CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, June 25, 1997

Appeal No. AP-96-029

IN THE MATTER OF an appeal heard on March 24, 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 February 22, 1996, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

NEWPORT MOTOR MANUFACTURING COMPANY LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-96-029

NEWPORT MOTOR MANUFACTURING COMPANY LIMITED **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 that rejected an application for a federal sales tax (FST) inventory rebate filed by the appellant. The goods for which an inventory rebate was claimed are engine parts for motor vehicles. The issue in this appeal is whether the appellant is entitled to an FST inventory rebate in respect of the engine parts held in its inventory on January 1, 1991. More specifically, the Tribunal must determine whether the engine parts for which a rebate was claimed meet the definition of "inventory" within the meaning of the *Excise Tax Act*.

HELD: The appeal is dismissed. Subsection 120(1) of the *Excise Tax Act* provides, in part, that, 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 *Excise Tax 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.

In the Tribunal's view, the evidence shows that the appellant's primary, albeit not sole, commercial activity, at the relevant time, was as a rebuilder or remanufacturer of motor engines and that, for the most part, the goods for which a rebate was claimed were used by the appellant in rebuilding or remanufacturing motor engines. As such, in the Tribunal's opinion, these goods were consumed or used in providing a service and were not held in inventory "separately" for sale. Accordingly, the Tribunal finds that the engine parts do not qualify for an FST inventory rebate.

Places of Videoconference Hearing:	Hull, Quebec, and Toronto, Ontario
Date of Hearing:	March 24, 1997
Date of Decision:	June 25, 1997
Tribunal Members:	Charles A. Gracey, Presiding Member Raynald Guay, Member Arthur B. Trudeau, Member
Counsel for the Tribunal:	Heather A. Grant
Clerk of the Tribunal:	Anne Jamieson and Margaret Fisher
Appearances:	Violet Murphy, for the appellant M. Kathleen McManus, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-96-029

NEWPORT MOTOR MANUFACTURING COMPANY LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
RAYNALD GUAY, Member
ARTHUR B. TRUDEAU, 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 that rejected an application for a federal sales tax (FST) inventory rebate filed by the appellant. The goods for which an inventory rebate was claimed are engine parts for motor vehicles. The respondent rejected the appellant's application on the basis that, as a rebuilder of motor engines, it is reasonable to assume that not all the goods in the appellant's inventory were held for sale, lease or rental to others in the ordinary course of the appellant's commercial activity, as required pursuant to section 120 of the Act.

The issue in this appeal is whether the appellant is entitled to an FST inventory rebate in respect of the engine parts held in its inventory on January 1, 1991. More specifically, the Tribunal must determine whether the engine parts for which a rebate was claimed meet the definition of "inventory" within the meaning of the Act.

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.
>
> (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.

Mrs. Violet Murphy, General Manager of Newport Motor Manufacturing Company Limited, appeared and testified on behalf of the appellant. She explained that the appellant was not granted an FST licence when the business was originally established because it was not considered a manufacturer. Accordingly, it paid FST on all its purchases until the implementation of the Goods and Services Tax.[2]

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1. R.S.C. 1985, c. E-15.
2. In support of this assertion, Mrs. Murphy referred the Tribunal to a number of written statements to that effect obtained by the appellant from a variety of its suppliers.

Mrs. Murphy stated that she and her brother took inventory around the end of December 1990 and that the total worth of the inventory at that time was $42,263. Mrs. Murphy further stated that all the goods included as inventory and for which a rebate was claimed were new. These goods include a variety of engine parts, such as main bearings, gaskets, crankshafts and engine cores. Moreover, they were purchased directly either from the manufacturer or from a distributor. Mrs. Murphy added that there were also numerous used goods held in inventory at that time, but that no rebate was claimed in respect of those goods because, in the appellant's view, they were of negligible value.

In describing the appellant's business, Mrs. Murphy explained that, at one time, it had approximately 20 employees, but that number had now been reduced to 3. Mr. Les Horvath, President of Newport Motor Manufacturing Company Limited, also appeared on behalf of the appellant. Mr. Horvath estimated that, in 1990, the appellant employed between 8 and 12 people. Mrs. Murphy explained that 90 to 95 percent of the appellant's business is done at the commercial level, while the remaining portion of the appellant's business is for private individuals. In other words, the majority of the appellant's customers are other businesses.

Mrs. Murphy explained that the appellant generally sells its customers the required parts for an engine and, if the customers choose, the appellant will perform the labour in order to put the engine together or to install the parts purchased. In some cases, the customers simply purchase the engine parts and perform the labour themselves on their own premises. Mrs. Murphy emphasized that, when parts are sold and installed on-site, the customer invoice shows the charges for the parts and those for the labour as separate items.[3]

In cross-examination, Mrs. Murphy disagreed that the appellant could be described solely as a rebuilder of engines. When she was presented with evidence that an advertisement in the yellow pages of a Hamilton area telephone directory described the appellant as such, Mrs. Murphy indicated that, to her knowledge, the appellant had not placed the advertisement. Mrs. Murphy acknowledged, however, that, in the appellant's notice of objection to the respondent's determination, the appellant referred to itself as "a remanufacturer of engines."

Counsel for the respondent asked the witnesses a number of questions regarding the appellant's use of used parts. Counsel also asked questions regarding the state of particular items included among those for which an inventory rebate was claimed, such as whether "ground, remanufactured" crankshafts on the appellant's inventory list were in fact "new" goods. Mrs. Murphy responded that these items were considered "new" by industry standards. Moreover, the grinding and remanufacturing of the crankshafts were done by the appellant's suppliers and not by the appellant.

Neither Mrs. Murphy nor Mr. Horvath could estimate for the Tribunal the proportion of total sales which were for parts alone with no additional labour charges and the proportion of total sales which were for parts with additional labour charges. Mr. Horvath estimated that between 30 and 60 percent of total sales were for parts and that the balance was for labour. When it was made clear that the Tribunal wished to know what proportion of the total sales were for parts sold "as is" and not used in engine repair and rebuilding, Mrs. Murphy testified that it would be necessary to examine the individual invoices to determine the answer.

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3. To support her statements regarding the distinction made by the appellant between the sale of parts and labour, Mrs. Murphy referred the Tribunal to an invoice to Range Truck Shop, dated November 19, 1996, which had already been placed on the record.

Mr. Horvath acknowledged that, in the majority of cases, the appellant would be installing some new parts in the process of remanufacturing an engine. Mr. Horvath further indicated that the major items of machinery at the appellant's premises, which include hoists, presses, cylinder boring machines and a number of other machines, are typically found in engine rebuilding shops.

In argument, Mrs. Murphy submitted that FST was paid on all the parts in respect of which the appellant claimed a rebate and that the goods were sold to the appellant's customers "as is." As such, the appellant is entitled to a rebate of the FST paid in respect of those goods. Mrs. Murphy appeared to argue that any labour performed in respect of the parts was not relevant to whether the appellant is entitled to a rebate of FST since, when the labour was performed, the parts already belonged to the appellant's customers.

Counsel for the respondent argued that the goods for which a rebate was claimed do not qualify for a rebate because subsection 120(2.1) of the Act, which defines "inventory" within the meaning of the FST inventory rebate provisions in the Act, specifically 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." Counsel submitted that, in this case, the goods were not held for sale, but were consumed or used by the appellant in the ordinary course of its business, namely, the rebuilding of engines.[4] Counsel further submitted that insufficient evidence was introduced by the appellant to show which proportion of the parts held in inventory were sold directly to customers "as is," without further labour being performed in conjunction with those parts.

Subsection 120(1) of the Act provides, in part, that, 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.

In previous decisions regarding the entitlement of a person to a rebate of FST paid in respect of tax-paid goods held in inventory as at January 1, 1991, 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.[5] In the Tribunal's view, the evidence shows that the appellant's primary, albeit not sole, commercial activity, at the relevant time, was as a rebuilder or remanufacturer of motor engines and that, for the most part, the goods for which a rebate was claimed were used by the appellant in rebuilding or remanufacturing motor engines.[6] On this point, the Tribunal notes the testimony of the witnesses for the

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4. Counsel referred to two Tribunal decisions, namely, *Gerald The Swiss Goldsmith* v. *The Minister of National Revenue*, Appeal No. AP-95-179, February 21, 1997, and *Impressions Gallery Inc.* v. *The Minister of National Revenue*, Appeal No. AP-93-111, March 14, 1995.

5. See, for example, *L.J. Chopp and Associates* v. *The Minister of National Revenue*, Appeal No. AP-94-276, September 11, 1996, and *IGL Canada Limited* v. *The Minister of National Revenue*, Appeal No. AP-92-181, March 8, 1994.

6. A review of the statement of earnings for the year ended April 30, 1991, placed on the record indicates that material or "inventory" costs account for less than half of the total expenses. If the appellant had been in the resale business, as suggested by the appellant, a lower percentage of other expenses as compared with material or "inventory" costs would be expected.

appellant. As such, in the Tribunal's opinion, these goods were consumed or used in providing a service and were not held in inventory "separately" for sale. Accordingly, the Tribunal finds that the engine parts do not qualify for an FST inventory rebate.

In respect of the goods which were not used or consumed in the provision of a service, but rather sold "as is," the Tribunal is of the view that, had such sales been properly documented, the appellant might have successfully claimed a rebate in respect of such sales. However, there is no evidence on the record to indicate what proportion of the goods included among the items for which a rebate was claimed qualify as such goods. Accordingly, the Tribunal cannot find that the appellant is entitled to a rebate in respect of any of the goods for which it has claimed a rebate.

For the foregoing reasons, the appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member