Bombay Jewellers Ltd. v. The Queen, 1998 CanLII 320 (TCC)

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Docket: 96-433-GST-G

BETWEEN:

BOMBAY JEWELLERS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Reasons for Judgment

Margeson, J.T.C.C.

[1] This appeal is from an assessment of the Minister of National Revenue (Minister) under Part IX of the *Excise Tax Act* (the *"Act"*) for the period January 1, 1991 to December 31, 1992, notice of which bears number 11BU0200374 and is dated April 20, 1993.

[2] By that assessment, the Minister assessed the Appellant in the amounts of $141,363.22 tax, $10,194.73 interest and $8,926.52 in penalties in respect of its goods and services tax ("GST") returns for the period in issue.

Evidence

[3] Salok Bhatti testified that he was the owner of all of the outstanding shares of the Appellant company, as well as the director and manager. He was a jeweller. The store was operated by the Appellant which sold mostly 22 karat gold jewellery. Most of this was custom made.

[4] He also stated that the company sold 24 karat gold to customers, which the Appellant bought from gold dealers, coin and stamp dealers in Vancouver. This gold was 99 % pure. He cut the bars into smaller portions, sometimes melted these portions and subsequently sold them. The bars were cut for customers according to the weight desired at the current price. They were in rectangular form. The longitudinal measurement was used to measure the desired quantity. This was a very hard measurement to make, which sometimes necessitated further amounts being cut-off of the bar by means of a chisel or other instrument. If the amount cut-off was too light, they fused these amounts onto the unit to be sold to bring it up to the desired weight. They did not charge GST on the gold sold thusly.

[5] The second method used was to cut pieces off of the gold bars and cut them into thinner pieces, which were then rolled by the use of a rolling mill. The thickness would be one to one-half millimetres. In this form, it was easier to cut. Then, the rolled item was cut longitudinally and sold to the customers. No GST was charged upon these amounts.

[6] The third method was to take smaller pieces of gold and pour them into a mould to make another rectangular piece. These rectangular pieces were all of the same purity, being 99.9 %. The mould was cleaned properly and consequently, the resulting product was pure. No GST was charged upon these amounts.

[7] The most common form was the cut form. He admitted that the customers would not be able to sell the gold in that form to banks or otherwise dispose of it readily. Sometimes, he put a mark on the item if the customer wished it.

[8] In cross-examination he admitted that the resulting form was not always perfectly smooth after smaller pieces were fused into the larger pieces, but it would be quite smooth. The product was heated to the "red hot point" before it was fused.

[9] This process was used in order for the Appellant to make money, since the larger bar was purchased more cheaply than the individual pieces, then the mark-up was applied to the product to be sold to the customer.

[10] Exhibit R-1 was admitted by consent and showed the various forms of gold bars minted by Johnson Matthey Limited and Gold Refiners & Bars Worldwide, from Credit Suisse.

[11] According to the witness, this was the same type that the Appellant bought. The Appellants would not necessarily know why the customer bought the gold from it. He admitted that if the gold was in the form as shown in Exhibit R-1, it could be readily sold.

[12] Exhibit R-2 was introduced by consent and contained two photographs; one showing a one-half kilogram bar in its entirety and the other one showing a one-half kilogram bar with a one ounce portion cut away from it. The Appellant said that his company was told by its accountants that if it sold the gold in ingot, bar, or wafer form, no GST would be chargeable thereon. The quantity that was sold was not marked as to purity, but was marked as to weight.

[13] His company melted down gold pieces and also bought some jewellery from customers, then melted it down. Most of the people who purchased their product had it made into jewellery. When this was done, GST was charged on the labour only. Most of the gold they sold was in chunks, very little was rolled and the only amounts that were melted were the "leftovers". It was easier to make rectangular pieces from the smaller units if they were melted first.

[14] Exhibit R-3 was a brochure, admitted into evidence by consent, which showed the type of gold used. If the Appellant could not buy a whole bar, it bought one-half of a bar. He admitted that if a customer returned the portion that had been sold to him, it could not be identified.

[15] He identified certain documents in Exhibit R-4 including the assessment, the Notice of Appeal, the GST registration form for the Appellant, certain financial statements, a letter from Revenue Canada and the monthly sales records. He indicated that his company never sold gold as such and that if a customer did not want to accept the portion that it had cut, they would buy it back and make jewellery out of it.

[16] When he was referred to his examination for discovery it appeared to contradict the statement that the Appellant's company never sold gold as such. His explanation was that he meant to say that he sold it to customers as gold, only after incorporating it into jewellery and they charged GST on the finished product.

[17] In re-direct, the witness said that someone could have brought gold into the Appellant's premises in the same form and it could have used that gold in the same manner. It made approximately $3.00 to $5.00 per ounce profit on resale of the gold which cost about $500.00 per ounce.

[18] Alastair McIntyre was called by the Respondent and objection was taken to the admissibility of his testimony. Counsel for the Appellant argued that his testimony added nothing to the evidence, since his evidence as to what the terms "bar", "ingot" and "wafer" meant was irrelevant, these being common English terms. Therefore it was not necessary to use a technical definition for them, as per *Daniel Oligny v. The Queen*, 96 DTC 1744 (T.C.C.).

[19] Furthermore, it was argued that his evidence as to whether the amounts of gold were precious metals, under the GST provisions of the *Excise Tax Act* is not the subject matter of expert testimony and was for the Court to decide.

[20] Counsel for the Respondent argued that the proposed evidence of this witness did add to the overall evidence as to the meaning of "bar", "ingot" and "wafer", since they have a technical meaning in the industry, whereas in the case cited, the words did not have a technical meaning and the Appellant therein did not follow the rules.

[21] Further, counsel said that this was the first case on this issue, it is very important to the sections of the statute involved here and that the Court needs this type of evidence in order to make a rational decision.

[22] After hearing argument on behalf of both parties, the Court allowed Alastair McIntyre to give evidence as an expert, but restricted his evidence to the issue of whether or not there was a technical meaning for the terms "bar", "ingot" and "wafer" used in the term "precious metal", as defined in section 123(1) of the *Excise Tax Act*.

[23] Alastair McIntyre testified that he was a Director of precious metals for the Bank of Nova Scotia and was resident in Toronto, Ontario. His bank provided risk management services to customers. He was also involved in buying and selling gold. He was a former manager at the Royal Canadian Mint in Ottawa. He was a geologist for Coxheath Gold Holdings in Halifax and acted as underground geologist. In 1985 and 1986 he was employed with Seabright Resources Ltd. in Halifax. He held the degrees of Bachelor of Science, Geology and Bachelor of Commerce and Securities. He was involved in sales and management and concentrated on gold. He was the author of a book called *Gold Resources and Refining* as well as a commentator for the media. In giving his opinions, he looked first at books on the subject and relied upon his experience at the Royal Canadian Mint and his sales experience at the Bank of Nova Scotia.

[24] Insofar as this witness was concerned, bars, coins and wafers, as referred to in section 123(1) of the *Act* are produced or cast at approved mints or smelters and are stamped by an assayer. Each product clearly exhibits its established hallmark, stamp, weight and fineness. These easily recognized and identifiable precious metal products are produced according to international standards. Each approved mint, smelter and assayer must adhere to a strict code of standards prior to its acceptance and in order to retain membership. He referred generally to a bar as a financially tradeable product, with the weight, purity and manufacturer marked upon it. It was his position that the term ingot was a French word for bar.

[25] The 99.5 % standard is the international standard although the Canadian standard was higher at 99.9 %. A wafer is usually of the purity of 99.9 %. Bars are reproduced by recognized refineries who adhere to strict requirements. There are 58 credited refineries world-wide. If the unit was tampered with or altered in any way, one would not consider it to be a marketable instrument. If any of the required elements were missing, it was not acceptable for trading purposes. Granular gold and gold wire were not exempt from GST. The markings upon the items are for the purposes of identifying the refinery that produced it, which attests to its authenticity and to allow a purchaser to be assured that it is receiving what it bargained for. Any item that meets these standards might demand different prices at different times, but it could be sold at any time in its existing form.

[26] He testified that if GST had been applied to gold which qualified as a "precious metal" under the definition contained in the *Act*, the gold market in Canada would have been destroyed. Consequently, it was important for the legislators to exempt those products which met the definition of "precious metal", as contained in the *Act*. Even coins which are not of the required purity range are not considered exempt from GST. Furthermore, GST applies to wire and granular gold because it does not meet all of the requirements of the definition.

[27] He was referred to Exhibit R-2, which showed a cut bar or wafer. He said that this could not be priced. It was not a "bar" or a "wafer" and was not in marketable form.

Argument on behalf the Appellant

[28] Counsel for the Appellant said that the Appellant purchases the gold from a dealer to the purity level of 99.5 % and that this purity level was not affected by his actions. Thus, the purity requirements of the definition have been met.

[29] Secondly, the Appellant must show that the items were "bars", "ingots" or "wafers". His position was that the evidence disclosed that the gold objects sold by the Appellant were "bars", "ingots" or "wafers", within the ordinary definition of those terms. Parliament did not intend any industry definition to apply nor did it intend, that in order for the object to meet the definition of "bar", "ingot" or "wafer", that it had to have certain markings placed upon it and be tradeable on an international exchange.

[30] He referred to the various dictionary meanings of the terms "bar", "ingot" and "wafer". In *Merriam-Webster's Collegiate Dictionary*, Tenth Edition, the term bar is described as follows:

(a) a straight piece (as of wood or metal) that is longer than it is wide and has any of the various uses (as for a lever, a support, barrier or fastening); (b) a solid piece or block of material that is usually considerably longer than it is wide (gold).

Further, *Webster's New Twentieth Century Dictionary of the English Language*, Second Edition, defines "bar" as follows:

from old French "barre", from Latin "barra", a bar. An ingot, lump, or wedge of gold or silver from the mines, run in a mould, and unwrought.

Further, the *Oxford English Dictionary*, Second Edition, defines "bar" as:

A narrow four-sided block of metal or material as manufactured, e.g. of iron, or soap, chocolate, etc.; an ingot of precious metal.

[31] Again *Merriam-Webster's Collegiate Dictionary*, Tenth Edition, defines "wafer": a thin crisp cake, candy or cracker. *Webster's New Twentieth Century Dictionary of the English Language*, *Unabridged*, Second Edition, defines "wafer" as: anything resembling a wafer. The *Oxford English Dictionary*, Second Edition, Volume 1, defines "wafer" as:

A very light thin crisp cake, baked between wafer-irons; formerly often eaten with wine, now chiefly with ices; in later use sometimes rolled, sometimes serving as the under part of a macaroon.

[32] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition, defines "ingot"

as:

a mass of metal cast into a convenient shape for storage or transportation to be later processed.

and *Webster's New Twentieth Century Dictionary of the English Language, Unabridged*, Second Edition, defines "ingot" as: that which is poured in a mold for molten metal. *The Oxford English Dictionary, Second Edition, Volume 1*, defines ingot as:

A mass (usually oblong or brick-shaped) of cast metal, especially of gold or silver, and (in modern use) of steel; these last are of various shapes.

[33] According to counsel for the Appellant, they are generally nothing more than rectangular pieces of metal. Generally, Mr. Bhatti said that the pieces he used were rectangular in shape. In ordinary meaning, they were bars. With respect to the term "wafer", counsel argued that a wafer is something that is very thin. Mr. Bhatti said that the ones that he rolled were one millimetre thick. The ordinary meaning should be attached to such an article and the Court should conclude that they were wafers.

[34] With respect to the term "ingot", we must bear in mind that the dictionary definition of the word ingot need not be a bar, as long as it is cast from molten metal. Mr. Bhatti said that he poured the metal pieces into moulds. Under the definition, according to the ordinary meaning, they were ingots.

[35] He further argued that Parliament did not intend that industry definitions should be applied with respect to this section. If Parliament had so intended, why would they use a word not used by the industry. According to Mr. McIntyre, the term "ingot" was merely the French equivalent of bar. However an "ingot" is different than a bar. Parliament must have intended that the ordinary dictionary meaning be used.

[36] He also referred to section 160 of the *Act* with respect to coin operated devices. He said that in light of that section, for the Court to conclude that Parliament intended that the industry meaning apply, it would have to assume that Parliament intended to use two different definitions, in light of section 160.

[37] However, counsel argued that even if the definitions put forward by the Respondent are accepted in the industry, the Court still should not apply those definitions in this case. He referred to the case of *Unwin v. Hanson*, (1891) 2 QB 115 (Eng. CA) in support of his contention that the Court should not apply the technical meaning as opposed to the ordinary meaning where the *Act* is directed to dealing with matters affecting everybody generally, in which case, common and ordinary language should be used. However, if the *Act* is passed with reference to a particular trade, business or transaction, then everybody conversant with that trade, business or transaction knows and understands the words to have a particular meaning and then the technical meaning should be applied even though it differs from the common or ordinary meaning.

[38] His argument was that the *Excise Tax Act* affects everyone generally, has a broad application, it does not just apply to financial services or industries. Anyone is entitled to buy the articles in question. Even if there is a technical meaning to the words, because of the broad application of the *Act*, the ordinary meaning should be applied in this case.

[39] Further, he argued that stamping and marking of the articles is not required by the "*Act*". Parliament never intended that this be required. If it did, as it does in Schedule II (section 23) - Tax Rate on Tobacco Products, it specifically says so. In that schedule, it specifically sets out how cigarette packages are to be marked. Further, there is an entire act which deals with precious metals, the *Precious Metal Marking Act*, RSC 1985, chap. P-9. There is no reference to this statute in the GST legislation.

[40] Furthermore, there is no reference in the *Act* to any requirement that the articles be transferable on the open market in order to meet the definition of "wafer", "ingot" or "bar".

[41] He said that the Respondent was arguing that in order for the article to be an exempt supply it must be a "financial instrument", under section 123 of the *Act*. But when one looks at that definition, all of the instruments referred to there are not readily marketable and yet a precious metal is included in the list. Therefore, the Court should take judicial notice that some of these "financial instruments" are not tradeable. If Parliament had intended that the object need be tradeable as a prerequisite to meeting the requirements of the definition, it would have said so specifically by indicating a specific exchange or a reference to an exchange.

[42] In summary, the Appellant has shown that the objects that he sold were "bars", "ingots" or "wafers" of a required purity. The choice of words used indicate that the intention of Parliament was that the ordinary meaning should be applied and not a technical meaning.

[43] The lack of positive words requiring stamping, trading and marking in order for the article to meet the requirements of the definition is consistent in light of the other sections of the *Act*, which require specificity. This shows that Parliament did not intend that the technical definition be applied on the facts of this case in order for the article to be exempt.

[44] This appeal should be allowed, with costs.

Argument of the Respondent

[45] Counsel for the Respondent took the position that the real issue before the Court is whether or not Bombay Jewellers Ltd. was providing a financial service when it cut a piece from a "wafer", "ingot" or "bar" and resold it. His position was that they were not. Part VII of Schedule V of the *Act* deals with an exempt supply. Section I, "a supply of a financial service that is not included in Part IX of Schedule VI". The supply in question here is not so included.

[46] Section 123(1) provides the following definitions:

"financial service" means

...

(d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument;

(e) the provision, variation, release or receipt of a guarantee, an acceptance or an indemnity in respect of a financial instrument,

"financial instrument" means

...

(e)..a precious metal,

"precious metal" means a bar, ingot, coin or wafer that is composed of gold, silver or platinum and that is refined to a purity level of at least

(a) 99.5% in the case of gold and platinum, and

(b) 99.9% in the case of silver;

[47] Counsel argued that if one looks at the definition of other financial instruments therein, such as (a) debt equity (b) equity security (c) insurance policy, these are all clearly in the nature of a financial instrument. By merely looking at these types of instruments one can determine what it is. One can determine its tradeable value. Most of these articles are exempt financial services.

[48] With respect to the item that the Appellant in this case purchased in its original form, it was an exempt financial instrument but when it was cut by the Appellant company it no longer qualified as a financial instrument. It is clear from the listing of these type of documents in the definition of "financial instrument", what Parliament intended to have included in the term. If an article is to meet the definition of financial instrument as a precious metal, it must meet all of the requirements of a financial instrument such as being readily identifiable, readily transferable and readily capable of having its value determined.

[49] The general purpose of the *Act* is to tax all goods and services, unless they are specifically exempted. The provisions of the *Act* must be interpreted very restrictively. All of the articles excepted are of the same type, readily identifiable.

[50] It was obvious from the evidence of Mr. Alastair McIntyre that if the gold "bars", "ingots", "coins" or "wafers" met the specifications as set out in the definition were to be taxed in Canada, the gold industry in this country would be destroyed. Therefore, the legislators had a purpose in mind when exempting precious metals which met the definition of "financial instrument" under the said definition . Counsel referred to the case of *Perka et al. v. The Queen*, (1984) 1984 CanLII 23 (SCC), 13 DLR (4th) 1 (SCC) at page 26 in support of her position that technical and scientific terms which appear in a Statute should be given their technical or scientific meaning. It is impossible to use the regular or common definition of "bar", "ingot" or "wafer". Parliament did not intend that this definition should apply.

[51] Counsel also referred to the case of *Unwin v. Hanson, supra,* at pages 117 and 119 arguing that in the case at bar, the technical meaning should be used rather than the general meaning because the sections in issue deal with a particular trade, business or transaction. Further, no one could reasonably expect that Parliament would be intending to rely upon the common meaning of the words in issue even though the *Act* applies to every one. The terms in question were used in a specific section dealing with financial instruments. Therefore, one goes to that particular section of the *Act* in trying to determine Parliament's intention.

[52] These terms are technical, used in the financial industry and one should not resort to the general meaning of these words. What is intended is a reference to investment quality gold and that is all that is meant to be exempt and not pieces of gold of the type that were sold in the case at bar.

[53] Counsel also referred to the **Report On The Technical Paper On The Goods and Services Tax** published by The Standing Committee on Finance and dated November 1989. This technical paper was considering the zero rating of certain forms of precious metals for investment purposes in keeping

with the exempt treatment afforded to investments in financial instruments. It referred to the requirements as to "purity" in the definitions of section 123. The Canadian Association of Numismatic Dealers (CAND) was lobbying to amend the definitions of "investment", "quality" and "precious metals" to include "gold" and "silver coins" with a purity level of 90 % and thus not be taxable. The argument was that otherwise this discriminatory tax treatment would drive much of the investment coin market underground. This was rejected. It is clear that Parliament had various exemptions in mind when they were considering the definition in section 123.

[54] The definition of "financial instrument" found in **The Dictionary of Banking**, Charles J. Woelfel, Irwin Professional Publishing, supports the contention that in order to qualify under this definition the article has to be readily tradeable and almost equivalent to cash. At least that was counsel's interpretation of the definition therein.

[55] Counsel's contention was that once the Appellant altered the form of the "bar", "ingot" or "wafer" this was no longer a financial instrument. Therefore, a delivery of the article in the then existent form was not a financial transaction. The intrinsic value of the item was changed, not merely the ownership, because no one would accept it in its new form as a financial instrument. Counsel did not contend that in order for the article to meet the definition under the *Act* that it had to be tradeable on an international market but it had to be something that kept its tradeability and saleability. Once its form is changed, one is no longer dealing with a financial instrument.

[56] It was counsel's contention that the purpose of the legislation and the exemption was clearly to facilitate the free flow of financial services and instruments so that our economy could function without the restrictions of the economic markets that a tax on every transaction would generate. This exemption applied not only to the gold "bars", "ingots" or "wafers", but to all items which were financial instruments under the definition. Parliament limited the gold included as a financial instrument to gold which met the standards of 99.5% purity in the form of a "bar", "ingot", "coin" or "wafer". These standards are the international standards for the precious metals market in exchanges as the evidence showed. When gold is a financial investment and so used it is GST exempt. Even gold purchased for industry, such as the jewellery business, is tax exempt on purchase, but once processed further and resold, as in the case at bar, GST must be charged.

[57] She likened the actions of the Appellant in this case in cutting the pieces off of the gold bar or wafer, to taking one page from an insurance policy and yet attempting to use it as a financial instrument. This could not be done. It would not be tradeable or saleable. It would not be accepted as such. Likewise once the gold "bar", "wafer" or "coin" is cut into pieces it is no longer a financial instrument and no longer meets the form requirement of the legislation. The fact that the purity level remains the same does not satisfy the requirements.

[58] She argued that the financial community, especially the precious metals market, have specific definitions for "bar", "ingot", "coin" or "wafer". Regular definitions are of no use in determining the correct meaning of a specialised industry term. When Parliament used the term "wafer" they did not mean a "very light, thin, crisp, cake baked between wafer-irons" as defined in the ordinary dictionaries. None of the standard meanings of "wafer" even remotely come close to the requirements in the *Excise Tax Act*.

[59] If the exact format of the gold was not important, Parliament could simply have exempted gold of 99.5% pure. This it did not do.

[60] Mr. McIntyre in his evidence explained the definition of "bar", "ingot", "coin" or "wafer" in the industry. He made it clear that these were technical terms within the industry. The Court should accept this as evidence when determining the correct technical definition.

[61] The Appellant has not met the onus on it of showing that the gold that was sold was still a precious metal and thus a financial instrument and exempt as a financial service. The appeal should be dismissed with costs.

Rebuttal

[62] Counsel for the Appellant argued that it was dangerous to refer to the other types of financial instruments and draw a parallel when deciding what the terms "precious metal", "financial instrument" and "financial service" mean in the context of this case. The difference between gold and the other financial instruments referred to in the *Act* is that gold can be used by itself as a commodity. The other articles cannot be so used.

[63] It is not important in this case that the gold be readily saleable, have a readily determinable value or that it be readily negotiable. The Court should not conclude that because the term "precious metal" was included in this list that it need include the same properties.

Analysis and decision

[64] The GST provisions of the *Excise Tax Act* require the application of the tax to all goods and services unless the goods and services are exempt. These goods and services may be exempt if they are specifically listed in some exempting provision of the *Act*. If not specifically listed, but are so similar to those specifically listed goods or services that they are the equivalent thereof, the Court may conclude that Parliament had intended that such goods and services also be exempt.

[65] The Court is also satisfied that some of these sections of the *Act* apply generally with respect to all goods and services while other sections of the *Act* are limited in scope and apply to specific goods and services or the equivalent thereof. Often times, it is necessary to consider different divisions, sections and parts of the *Act* in order to determine whether a particular good or service is exempt or not. Such is the case at bar.

[66] What the Appellant sold was obviously a good or service and it was subject to GST unless the Appellant can show on a balance of probabilities that the good or service was exempt. In light of the relevant provisions, the Appellant must show that what he provided was a financial service. He could only provide a financial service if the gold that he sold was a precious metal as defined because the Court is satisfied that what is exempt is not the gold itself but the financial service which results from the sale of the gold.

[67] Evidence was given by a witness qualified as an expert in the financial community, especially in the precious metals market. He testified that there are specific definitions for the term "bar", "ingot", "coin" or "wafer", that they are technical terms and that the pieces of gold used by the Appellant in the case at bar do not qualify as such under the technical definitions used in such markets.

[68] The main issue between the two parties was centred around whether or not the Court should apply the dictionary, general or common meaning of the words "bar", "ingot" and "wafer" or whether it should apply a more technical meaning, such as that suggested by the expert called on behalf of the Respondent.

[69] Interestingly enough, both parties relied upon the same case in support of their position. Counsel for the Appellant argued that the Court should apply the general, ordinary or dictionary meaning of the terms because the GST provisions of the *Excise Tax Act* apply to almost every good and service

in general, (see *Perka et al., supra*). On the other hand, counsel for the Respondent, in applying the same case, argued that the findings in that case supported her position that Parliament was intending to use technical terms and therefore, the Court should not substitute a general meaning for them.

[70] The Court finds that to some extent both parties may be correct. The Court is satisfied that some sections of the GST provisions of the *Excise Tax Act* apply generally to all goods and services and it would be reasonable to apply the general, common or dictionary meaning to the terms in dispute. Likewise, the Court finds that there are sections of the GST provisions of the *Act* that refer to more specific goods and services and it would be reasonable to apply the technical or scientific meaning to the terms in dispute.

[71] The Court finds that in the case at bar the terms in issue are used in the context of a more restrictive section dealing with financial instruments. It is true that all of the terms used in the definition of "financial instrument" do not have the exact same qualities, one with the other, but they are very similar in nature. They are generally readily transferable, have a readily ascertainable value, are readily identifiable and are more or less saleable. The Court is satisfied that in the case at bar it would be more reasonable to apply the technical meaning in reaching its conclusion as to what the intention of Parliament was in creating this definition.

[72] To some extent the Court is aided in its decision by considering the Report **The Technical Paper On The Goods and Services Tax** that was earlier referred to. It is obvious from looking at the final form of the *Act* that Parliament intended a more restrictive definition than that suggested by counsel for the Appellant. Indeed, it refused to change the definition of investment gold to include numismatic coins because their purity level fell below the standards set out in the definition of precious metal. It can be reasonably assumed that any other article which lacked any of the qualities of a "bar", "ingot" or "wafer" would not qualify for exemption under the definition. The Court is satisfied that the intention of Parliament must have been to include only investment quality gold in the definition of financial services and into the exempt category.

[73] The argument of counsel for the Respondent that a piece of "bar", "ingot", "coin" or "wafer", even if rectangular in shape, no longer fits the definition of a financial instrument which would be the equivalent to money, which is no longer negotiable in the form in which it is presented and does not meet the definition, is not without merit. It is obvious that no bank, gold dealer or any customer would accept the pieces as presented without having them assayed and weighed except those who trusted intriscintly the information provided by the person with whom they were dealing.

[74] The only quality of a "bar", "ingot" or "wafer" that these pieces of gold sold by the Appellant maintained was the element of purity, but in each case the recipient would have to rely upon the statement of the Appellant as to the purity of the article being sold. One would not find this happening in the financial market and it would be difficult to conclude that this was indeed a financial instrument.

[75] Finding as the Court does that Parliament intended that the more technical terms be used in the definition of "ingot", "wafer" or "bar", the Court is further satisfied that to accept the dictionary, common or general definition of the terms would lead to an absurd result. The Court would find it hard to conclude that when Parliament used the term "wafer" they meant to include anything even remotely similar to the broad definition of wafer as contained in the dictionary or that when they use the term "ingot" or "bar" that they ever considered that it might include small pieces of gold which were clipped or cut from something which was otherwise readily identifiable, saleable, capable of immediate recognition, valuation and which was commonly used as a financial instrument in the precious metals market.

[76] The Court is not satisfied that the Appellant has met the onus upon him of proving that the items in question fell within the exempt provision of the *Act*. GST should have been charged on these items.

[77] Evidence was given that the Appellant had received advice before deciding to act as he did and not apply GST to the sales. But without a judicial interpretation of the relevant sections; without a technical paper being produced by the department which indicated, as proposed, that the department might interpret this definition the same way; without an advanced ruling by the department, which was favourable to the Appellant's position; it would be dangerous indeed to rely upon such a tenuous interpretation.

[78] The Court is not influenced in its decision by the motive of the Appellant in acting as it did, although it is obvious that it was able to make a profit by buying the bars at a lower price and applying a mark-up when the pieces were sold. However, when it sold the pieces of gold in the form otherwise than that form in which they were purchased, the pieces were no longer financial instruments and were no longer exempt from the application of GST.

[79] The Court is not assisted in its decision by the reference by counsel for the Appellant to section 160 which deals with coin operated devices.

[80] The appeal is dismissed and the Minister's assessment is confirmed, with costs to the Respondent.

Signed at Ottawa, Canada, this 20th day of August 1998.

"T.E. Margeson"

J.T.C.C.