

Ottawa, Monday, August 11, 1997

Appeal No. AP-96-119

IN THE MATTER OF an appeal heard on April 29, 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 16, 1996, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

FERLAND SOUDURE ENR.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-119

FERLAND SOUDURE ENR.

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. The assessment relates to an application for a federal sales tax inventory rebate that the appellant submitted on March 21, 1991, for iron plates or bars that were purchased and used for repairing machinery, particularly agricultural machinery, and which were described in its inventory on January 1, 1991. The respondent had accepted the application. The respondent's assessment was made after the retroactive amendments to the provisions of the *Excise Tax Act* governing the federal sales tax inventory rebate. The issue in this appeal is whether the appellant is entitled, under section 120 of the *Excise Tax Act*, to a federal sales tax inventory rebate for the goods in issue.

HELD: The appeal is dismissed. The Tribunal believes that the goods in issue, i.e. the iron plates or bars purchased and used for repairing machinery, particularly agricultural machinery, were not described in the appellant's inventory within the meaning of the *Excise Tax Act*. Specifically, the goods in issue were not held for sale "as is," i.e. separately for a price in the ordinary course of the commercial activity of the appellant. The evidence showed that the goods in issue were ancillary to the provision of a service that the appellant provided to its customers.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 29, 1997
Date of Decision:	August 11, 1997
Tribunal Member:	Arthur B. Trudeau, Presiding Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Hervé Ferland, for the appellant Louis Sébastien, for the respondent

Appeal No. AP-96-119

FERLAND SOUDURE ENR.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member

REASONS FOR DECISION

This is an appeal, heard by one member of the Tribunal,¹ under section 81.19 of the *Excise Tax Act*² (the Act), of an assessment of the Minister of National Revenue in the amount of \$1,557.16, including penalty and interest. The assessment relates to an application for a federal sales tax (FST) inventory rebate in the amount of \$1,036.72 that the appellant submitted on March 21, 1991, for iron described in its inventory on January 1, 1991. The respondent had accepted the application. The respondent's assessment was made after the retroactive amendments to the provisions of the Act governing the FST inventory rebate. The issue in this appeal is whether the appellant is entitled, under section 120³ of the Act, to an FST inventory rebate for the goods in issue.

In general, legislation will not apply retroactively unless such application is expressly provided in an act or necessary by implication.⁴ The provisions of an act⁵ that was assented to June 10, 1993, expressly stated that the amendments to section 120 were deemed to have come into force on December 17, 1990.⁶ The respondent's assessment was, therefore, made because the goods in issue were not held at that time for sale, lease or rental in the ordinary course of the commercial activity of the appellant. The appellant objected to the respondent's assessment. In a decision dated February 16, 1996, the respondent disallowed the appellant's objection.

1. 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 *Excise Tax Act* in respect of an application for a rebate under section 120 of that act.

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

3. S.C. 1990, c. 45, s. 12, as amended.

4. See, for example, *Michelin Tires (Canada) Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-93-333, March 22, 1995, at 15, where the Tribunal referred to *Gustavson Drilling (1964) Limited v. The Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 at 279.

5. *An Act to amend the Excise Tax Act, the Access to Information Act, the Canada Pension Plan, the Customs Act, the Federal Court Act, the Income Tax Act, the Tax Court of Canada Act, the Tax Rebate Discounting Act, the Unemployment Insurance Act and a related Act*, S.C. 1993, c. 27.

6. *Ibid.* s. 6(7).

During the hearing, the appellant was represented by its owner, Mr. Hervé Ferland, who also testified on behalf of the appellant. Mr. Ferland explained that the activities of the appellant, which began in the early 1980s, involve repairing machinery, particularly agricultural machinery. To do so, the appellant uses iron plates or bars that it purchases. Mr. Ferland repairs defective parts in his welding workshop. Mr. Ferland maintained that, according to him, all of the appellant's inventory was held for resale, contrary to what he had been told by the respondent. He claimed that he had met all the requirements of the Act with respect to the appellant's application for an FST inventory rebate and, as a result, that the appeal should be allowed.

Counsel for the respondent maintained that the goods in issue could not be considered as goods described in the inventory on January 1, 1991, because they were not held "at that time for sale separately, for a price or rent in money," but were held to be consumed during the provision of a service for the appellant's customers.

Before the amendments to the Act, the term "inventory" was defined in section 120, in part, as follows:

"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 taxable supply (within the meaning assigned by subsection 123(1)) by way of sale, lease or rental to others in the ordinary course of the person's business.

This definition has been amended and now reads, in part, as follows:

"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.

Section 120 of the Act was also amended by the addition of subsection 120(2.1) which provides that the portion of the tax-paid goods that are described in a person's inventory "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."

Before the amendments, the Tribunal had always ruled that a person was entitled to an FST inventory rebate for goods provided to a customer in the provision of a service.⁷ Since these amendments, the Tribunal has ruled that the goods must be sold "as is" to qualify for the FST inventory rebate. The Tribunal has interpreted the requirement according to which the goods must be "held ... for sale ... separately, for a price"⁸ in a way that excluded cases where the title of the goods is transferred to a customer for a fixed price during the provision of a service.

7. See, for example, *Northern Aircool Engines Co. v. The Minister of National Revenue*, Appeal No. AP-92-104, September 21, 1993; and *P.R.E.P. Consulting Ltd. v. The Minister of National Revenue*, Appeal No. AP-92-002, March 19, 1993.

8. See, for example, *Super Générateur Inc. v. The Minister of National Revenue*, Appeal No. AP-94-265, March 6, 1996, at 3; and *Harry M. Gruenberg, Synoda Co. Reg'd v. The Minister of National Revenue*, Appeal No. AP-92-252, April 5, 1994.

In this appeal, the Tribunal believes that the goods in issue, i.e. the iron plates or bars purchased and used in repairing machinery, particularly agricultural machinery, were not described in the appellant's inventory within the meaning of the Act. Specifically, the goods in issue were not held for sale "as is," i.e. separately for a price in the ordinary course of the commercial activity of the appellant. The evidence showed that the goods in issue were ancillary to the provision of a service that the appellant provided to its customers.

Consequently, the appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member