



Ottawa, Tuesday, September 30, 1997

**Appeal No. AP-96-071**

IN THE MATTER OF an appeal heard on March 27, 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 May 24, 1996, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**SANI MÉTAL LTÉE**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed in part. The matter is referred back to the respondent to determine, with the co-operation of the appellant, which goods in issue have already been subject to a refund of federal sales tax.

Lyle M. Russell  
Lyle M. Russell  
Presiding Member

Dr. Patricia M. Close  
Dr. Patricia M. Close  
Member

Charles A. Gracey  
Charles A. Gracey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-96-071**

**SANI MÉTAL LTÉE**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* from a determination of the Minister of National Revenue which rejected part of an application for a refund of federal sales tax made by the appellant under section 68.2 of the *Excise Tax Act*. The appellant is both a manufacturer and a distributor of equipment used in the manufacture or production of food or drink. The parties agree that these goods are exempt from tax, pursuant to section 3, Part V, Schedule III to the *Excise Tax Act*. The appellant applied for and obtained a refund of federal sales tax paid on the goods that it manufactured; however, it was denied such a refund for the goods that it purchased from third parties and then resold. The parties also agree that the goods purchased from third parties were resold to persons who used them exclusively in the manufacture or production of food or drink. The issue in this appeal is whether the appellant is entitled to a refund of federal sales tax with respect to the equipment that it purchased from third parties.

**HELD:** The appeal is allowed in part. The matter is referred back to the respondent to determine, with the co-operation of the appellant, which goods in issue have already been subject to a refund of federal sales tax. It is agreed by both parties that the goods in issue were imported or manufactured by someone other than the appellant, that this other person remitted tax to the government and sold the goods to the appellant on a tax-included basis and that, after the goods were resold by the appellant, they were used in the manufacture or production of food or drink, being tax-exempt goods. The Tribunal is, therefore, of the view that the appellant is entitled to a refund of federal sales tax on goods that it purchased and then resold to persons who used them exclusively in the manufacture or production of food or drink. The Tribunal notes, however, that the facts appear to suggest that several of the persons from whom the appellant bought the goods in issue already received refunds pursuant to section 68.2 of the *Excise Tax Act*. In the Tribunal's opinion, the appellant should not receive a refund of federal sales tax paid on any goods in respect of which a refund has already been paid.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: March 27, 1997  
Date of Decision: September 30, 1997

Tribunal Members: Lyle M. Russell, Presiding Member  
Dr. Patricia M. Close, Member  
Charles A. Gracey, Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

Appearances: Felipe Morales, for the appellant  
Louis Sébastien, for the respondent

**Appeal No. AP-96-071**

**SANI MÉTAL LTÉE**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member  
DR. PATRICIA M. CLOSE, Member  
CHARLES A. GRACEY, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) from a determination of the Minister of National Revenue dated December 20, 1995, which rejected part of an application for a refund of federal sales tax (FST) made by the appellant under section 68.2 of the Act. This determination was confirmed by the respondent in a decision dated May 24, 1996.

The appellant is both a manufacturer and a distributor of equipment used in the manufacture or production of food or drink. The parties agree that these goods are exempt from tax, pursuant to section 3, Part V, Schedule III to the Act. The appellant applied for and obtained a refund of FST paid on the goods that it manufactured; however, it was denied such a refund for the goods that it purchased from third parties and then resold. The parties also agree that the goods purchased from third parties were resold to persons who used them exclusively in the manufacture or production of food or drink.

The issue in this appeal is whether the appellant is entitled to a refund of FST with respect to the equipment that it purchased from third parties and then resold to persons who used them exclusively in the manufacture or production of food or drink.

For the purposes of this appeal, the relevant legislative provision is section 68.2 of the Act, which reads as follows:

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.

No evidence was presented at the hearing. The Tribunal, therefore, proceeded directly to hear argument from counsel for the appellant and counsel for the respondent.

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

Counsel for the appellant argued that the appellant met all of the criteria established in section 68.2 of the Act and that it should have been granted a refund of FST. According to counsel, the fact that the goods in issue were sold by the appellant to purchasers who used them exclusively in the manufacture or production of food or drink in commercial establishments, which are goods covered by the exemption in section 3, Part V, Schedule III to the Act, qualified them for a refund under section 68.2 of the Act. Counsel relied on the Federal Court—Trial Division decisions in *Russell Food Equipment Ltd. v. The Minister of National Revenue*,<sup>2</sup> *Cassidy Ltée v. The Minister of National Revenue*<sup>3</sup> and *Faema Distributeur Inc. v. The Minister of National Revenue*<sup>4</sup> in support of his argument that a person other than the manufacturer or producer of tax-exempt goods can obtain a refund under section 68.2 of the Act if that person applies within two years after he sold the goods.

Counsel for the respondent argued that the importers and the manufacturers or producers of tax-exempt goods are the only claimants entitled to refunds of FST under section 68.2 of the Act. According to counsel, several of the manufacturers, producers or importers of the goods that were purchased by the appellant and then resold already received refunds in accordance with section 68.2 of the Act. Therefore, the appellant is not entitled to a refund.

In the Tribunal's view, to be entitled to a refund of FST under section 68.2 of the Act, the appellant must show that the goods in issue were sold to a purchaser in circumstances that would have rendered the sale to that purchaser exempt or relieved from tax by virtue of the nature of that purchaser or of the use to which the goods were to be put, or by virtue of both such nature and use. Section 68.2 of the Act provides for a refund of tax in cases where either the "nature" of the purchaser or "the use to which the goods are to be put" would have rendered the goods tax exempt, if these facts had been known when the goods were first sold.

In the present case, it is agreed by both parties that the goods in issue were imported or manufactured by someone other than the appellant, that this other person remitted tax to the government and sold the goods to the appellant on a tax-included basis and that, after the goods were resold by the appellant, they were used in the manufacture or production of food or drink, being tax-exempt goods.

The three decisions to which counsel for the appellant referred, *Russell Food*, *Cassidy Ltée* and *Faema Distributeur*, were appealed to the Federal Court of Appeal<sup>5</sup> and were heard together. In those cases, the Federal Court of Appeal found that someone other than the manufacturer or producer can obtain a refund when that person sells goods to persons who use them exclusively in the manufacture or production of tax-exempt goods.

The Tribunal is, therefore, of the view that the appellant is entitled to a refund of FST paid on goods that it purchased and then resold to persons who used them exclusively in the manufacture or production of food or drink. The Tribunal notes, however, that the facts appear to suggest that several of the persons from whom the appellant bought the goods in issue already received refunds pursuant to section 68.2 of the Act.

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2. 1 G.T.C. 6132, Court File No. T-1990-91, December 4, 1992.

3. 1 G.T.C. 6128, Court File No. T-1991-91, December 4, 1992.

4. 1 G.T.C. 6123, Court File No. T-1992-91, December 4, 1992.

5. *Cassidy Ltée v. Canada*, F.C.J. No. 1114, Appeal Nos. A-183-93, A-184-93 and A-185-93, October 27, 1993.

In the Tribunal's opinion, the appellant should not receive a refund of FST paid on any goods for which a refund has already been paid.

Accordingly, the appeal is allowed in part. The matter is referred back to the respondent to determine, with the co-operation of the appellant, which goods in issue have already been subject to a refund of FST.

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Presiding Member

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