

NOVA SCOTIA COURT OF APPEAL

Cite as: Tusket Sales & Service Ltd. v. Nova Scotia (Finance), 1997 NSCA 23

Hallett, Pugsley and Flinn, JJ.A.

**BETWEEN:**

TUSKET SALES & SERVICE LIMITED	)	Richard W.P. Murphy
Appellant	)	for the Appellant
- and -	)	
MINISTER OF FINANCE	)	John W. Traves
Respondent	)	for the Respondent
	)	Appeal Heard:
	)	January 22, 1997
	)	Judgment Delivered:
	)	January 23, 1997

**THE COURT:** Appeal allowed and matter remitted to the Nova Scotia Utility and Review Board for a re-hearing in a *de novo* proceeding by a differently constituted panel per reasons for judgment of Hallett, J.A.; Pugsley and Flinn, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of the Nova Scotia Utility and Review Board dismissing an appeal from a decision of the Nova Scotia Provincial Tax Commissioner assessing tax, interest and penalty of \$24,189.68 under the **Health and Services Tax Act**, R.S.N.S. 1989, c. 198.

The appellant is a car dealer. Over a four or five year period he sold 12 vehicles to a Mr. Paul Riddell, who apparently lives in Calgary, Alberta. Eleven of the vehicles were purchased for use as stunt vehicles in a show staged by Mr. Riddell throughout Canada and the United States and were not intended for highway use. The twelfth vehicle was a truck which was purchased from the appellant in December of 1992. It was registered, although we do not know when, in Alberta and returned to the Province of Nova Scotia in November of 1995.

Witnesses for the appellant testified that the vehicles purchased from the appellant by Riddell were removed from the Province in two ways: (i) some were loaded on a car carrier owned by Riddell and transported out of the Province; and (ii) others were fitted with dealer plates and driven by personnel employed by the appellant to the ferry dock at Yarmouth and loaded on the M. V. Bluenose for transport to Maine. The evidence would indicate that two of the stunt vehicles were shipped via the Bluenose although there is no documentary evidence to prove this.

There was no documentary evidence presented to the Board to support the *viva voce* evidence that the stunt vehicles were removed from the Province by Riddell's carrier.

The Commissioner was not satisfied that the vehicles in question were exported from the Province of Nova Scotia. As the appellant had failed to remit tax in connection with the sales, it was assessed.

On appeal from this assessment the Nova Scotia Utility and Review Board decided that the appellant had not proven it was entitled to the exemption claimed.

On appeal to this Court the appellant asserts that the Board erred in its interpretation of s. 12 of the **Health Services Tax Act** and applied too onerous a burden of proof on the appellant.

I have reviewed the record of the proceedings before the Board and the decision of the Board as well as the relevant provisions of the **Act**.

Section 12(1)(u) of the **Act** provides for the exemption. It states:

"12 (1) The following classes of tangible personal property are specifically exempted from the provisions of this Act:

. . . . .

(u) goods to be shipped by the seller for delivery outside the Province and ship stores delivered to a commercial vessel or boat that normally operates in extra-territorial waters;"

The appellant had the burden of proving on a balance of probabilities that it qualified for the exemption claimed (**Stora Forest Industries v. Nova Scotia (Minister of Finance)** (1992), 105 N.S.R. (2d) 115 (N.S.C.A.)).

In the course of its decision the Board stated:

"The auditor stated that, in his opinion, vehicles should only be removed from the province by independent (third party) carriers. That stipulation is not found in the **Act** or accompanying **Regulations**. They could, in fact have been removed by vehicles belonging to the seller. However, clause (u) does place a particular burden upon the seller. In circumstances such as those described above, where the purchaser also transported the vehicles, there would be an even more onerous burden placed on the seller to ensure the removal of the vehicles in question and support the removals with an unassailable paper trail."

The Board, in its decision, then made reference to a commentary by Eric G. Owen entitled **Retail Sales Tax in Ontario**, which appeared in a CCH publication, in which the author spells out certain guidelines which the author says should be considered in determining whether a seller comes within the exemption provided in a similar section of the Ontario legislation. There is no reference in that commentary to the burden of proof on a party seeking an exemption.

The Board concluded its decision with the following finding:

"The Board is not satisfied that sufficient steps were taken by the Appellant, given the onus placed upon it, to ensure and substantiate that the twelve vehicles in question were in fact exported from the province with transportation arranged by the Appellant and without any use having been made of them in the Province prior to removal. In short, the evidence before the Board does not justify a finding that the Appellant is exempt from the payment of tax under **s. 12(1)(u)**. Therefore, the Board denies this part of the Appeal."

An appeal to this Court is limited to errors in jurisdiction or law (**Nova Scotia Utility & Review Board Act**, S.N.S. 1992, c. 11, s. 30).

### **Disposition**

The Board, in its decision, does not make a finding that it disbelieved the *viva voce* evidence of the appellant's witnesses. The Board, in its decision, does not state that the burden of proof to come within the exemption is on a balance of probabilities. I am not satisfied that the Board, in arriving at its decision, did not place a burden on the appellant that the appellant had to support the removal of the vehicles from the Province with an "unassailable paper trail". If this is the burden that was applied by the Board, it is too high a burden. It would have been open to the

Board to accept the *viva voce* evidence of the appellant's witnesses that the vehicles, or some of them, were shipped by the seller for delivery outside the Province. This is particularly so with respect to the vehicles that were delivered by the appellant's employees to the M.V. Bluenose. Although the evidence presented to the Board to support the claim for exemption was devoid of persuasive documentary evidence, nevertheless the *viva voce* evidence, if believed, might very well have established the claim for exemption on a balance of probabilities. Under the circumstances, I cannot be satisfied that the Board did not err in the burden of proof it applied. Justice requires that the matter be remitted to the Nova Scotia Utility and Review Board to be heard in a *de novo* proceeding by a differently constituted panel. I would, therefore, allow the appeal but without costs.

Hallett, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.

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Appellant

- and -

MINISTER OF FINANCE

Respondent

REASONS FOR  
JUDGMENT BY:

HALLETT, J.A.