CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, January 9, 2001

Appeal No. AP-99-118

IN THE MATTER OF an appeal heard on September 6, 2000, under section 81.22 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a notice of objection to the determination of the Minister of National Revenue dated February 5, 1992, served under section 81.17 of the *Excise Tax Act*.

BETWEEN

LADY ROSEDALE INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-99-118

LADY ROSEDALE INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.22 of the *Excise Tax Act* (the Act) of a determination of the Minister of National Revenue dated February 5, 1992, rejecting the appellant's application for a sales tax refund on raw materials. The application was rejected on the ground that a refund was not available under the Act, as the appellant was a licensed manufacturer that should have purchased its raw materials exempt from sales tax by quoting its tax exemption licence number to its suppliers. On June 22, 1993, the appellant served the respondent with a notice of objection and, on September 22, 1993, the respondent issued a notice of decision disallowing the objection and confirming the determination. The issues in this appeal are: (1) whether the appellant is entitled to a sales tax inventory rebate under section 120 of the Act on tax-paid goods which were held in inventory as of January 1, 1991; and (2) whether the appellant is entitled to claim a refund of an amount equal to the portion of the price paid to its suppliers that represented sales tax paid on raw materials used in the manufacturing process or on finished goods ready to be sold.

HELD: The appeal is dismissed. Dealing with the first issue, the Tribunal is of the opinion that, as provided by subsection 120(2.1) of the Act, where the goods are to be "consumed or used" by the person, they are deemed not to be sold and, therefore, not held in inventory for sale "separately". In this case, the evidence shows that the appellant's primary, albeit not sole, commercial activity was the assembling of a variety of goods to produce cosmetic bags, travel accessories, home decor products and different kinds of gift baskets and that, for the most part, the goods for which a rebate was claimed were used by the appellant in the manufacture of these sorts of arrangements. As such, they do not meet the definition of "inventory" found at subsection 120(1) of the Act and, consequently, do not qualify for a sales tax inventory rebate under paragraph 120(3)(*a*) of the Act. In respect of the goods sold "as is", which could possibly meet the definition of "inventory", the Tribunal concludes that the appellant's testimony was not supported by any written evidence that could help the Tribunal in evaluating the nature, the proportion and the value of the goods held in inventory. Accordingly, the Tribunal cannot find that the appellant is entitled to a rebate in respect of any of the goods for which a rebate was claimed.

With respect to the second issue, the Tribunal is of the view that the monies paid in error by the appellant were paid to its suppliers, which were the ones required to pay the sales tax under the Act. This being so, the appellant has not paid any amount which has been taken into account as taxes imposed under the Act and is, therefore, not entitled to claim a refund under section 68 or 68.2 of the Act.

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Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 6, 2000
Date of Decision:	January 9, 2001
Tribunal Members:	Zdenek Kvarda, Presiding Member Peter F. Thalheimer, Member Richard Lafontaine, Member
Counsel for the Tribunal:	Michèle Hurteau Dominique Laporte
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Elizabeth Law, for the appellant Susanne Pereira, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-99-118

LADY ROSEDALE INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ZDENEK KVARDA, Presiding Member
PETER F. THALHEIMER, Member
RICHARD LAFONTAINE, Member

REASONS FOR DECISION

BACKGROUND AND PRELIMINARY ISSUE

This is an appeal under section 81.22 of the *Excise Tax Act*[1] of a determination of the Minister of National Revenue dated February 5, 1992, rejecting the appellant's application for a sales tax refund on raw materials purchased from certain suppliers prior to January 1, 1991. The respondent rejected the application on the ground that a refund was not available under the Act, as the appellant was a licensed manufacturer that should have purchased its raw materials exempt from sales tax by quoting its tax exemption licence number to its suppliers. On September 16, 1992, the appellant filed a notice of objection under section 81.17 of the Act. On March 31, 1993, the respondent rejected the objection made by the appellant, as it was not filed within the statutory period provided by section 81.19 of the Act. On June 22, 1993, and pursuant to section 81.32 of the Act, the Tribunal granted the appellant an extension of time to object to the determination. On June 22, 1993, the appellant served the respondent with a notice of objection. On September 22, 1993, the respondent issued a notice of decision disallowing the objection and confirming the determination.

The issues in this appeal are: (1) whether the appellant is entitled to a sales tax inventory rebate under section 120 of the Act on tax-paid goods which were held in inventory as of January 1, 1991; and (2) whether the appellant is entitled to claim a refund of an amount equal to the portion of the price paid to its suppliers that represented sales tax paid on raw materials used in the manufacturing process or on finished goods ready to be sold.

Before addressing these two issues, the Tribunal must first determine if it has jurisdiction to hear the present case. The respondent argued that, pursuant to section 81.19 or 81.22 of the Act, the appellant was possibly statute-barred from commencing an appeal of the notice of determination, as the balance of probabilities indicates that the notice of decision of September 22, 1993, was sent to the appellant by registered mail at the appellant's address indicated on the notice of objection. The respondent indicated that the designation "registered" was written on the notice of decision and that the address indicated on the notice of decision was the appellant's current address. The appellant testified never having received the notice of decision.

1. R.S.C. 1985, c. E-15 [hereinafter Act].

The relevant provisions of the Act provide as follows:

> 81.19 Any person who has served a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, may, within ninety days after the day on which the notice of decision on the objection is sent to him, appeal the assessment or determination to the Tribunal.
>
> 81.22 (1) Where a person has served a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, and the Minister has not sent a notice of his decision to that person within one hundred and eighty days after the notice of objection was served, that person may appeal the assessment or determination to which the notice relates to the Tribunal or the Federal Court—Trial Division.
>
> . . .
>
> (3) No appeal may be instituted pursuant to this section after the Minister has sent a notice of decision to the person who served the notice of objection.
>
> 105. (1) Where a notice or other document under this Act or the regulations is sent by registered or certified mail, an affidavit of an officer of the Agency [formerly the Department of National Revenue], sworn before a commissioner or other person authorized to take affidavits, setting out
>
> (*a*) that the officer has knowledge of the facts in the particular case,
>
> (*b*) that such a notice or document was sent by registered or certified mail on a named day to the person to whom it was addressed, indicating such address, and
>
> *(c)* that the officer identifies as exhibits annexed to the affidavit the postal certificate of registration or proof of delivery, as the case may be, of the notice or document or a true copy of the relevant portion thereof and a true copy of the notice or document,
>
> is evidence of the sending and of the notice or document.

The Tribunal is of the view that subsection 81.22(3) of the Act makes it clear that, if a notice of decision was, in fact, sent to the appellant, the Tribunal would lack jurisdiction to hear the appeal pursuant to subsection 81.22(3). However, in the present matter, as the respondent did not fulfil the evidence requirements for a notice of decision sent by registered mail set out in subsection 105(1), and as the appellant testified not having received the decision, the Tribunal cannot conclude that the notice of decision dated September 22, 1993, was sent to the appellant. Accordingly, the Tribunal considers that it has jurisdiction to hear the matter under section 81.22.

EVIDENCE

Ms. Elizabeth Law, President of Lady Rosedale Inc., whose functions include, among other things, the coordination of production, appeared and testified on behalf of the appellant. The appellant is in the business of manufacturing and selling picnic baskets, cosmetic bags, travel accessories, home decor products and other sorts of arrangements. The appellant manufactures some of the items at its Richmond Hill, Ontario, location and operates a retail outlet where it puts together samples for its customers. Ms. Law testified that, up until December 31, 1990, the appellant had a manufacturer's licence for sales tax purposes.[2]

On the question of the sales tax inventory rebate, Ms. Law referred to a document entitled "FST Paid Invoices" listing the goods on which the appellant claimed it paid the sales tax and on which the sales tax rebate was requested.[3] These goods include a variety of items, such as baskets, T-shirts, fabrics, velcro,

2. *Transcript of Public Hearing*, 6 September 2000, at 11.
3. Appellant's brief, Exhibit 6.

linings, ribbon, zippers, cosmetics, plastic ware, glasses, etc. In responding to the questions by counsel for the respondent and the panel, Ms. Law described all items appearing on the list and provided details about their uses. With respect to fabrics, Ms. Law indicated that they could have been used in the manufacture of liners or a specific product, or could have been sold "as is". When asked to assess what percentage of the fabrics were sold "as is" to customers compared to those that were used in the manufacturing process, Ms. Law testified that it would be necessary to examine the individual invoices to determine the answer.[4] Ms. Law further testified that some of the items, like the thread and velcro, were used in the manufacture of products.[5] For the glasses and plastic ware, she stated that they were placed in gift baskets.[6] In describing the goods listed, Ms. Law explained that the baskets were subject to further manufacture by putting a liner inside and by assembling different sets of goods with them.[7] She also stated that some of the baskets were resold directly to customers "as is", without being altered or modified. It was, however, impossible for Ms. Law to assess the quantity of baskets that constituted goods that were sold "as is" to customers,[8] although she did recall selling some 2,000 baskets to Dare Foods/Cookies "as is".[9]

The respondent did not present any evidence.

ARGUMENT

The appellant submitted that, despite its efforts, it has been impossible to recoup from its suppliers the sales tax paid, as most of the larger suppliers went bankrupt. It is the appellant's submission that it is entitled, under subsection 120(3) of the Act, to a sales tax inventory rebate in respect of the components of picnic baskets, home decor products, travel accessories and baby accessories made of components on which tax has been paid. These goods specifically qualify as tax-paid goods held in inventory on January 1, 1991, for sale to others in the ordinary course of business.

The appellant claimed that the goods in issue were held in inventory for sale as individual items, as some components were ready to be sold "as is" and others were manufactured or assembled into complete picnic baskets which might have included liners, wine glasses and cutlery. The appellant submitted that the goods that were subject to further manufacture or that were inputs in the manufacturing process, nevertheless, constituted "taxable supply" and qualified for a rebate. The appellant also submitted that it was also entitled to a rebate on the finished goods held in inventory for sale, which were produced from tax-paid components. Therefore, the appellant was entitled to a rebate, as the goods met the definition of "inventory" found in subsection 120(3) of the Act. The appellant referred to the Tribunal's decision in *Techtouch Business Systems* v. *MNR*,[10] which dealt with the interpretation of the terms "tax-paid goods" and "inventory".

The respondent submitted that, in order for the appellant to be successful in obtaining the sales tax inventory rebate, it had to prove that the goods were inventory, that they were in inventory as of January 1, 1991, and that they are tax-paid goods held for sale separately. The respondent argued that the evidence indicates that most of the appellant's business consists in taking a variety of goods and combining or assembling them into a set or some other sort of arrangement. The respondent noted that the appellant admitted that some of the tax-paid goods were purchased for the purpose of manufacturing finished products for sale. The respondent submitted that the retroactive amendment made to section 120 of the Act, which

4. *Transcript of Public Hearing*, 6 September 2000, at 25.
5. *Ibid.* at 26 and 51.
6. *Ibid.* at 26 and 34.
7. *Ibid.* at 51.
8. *Ibid.* at 51 and 54.
9. *Ibid.* at 61.
10. (18 September 1992), AP-91-206 (CITT) [hereinafter *Techtouch*].

added subsection 120(2.1), had specifically excluded from the definition of inventory the goods that "can reasonably be expected to be consumed or used by the person". Once the arrangements or the sets are combined, it is the respondent's view that the finished products have a different character than each individual component part. Therefore, the appellant has used component parts to create something different, which is then sold to customers. Thus, the goods are not sold separately, as they are used for further manufacture by the appellant. Accordingly, the respondent submitted that the majority of the appellant's goods did not meet the definition of "inventory" found in subsections 120(1) and (2.1). It is the respondent's position that, in order to be successful with its claim, the appellant has to show that all these goods are, in fact, jobbed goods. The respondent described "jobbed goods" as goods that are purchased and resold "as is", in exactly the same condition without any sort of work, embellishment or change done on them. The respondent further submitted that insufficient evidence was introduced by the appellant to show which proportion of the goods held in inventory was sold directly to customers "as is" compared to goods subject to further manufacture or assembling. For this reason, submitted the respondent, the appellant has been unable to meet the burden of evidence required and, thus, the appeal should be dismissed.

Furthermore, the respondent submitted that, as the appellant could have recovered the sales tax paid in error from its suppliers, the goods in issue are not tax-paid goods as defined under subsection 120(1) of the Act and, therefore, do not meet the statutory definition of "inventory". The respondent also argued that there was no evidence demonstrating that the listed goods were, in fact, held in inventory on January 1, 1991, as the date of the invoice simply established when the goods had been purchased from the suppliers.

When asked by the panel whether section 68 of the Act, which deals with payments made in error, would apply to the present case, the respondent submitted that this section only applies to parties that remit tax directly to the Crown, which, in the respondent's view, is not the case here.

DECISION

The first issue in this appeal is whether the appellant is entitled to a sales tax inventory rebate under section 120 of the Act on tax-paid goods that were held in inventory as of January 1, 1991.

Section 120 of the Act[11] reads, in part, as follows:

> (3) Subject to this section, where a person who, as of January 1, 1991, is registered under Subdivision d of Division V of Part IX has any tax-paid goods in inventory at the beginning of that day,
>
> (*a*) where the tax-paid goods are goods other than used goods, the Minister shall, on application made by the person, pay to that person a rebate in accordance with subsections (5) and (8).

The term "inventory" is defined under subsections 120(1) and 120(2.1) of the Act 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.
>
> (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.

11. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27, s. 6.

Subsection 120(1) of the Act provides, in part, that, for goods held in inventory to qualify for a sales tax inventory rebate, the tax must have been paid on the sale price 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,[12] which changed the interpretation given by the Tribunal to the definition of inventory,[13] now 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 in inventory 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 the assembling of a variety of goods to produce cosmetic bags, travel accessories, home decor products or different kinds of gift baskets and that, for the most part, the goods for which a rebate was claimed were used by the appellant in the manufacture of these sorts of arrangements. From the list of goods submitted by the appellant and the testimony given, the evidence indicates that the baskets represented almost half of the appellant's refund claim, while fabrics accounted for approximately 25 percent of the total value of the items for which the sales tax rebate was claimed.[14] The appellant's testimony indicates that several items appearing on the list, like the thread and velcro, were used in the manufacturing process, while other goods were used in the production of several sorts of arrangements. The Tribunal considers, for example, that baskets in which liners are added, or goods that are put in sets or packages or that are assembled to be given new qualities, properties or combinations, are held for the purpose of manufacture, not for the purpose of sale. Therefore, as provided under subsection 120(2.1) of the Act, these goods that were expected to be consumed or used by the appellant were deemed not to be held at that time for sale, lease or rental. As such, they do not meet the definition of "inventory" found at subsection 120(1) and, consequently, do not qualify for a sales tax inventory rebate under paragraph 120(3)(*a*).

The Tribunal notes that the appellant's testimony indicates that some of the goods were sold "as is". In respect of these goods, which could possibly meet the definition of "inventory", the Tribunal concludes that the appellant's testimony was not supported by any written evidence that could help the Tribunal in evaluating the nature, the proportion and the value of the goods held in inventory to be sold "as is". Accordingly, the Tribunal cannot find that the appellant is entitled to a rebate in respect of any of the goods for which a rebate was claimed.

In light of the above, the Tribunal finds it unnecessary to address the other arguments raised by the respondent regarding the definition of "tax-paid goods" and the evidentiary requirements with respect to inventories.

The Tribunal will now address the second issue, which deals with the appellant's entitlement to claim, under the Act, a refund of an amount that represented sales tax paid in error to its suppliers. The respondent argued that, as the tax has been paid in error to its suppliers, the appellant did not, in fact, remit tax to the Crown and that, therefore, it could not take advantage of section 68 or subsection 68.2(1) of the Act.

Section 68 and subsection 68.2(1) read as follows:

> 68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of

12. Assented on June 10, 1993, and made retroactive to December 17, 1990.
13. See, for example, *Techtouch*.
14. Tab 1 of respondent's brief.

> those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.
>
> 68.2 (1) 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.

The jurisprudence established by the Supreme Court of Canada in *The Queen* v. *M. Geller*,[15] and followed by the Federal Court of Appeal and by the Tribunal in several cases,[16] has consistently held that amounts representing federal sales tax paid by the purchasers of goods to the person obliged to pay such tax under the legislation are not considered taxes imposed under the Act. The Tribunal is of the view that the monies paid by the appellant were paid to its suppliers, which were the ones required to pay the sales tax under the Act. This being so, the appellant has not paid any amount which has been taken into account as taxes imposed under the Act and is, therefore, not entitled to claim a refund under section 68 or 68.2 of the Act. The Tribunal believes that, if the appellant has been taxed twice, it is as a result of it not claiming a sales tax exemption when it purchased the goods in issue. While the Tribunal is sensitive to the appellant's plight, it is nevertheless bound by the law and lacks jurisdiction to grant equitable relief in determining appeals.[17]

Accordingly, and for the above reasons, the appeal is dismissed.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

15. [1963] S.C.R. 629.
16. *Price (Nfld.) Pulp and Paper* v. *The Queen*, [1974] 2. F.C. 436; *Geotrude Energy* v. *MNR* (21 August 1989), 2937 (CITT); and *Mackay Family* v. *MNR* (30 October 1992), AP-91-155(CITT).
17. *Granger* v. *Canada Employment and Immigration Commission*, [1986] 3 F.C. 70, affirmed [1989] 1 S.C.R. 141.