CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 21, 1989

Appeal No. 2937

IN THE MATTER OF an application heard May 16, 1989, pursuant to section 51.19 of the *Excise Tax Act*, R.S.C. 1970, c. E-13 (the Act);

AND IN THE MATTER OF a Notice of Decision of the Minister of National Revenue dated December 18, 1987, with respect to a Notice of Objection filed pursuant to section 51.17 of the Act.

BETWEEN

GEOCRUDE ENERGY INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal declares that the appellant is not eligible to claim a refund under section 44 of the Act for the federal sales tax portion of the purchase price it paid to a licensed manufacturer for three metal buildings used by the appellant at its Grand Forks heavy oil battery.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
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UNOFFICIAL SUMMARY

Appeal No. 2937

GEOCRUDE ENERGY INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Whether Geocrude Energy Inc. is eligible to claim a refund under section 44 of the Act for the federal sales tax portion of the purchase price it paid to a licensed manufacturer for three metal buildings - Whether amount is taken into account as taxes imposed by or under the Act.

DECISION: *The appeal is dismissed. Section 44 of the Act provides that in order to claim a refund, the amount claimed must have been taken into account as taxes imposed by or under the Act. The amount paid by the appellant, the end user of the buildings, was paid to a licensed manufacturer for federal sales tax required under the Act to be paid by the manufacturer. The case law has consistently held that such amounts are not considered as taxes imposed by or under the Act.*

Place of Hearing:	*Calgary, Alberta*
Date of Hearing:	*May 16, 1989*
Date of Decision:	*August 21, 1989*
Panel Members:	*Sidney A. Fraleigh, Presiding Member* *Robert J. Bertrand, Q.C., Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Clifford Sosnow*
Clerk of the Tribunal:	*Lillian Pharand*
Appearances:	*David F. Lunnen, for the Appellant* *Peter Engelmann, for the Respondent*
Cases Cited:	*G.M.L. Minerals Consulting Limited v. The Minister of National Revenue (Appeal No. 2974); R. v. Stevenson Construction Co. Ltd., 24 N.R. 390; B.A.C.M. Construction Company Ltd. et al. v. R. in Right of British Columbia et al., 8 B.C.L.R. 391; Price (Nfld.) Pulp and Paper Limited v. The Queen, [1974] 2 F.C. 436; Saugeen Indian Band v. The Queen, 2 T.C.T. 4033; M. Geller et al. v. The Queen [1960], Ex. C.R. 512; The Queen v. M. Geller Inc. [1963], S.C.R. 629.*
Statutes Cited:	*Canadian International Trade Tribunal Act, S.C. 1988, c. 56, subs. 54(2) and s. 60; Excise Tax Act, R.S.C. 1970, c. E-13, subss. 27(1), 29(1),s. 44 and par. 1(j), Part XIII, Schedule III; An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof, S.C. 1986, c. 9, subss. 34(2), 55(2); Special War Revenue Act, S.C. 1943-44, c. 11, s. 105.*

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Appeal No. 2937

GEOCRUDE ENERGY INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
W. ROY HINES, Member

REASONS FOR DECISION

SUMMARY

The appellant purchased three metal buildings from a licensed manufacturer Almac Metal Industries Ltd. (Almac), to house equipment that the appellant uses at its Grand Forks heavy oil battery. The appellant was invoiced an amount ($782.68) which represented the federal sales tax that Almac was obligated to pay to the Department of National Revenue (Customs and Excise) by virtue of subsection 27(1) of the *Excise Tax Act*.[1] Subsequently, the appellant asked the manufacturer for a refund equal to the amount which it had given the company for the federal sales tax on the basis that the buildings were in fact sales tax exempt. The manufacturer refused to issue a credit note to the appellant because it had been advised by Department officials that the buildings would not be considered sales tax exempt.

The appellant decided to request a refund of the amount directly from the Department. It filed the refund claim under section 44 of the Act stating that the goods were tax exempt and that, consequently, the amount that it had given the manufacturer had been paid in error.

The Department, and subsequently its Minister, refused to grant the refund on the grounds that the appellant was not an eligible claimant. As a result of their decision, they did not determine whether the buildings were exempt from federal sales tax.

The issue in this appeal is whether the appellant is eligible to claim a refund. If the appellant is an eligible claimant, the Tribunal must determine whether it should decide on the question of whether the goods for which refund is claimed are for use in development of oil and thus exempt from tax or whether it should refer the question back to the Minister for reconsideration.

The appeal is not allowed. Section 44 of the Act states that as a condition to claiming a refund, the amount claimed must have been taken into account as taxes imposed by or under the Act. The case law has consistently held that amounts paid by the end user for federal sales tax required under the legislation to be paid by the manufacturer or other licensee are not considered as taxes imposed by or under the Act.

1. R.S.C. 1970, c. E-13; *now* R.S.C. 1985, c. E-15, subs. 50(1).

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The amounts paid by Geocrude Energy Inc. (Geogrude), the end user of the metal buildings, to Almac, the manufacturer of the buildings, were paid to Almac for federal sales tax required under the legislation to be paid by the manufacturer. In view of the case law, the Tribunal does not consider that the appellant has satisfied the condition set out in section 44 of the Act. Thus, the Tribunal does not consider the appellant, an end user, eligible to claim a refund under that section.

Because the Tribunal does not consider the appellant to be an eligible claimant, it is not necessary for the Tribunal to determine whether it should decide on the question of whether the buildings are for use in development of oil and thus exempt from tax or whether it should refer the question back to the Minister for reconsideration.

THE LEGISLATION

The following legislative provisions of the Act are relevant to this appeal:

27. (1) There shall be imposed, levied and collected a consumption or sales tax at the rate specified in subsection (1.1) on the sale price of all goods

(a) produced or manufactured in Canada

29. (1)[2] *The tax imposed by section 27 does not apply to the sale or importation of the goods mentioned in Schedule III ...*

SCHEDULE III

PART XIII

PRODUCTION EQUIPMENT, PROCESSING MATERIALS AND PLANS

1. All the following:

...

(j) machinery and apparatus, including wire rope, drilling bits and seismic shot-hole casing, for use in exploration for or discovery or development of petroleum, natural gas or minerals;

The appellant says that the refund provisions of the Act, as they existed at the time it paid money to Almac, should govern this appeal. Those provisions are as follows:

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2. *Now* R.S.C. 1985, c. E-15, subs. 51(1).

44.(1) A deduction from, or refund of, any of the taxes imposed by this Act may be granted

...

(c) where the tax was paid in error;

(7.1) Subject to subsection (7), no refund of moneys paid or overpaid in error, whether by reason of mistake of fact or law or otherwise, and taken into account as taxes imposed by this Act shall be granted under this section unless application in writing therefor is made to the Minister by the person entitled to the refund within four years after the time the moneys were paid or overpaid.

Paragraph 44(1)(*c*) and subsection 44(7.1) have been repealed and replaced by a different refund provision which is also numbered section 44.

The respondent says that the new refund provision of the Act should govern the appeal. This provision is as follows:

44.[3] 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 those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after he paid the moneys.

Although the appeal was originally commenced before the Tariff Board, the appeal is taken up and continued by the Canadian International Trade Tribunal (the Tribunal) in accordance with subsection 54(2) and section 60 of the *Canadian International Trade Tribunal Act*.[4]

THE FACTS

Almac is a licensed manufacturer of metal building components. On January 28, 1986, Almac sold three prefabricated metal buildings to Geocrude. The buildings are used to house a skim pump and recycle pumps located at the appellant's Grand Forks heavy oil battery. The appellant was invoiced an amount for the buildings that included the sum of $782.68. This sum represented the federal sales tax that Almac owed to the Department pursuant to subsection 27(1) of the Act, on the sale of the buildings to Geocrude.

After the appellant purchased the buildings, it asked Almac for a refund equal to the $782.68. It said that the buildings were apparatus for use in the development of heavy oil. Relying on subsection 29(1) and on paragraph 1(*j*), Part XIII, Schedule III of the Act, the appellant said that the goods were sales tax exempt. Thus, it said that it had paid federal sales tax in error.

Almac contacted the District Excise Office in Edmonton, Alberta who advised the company that the buildings would not qualify for exemption from sales tax. Thus, Almac declined

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3. *Now* R.S.C. 1985, c. E-15, s. 68.
4. S.C. 1988, c. 56.

to seek a refund of the sales tax that it had remitted ($782.68) and declined to issue a credit note to Geocrude.

On August 28, 1987, Geocrude directly applied for a refund from the Department. It issued a Notice of Determination (ALB 63224) on September 15, 1987. It said that the appellant was not an eligible claimant.

Unhappy with the result, the appellant filed a Notice of Objection on October 19, 1987. The Minister confirmed its earlier decision in a Notice of Decision dated December 18, 1987. In that Notice, the Minister said the "right, if any, to exemption or recovery of tax is exclusively that of the vendor..." The appellant, being a purchaser, was therefore ineligible to claim a refund. The Minister did not determine whether the goods, for which the refund was claimed, were in fact exempt from federal sales tax.

Hence, the appellant filed an appeal with the Tariff Board on January 14, 1988, pursuant to section 51.19 of the Act.

THE ISSUE

The issue in this appeal is whether the appellant is eligible to claim a refund. If the appellant is an eligible claimant, the Tribunal must determine whether it should decide on the question of whether the goods for which refund is claimed are for use in development of oil and thus exempt from tax or whether it should refer the question back to the Minister for reconsideration.

The appellant argued that the Minister had been wrong in deciding that only the vendor of goods was eligible to claim a refund. He argued that the federal sales tax was an indirect tax that was passed on from the manufacturer and ultimately paid by the end user of the goods. Geocrude is the end user of the metal buildings and thus is the one who must pay the federal sales tax. The only obligation of the manufacturer, Almac, was to collect and remit the sales tax to the government.

The appellant submitted that sales tax would not be borne by the end user if the goods were described in Schedule III of the Act because, in that situation, the goods would be sales tax exempt.

The appellant argued that an end user has paid federal sales tax in error when the tax has been paid on sales tax exempt goods. The appellant submitted that it had paid tax in error because the metal buildings were used in the development of heavy oil and therefore qualified for a sales tax exemption pursuant to paragraph 1(*j*), Part XIII, Schedule III of the Act.

The appellant argued that the refund provisions in force when the appellant paid "sales tax" did not limit refund claims only to vendors. It simply said that a refund may be granted where the tax had been paid in error. Since the appellant had paid federal sales tax in error, it was entitled to claim a refund.

In support of these propositions, the appellant relied on the Tariff Board decision in the case of *G.M.L. Minerals Consulting Ltd. v. The Minister of National Revenue*;[5] the Federal Court of Appeal decision in *R. v. Stevenson Construction Co. Ltd.*;[6] and a decision of the British Columbia Supreme Court in *B.A.C.M. Construction Company Ltd. et al. v. R. in Right of British Columbia et al.*[7]

The respondent argued that the appellant was not eligible to claim a refund regardless of the provision used to support the claim. Both provisions indicated that the right to claim a refund was only available to the taxpayer.

The respondent submitted that the appellant had not paid federal sales tax to the Department. Almac was the taxpayer. Because the appellant had made no payment of taxes, it could not make a claim for a refund of taxes paid in error.

The respondent submitted that the rights of the appellant to pursue claims for refunds have been set out in, and restricted to, section 51.33[8] of the Act. He said that the section in question had no applicability to the present case because the circumstances which were necessary to occur before the section came into play had never arisen.

In support of these propositions, the respondent relied on the Supreme Court of Canada decision of *The Queen v. M. Geller Inc.*[9] and on the Federal Court of Appeal decision of *Price (Nfld.) Pulp and Paper Limited v. The Queen*.[10]

The respondent argued that even if the appellant were eligible to claim a refund, the metal buildings did not qualify for exemption. He submitted that the buildings were not used to develop heavy oil but rather to house production equipment. He contended that the use of the word "production" in other portions of Part XIII, Schedule III indicated that Parliament intended a distinction to be drawn between equipment for production, on the one hand, and equipment for development on the other.

DECISION

Applicable Refund Provision

Paragraph 44(1)(*c*) and subsection 44(7.1) were repealed by *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof*, S.C. 1986, c. 9 (hereinafter the Act of 1986). They were replaced by a refund provision which was also numbered section 44.

The Act of 1986 said that the new refund provision would become law on May 1, 1986 (subsection 34(2)), and that the old refund provision was to be used only if the Minister had rejected (in whole or in part) or approved a refund claim before May 1, 1986 (subsection 55(2)).

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5. Appeal No. 2974.
6. 24. N.R. 390.
7. 8 B.C.L.R. 391.
8. *Now* R.S.C. 1985, c. E-15, s. 81.33.
9. [1963] S.C.R. 629.
10. [1974] 2 F.C. 436.

Because the appellant made a refund claim on August 28, 1987, i.e. after May 1, l986, the Tribunal considers that the new refund provision governs the present appeal.

Eligibility of Purchaser to Claim Refund

From an examination of the case law and the wording of section 44 of the Act , the Tribunal considers that the appellant is not eligible to claim a refund for the $782.68 that it paid to Almac on account of federal sales tax statutorily required to be paid by Almac to the Department.

The issues before the Tribunal are substantially similar to those heard before the Tariff Board in the G.M.L. case (*supra*). That case examined whether a purchaser could claim a refund of sales tax under the new section 44 of the Act regarding goods used in its (mineral prospecting) business which the appellant claimed qualified for an exemption from sales tax pursuant to paragraph 1(*j*), Part XIII, Schedule III of the Act. The appellant had paid an amount to retailers on account of federal sales tax owed and paid by the manufacturers of the goods. A majority of the Tariff Board said that the appellant, an end user of the goods, could claim the refund if the Minister determined that the goods were in fact tax exempt.[11]

In holding that a refund could be paid to a purchaser or end user under section 44 of the Act, the majority of the Board said:

> Since the goods ... are end use equipment, unless the end user is entitled to claim a refund of sales tax passed on to him by the producer or manufacturer, ... end users cannot take advantage of the exemption provided for by the Act. Being an end user and, therefore, exempt from payment of taxes, any such taxes passed on to and paid by the appellant are paid in error. I therefore find that the appellant is entitled to claim a refund under section 44 of the Act. (emphasis added)

In coming to this conclusion, the majority relied on the B.A.C.M. case (*supra*) and the Stevenson Construction case (*supra*).

It would appear that underlying the reasoning of the majority was the assumption that amounts paid by the end user to the vendor for federal sales tax, statutorily required to be paid by another, constituted taxes imposed under the Act.

With respect, the Tribunal neither agrees with this assumption nor with the majority decision of the Tariff Board. Initially, the Tribunal considers that the two cases on which the majority relied do not provide authority for their conclusion. In the Stevenson Construction case (*supra*), the Federal Court of Appeal dealt with refund eligibility where goods had been purchased on a federal sales tax included basis by three contractors pursuant to a ferry terminal contract between them and the province of British Columbia. The refund claim was made by the contractors under then section 44.2 of the Act (currently section 44.19) which authorizes the Crown, the "manufacturer, producer, wholesaler, jobber or other dealer, as the case may require..." to seek a refund of sales tax paid where the Crown has purchased the goods.

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11. On February 16, 1989, the Attorney General of Canada filed an appeal of this decision with the Trial Division of the Federal Court of Canada. A decision has yet to be rendered.

The court, holding that the goods were, in law, purchased by the Crown, allowed the contractors to claim the refund, though they had not initially paid the federal sales tax. In dealing with section 44.2, the court said (at pages 399 and 400) that the provision:

> ... does not impose as a condition of refund that the person who seeks the refund must have paid the tax initially, but rather contemplates that a refund may be made to one to whom the tax has been passed on. This, I think, is indicated by the words "as the case may require" ... The purpose of the description of the persons to whom a refund may be made is not so much to limit such persons to specific categories but to encompass anyone who has borne the ultimate burden of the tax in dealing with the goods. (emphasis added)

The Tribunal notes that section 44.2 specifically entitles categories of persons to whom the tax has been passed on to claim a refund. There being no similar description of the persons to whom a refund may be made in section 44 of the Act, the case merely begs the question as to whether section 44, like section 44.2, also encompasses "anyone who has borne the ultimate burden of the tax in dealing with the goods."

The second case upon which the majority of the Tariff Board relied examined the meaning of the phrase "sale price" or "purchase price" in section 2 of the British Columbia *Social Service Tax Act*, a provincial sales tax statute.

Because of the importance of the case, both for the majority of the Tariff Board and for the appellant, the headnote, which accurately summarizes the facts, is set out below:

> A subcontractor [Ocean] on a project relating to the construction of a manufacturing plant purchased steel from a manufacturer. The manufacturer paid federal sales tax on the steel, which it passed on as part of its sale price to the subcontractor. At the time the subcontractor incorporated the steel into the project, it paid tax to the province based on its purchase price from the manufacturer which price included the component of federal sales tax. The subcontractor then billed the head contractor [B.A.C.M.], including in its sale price components made up of the federal sales tax paid by the original manufacturer and the provincial sales tax it had paid ... In turn, the head contractor included in its price to the owner the amount it had paid to the subcontractor. On the sale to the owner, the federal sales tax became refundable, and the contractor received a refund ... The contractor then requested the provincial sales tax branch to refund that portion of the provincial sales tax paid by the subcontractor that was assessed on the federal sales tax component of the purchase price paid by the subcontractor. This request was refused, which led [to the case being heard by the court].

The British Columbia Supreme Court upheld the decision of the provincial sales tax branch for the following reasons:

> In my judgment, the branch was correct in refusing the refund. Whilst the definition of "sale price" and "purchase price" in s. 2 takes into account the netting of refunds of federal sales tax where such a refund is received by the same taxpayer who paid the provincial sales tax, it does not require any refund of the provincial tax where another person received the federal refund.

Thus, the Tribunal considers that the case only stands for the proposition that the person who is eligible to claim a refund of provincial sales tax pursuant to section 2 (due to netting of refunds of federal sales tax) is the provincial sales taxpayer.

However, the Tariff Board relied on the following incidental remarks made by the court (at page 395) on section 44 of the Act, as it existed before its repeal and replacement by the Act of 1986:

> I find nothing in the federal *Excise Tax Act* to say who should get the refund, but the scheme of the Act is that tax is assessable at the outset, and becomes inapplicable only in the event of a subsequent exempt sale. That is a curative event. The philosophy is to encourage the development of the manufacturing industry in Canada, and the logic therefore is for the manufacturer to gain the financial incentive of the refund. This is in keeping with the indirect nature of the tax, i.e., one of which the burden is expected in the ordinary course of things to be passed on to the end user. By the same token, it is the end user who should receive the benefit of any refund. Were the refund to be made to the original manufacturer ... there is no obligation upon it to pass that benefit on to its purchaser ... and so on down the line to the end user.

These remarks appear to suggest that the end user (purchaser) of goods is entitled to claim a refund on monies it has paid to a manufacturer for federal sales tax under section 44 of the Act. In fact, the wording of section 44 of the Act, and its predecessor sections, as they have been interpreted by the jurisprudence over the past 25 years, indicates a contrary conclusion.

Section 44 of the Act originates from S.C. 1943-1944, c. 11. In those days, the federal sales tax refund provisions for sales tax paid in error were numbered subsections 105(1) and 105(6). They are worded in an almost identical manner to the words found in paragraph 44(1)(*c*) and subsection 44(7.1) of the Act, as they read immediately before their repeal and replacement by the current section 44.

A common thread running through these refund provisions since 1943 is that, as a condition to claiming a refund, monies, for which the claim was made, must have been taken into account as taxes imposed by or under the Act.

This phrase has been interpreted in a number of cases beginning with the Supreme Court of Canada decision in Geller (*supra*). The issue in that case involved a refund claim under subsections 105(1) and 105(6) of the then Act for federal sales tax purportedly paid in error. The claim centred around a provision which said that a sales tax was to be imposed on all dressed furs and payable by the dresser at the time of delivery of the goods to the purchaser. The dresser, Nu-Way Lambskin Processors Ltd. (Nu-Way), paid the tax on the sheepskins that it delivered to Geller, the purchaser, and was reimbursed by Geller for the tax paid. Geller and Nu-Way then made competing claims for a refund arguing that sheepskins were not furs; i.e. that monies taken into account as taxes were paid in error.

The trial judge[12] dismissed the claim of Nu-Way on the grounds that it failed to apply for a refund within the statutorily allotted time. However, the claim of the respondent was maintained on the grounds that the right to claim a refund for monies paid in error was open to any person who paid the monies which had been taken into account as taxes imposed by the Act. The trial judge considered the reimbursement to Nu-Way for taxes statutorily required to be paid by Nu-Way to be monies taken into account as taxes imposed by the Act.

Nu-Way did not appeal before the Supreme Court of Canada and thus, the sole issue for the court to decide was whether the trial judge was correct in holding that the reimbursement constituted monies taken into account as taxes imposed by the Act. In holding that such monies were not statutorily imposed taxes, the Court said (at page 631):

> The person obliged to pay the tax is the dresser, and the person entitled to a refund is the dresser if the tax has been paid through mistake of law or fact. In the present case, the tax was paid by the dresser Nu-Way and it was the sole person entitled to a refund ...
>
> The respondent has no legal right to claim. It is true that M. Geller Inc. reimbursed Nu-Way, but this payment does not give a right of action to the former, which the law denies.
>
> The arrangements made between Geller and Nu-Way are of no concern to [the Crown]. They are "res inter alios acta" and cannot affect the rights of the Crown. (emphasis added)

The Tribunal notes that the majority of the Tariff Board in the G.M.L. case (*supra*) sought to distinguish the applicability of the Geller case (*supra*) on the grounds that the case involved two competing claims and that "Faced with such a situation one can understand why the court ordered that the person obliged to pay the tax is the one entitled to a refund."[13]

12. [1960] Ex. C.R. 512.
13. Appeal No. 2974, p. 7.

With respect, the Tribunal does not agree with this conclusion. The issue before the Supreme Court did not involve deciding which of two competing claimants had a superior right to claim a refund of monies paid in error and taken into account as taxes imposed by the Act, but rather involved, as stated earlier, the issue of whether monies paid by the purchaser to the dresser, as reimbursement for taxes it had paid under the Act, constituted statutorily imposed sales tax.

However, even if the Geller case (*supra*) were distinguishable from the Tariff Board appeal and, by extension, from the present appeal, the Tribunal considers that the subsequent case law has reaffirmed the Geller principle in situations that did not involve competing claimants.

In the Federal Court of Appeal decision of Price (Nfld.) Pulp & Paper Limited (*supra*), the court dealt with the issue of whether a purchaser of goods, who had paid a price that included an amount for sales tax statutorily required to be paid by the manufacturer of the goods, could claim a refund where those goods were subsequently held to be sales tax exempt by amending legislation. The court, in holding that the amending legislation was not retroactive to the tax already paid, said (at pages 441 and 442):

> ... even if it is accepted that the tax already paid became non-exigible and therefore returnable...the appellant in my opinion has established no right against the Crown to recover the amount claimed. The fact as asserted by counsel that the appellant was the only person interested in obtaining reimbursement of the money is not, in my opinion, sufficient to afford the appellant a right of action therefor against the Crown because no tax was imposed upon or received from the appellant, and in my view it cannot be affirmed that as against the Crown the appellant was ever the owner of the money which the Crown received from Dominion Engineering Works Limited as payments of the tax. (emphasis added)

This jurisprudential principle was again applied in the recent Federal Court of Canada, Trial Division decision of *Saugeen Indian Band v. The Queen.*[14] In that case, the appellant Indian band purchased several commodities on a federal sales tax included basis. The appellant then applied for a refund under the Act for the sales tax portion of the purchase price based on its Indian status under the *Indian Act*. The main issue raised before the Trial Division was whether the *Indian Act* operated so as to exempt Indian bands from the incidence of tax, thereby entitling the appellant band to a refund of the federal sales tax portion of the purchase price paid to the vendors of those commodities.

The court rejected the appeal, in part, because it did not consider that the federal sales tax portion of the purchase price paid by the appellant to the vendors of the commodities constituted a tax imposed under the Act. The court stated (at pages 4037 and 4038):

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14. 2 T.C.T. 4033.

> Counsel for the plaintiff argues that the federal sales tax is a consumption tax; a tax on property that was purchased for consumption on the reserve and therefore...exempt from taxation...I think this argument confuses the nature of the federal sales tax with that of the provincial retail sales taxes. Provincial retail sales taxes are levied on the consumption of end-users; the vendor of the product is the collector of the tax, as agent for the Crown. Federal sales taxes are levied on the vendor not the purchaser and the primary focus of the tax is the sale of finished products at the manufacturer's level. The word "consumption" is used to describe the tax; subsection 27(1) of the *Excise Tax Act* refers to the tax as a "consumption or sales tax"...Whatever may be the significance of the use of that description, it is not accurate to classify the tax imposed by subsection 27(1) as a tax on the consumption or purchase of the property by the end-user. (emphasis added)

In short, the case law has consistently held that amounts paid by the end user for federal sales tax required under the legislation to be paid by the manufacturer or other licensee are not considered as taxes imposed by or under the Act.

CONCLUSION

The amounts paid by Geocrude, the end user of the metal buildings, to Almac, the manufacturer of the buildings, were paid to Almac for federal sales tax required under the legislation to be paid by the manufacturer. In view of the case law, the Tribunal does not consider that the appellant has satisfied the condition set out in section 44 of the Act. Thus, the Tribunal does not consider the appellant, an end user, eligible to claim a refund under that section.

Because the Tribunal does not consider the appellant to be an eligible claimant, it is not necessary for the Tribunal to determine whether it should decide on the question of whether the buildings are for use in development of oil and thus exempt from tax or whether it should refer the question back to the Minister for reconsideration.

The appeal is dismissed.

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