CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, February 2, 1990

Appeal No. 3066

IN THE MATTER OF an application heard May 30, 1989, pursuant to section 51.19 of the *Excise Tax Act*, R.S.C. 1970, c. E-13, as amended;

AND IN THE MATTER OF a Notice of Decision of the Minister of National Revenue dated August 4, 1988, with respect to a Notice of Objection filed pursuant to section 51.15 of the *Excise Tax Act*.

BETWEEN

WEST SHORE CONSTRUCTORS LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. It is the conclusion of the Tribunal that the refund claim period commenced no later than January 31, 1986, and thus, the appellant did not submit its claim for a refund of federal sales tax within two years as required under section 44.2 of the *Excise Tax Act*.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

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

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. 3066

WEST SHORE CONSTRUCTORS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Determination of the date of sale for the purpose of establishing whether the claim for refund was submitted within the two-year period prescribed by section 44.2 of the Excise Tax Act -Effect of the contractual term governing the transfer of property.

DECISION: *The appeal is dismissed. It is the conclusion of the Tribunal that the refund claim period commenced no later than January 31, 1986, and thus, the appellant did not submit its claim for a refund of federal sales tax within two years as required under section 44.2 of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 30, 1989*
Date of Decision:	*February 2, 1990*
Panel Members:	*Sidney A. Fraleigh, Presiding Member* *Robert J. Bertrand, Q.C., Member* *Kathleen E. Macmillan, Member*
Counsel for the Tribunal:	*Donna J. Mousley*
Clerk of the Tribunal:	*Lillian Pharand*
Appearances:	*Ray Trottier, for the appellant* *Peter C. Englemann, for the respondent*
Cases Cited:	*The King v. Dominion Bridge Co. Ltd., [1940] S.C.R. 487; [1940-41] C.T.C. 99; D.T.C. 499-14; The Queen v. Stevenson Construction Co. Ltd. et al., [1979] C.T.C. 86 (B.C.C.A.).*
Statutes Cited:	*Canadian International Trade Tribunal Act, S.C. 1988, s. 60; Excise Tax Act, R.S.C. 1970, c. E-13, s. 44.2.*
Other Reference Cited:	*Department of National Revenue Ruling 5325/8-2, September 19, 1984.*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3066

WEST SHORE CONSTRUCTORS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
KATHLEEN E. MACMILLAN, Member

REASONS FOR DECISION

SUMMARY

The issue in this appeal is whether the appellant's claim for a refund of federal sales tax paid on certain goods used in the construction of a bridge was submitted within the two-year period prescribed in section 44.2 of the *Excise Tax Act* (the Act). As that section states, a refund shall be paid "if the person who sold the goods applies therefor within two years after he sold the goods."

There is no doubt that the supply of materials under a contract for construction is a sale for the purposes of claiming a refund of federal sales tax. This was established in the case of *The King v. Dominion Bridge Co. Ltd.*[1] and affirmed more recently in the case of *The Queen v. Stevenson Construction Co. Ltd. et al.*[2] The effect of the contract in the present appeal was also to translate the property in the goods to the Crown, and we may similarly conclude that there has been a sale of the materials to the Crown.

General Condition 13 of the contract with West Shore Constructors Ltd. (West Shore) provides that "All material ... acquired, used or provided ... for the contract shall, from the time of ... acquisition, use or provision, be the property of Her Majesty for the purposes of the work...." Thus, the date of sale is the date that the materials were acquired for use in the construction project, and the refund claim period began to run from that date.

The contract further provides that all materials for use in the project could have been accounted for within 30 days of their purchase or delivery to the site. The progress claim for the period of January 1 to January 31, which is neither signed nor dated, is apparently the final such claim submitted in respect to work done and materials delivered to the construction site. The amounts shown on this claim match the amounts for which a refund of tax has been claimed for the whole of the project. Moreover, the refund claim, which is the subject of this appeal, states that the claim is in respect of goods purchased between November 1985 and January 1986.

1. [1940] S.C.R. 487; [1940-41] C.T.C. 99; D.T.C. 499-14.
2. [1979] C.T.C. 86 (B.C.C.A.).

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On the basis of the evidence, the Tribunal concludes that there was no sale of materials to the Crown after the final billing period and, therefore, the refund claim period commenced no later than January 31, 1986. Consequently, the appellant was outside the statutory two-year time limit when the refund claim was signed on March 10, 1988. The appeal is not allowed.

THE LEGISLATION

For the purpose of this appeal, the relevant statutory provision of the Act is as follows:

> *44.2 Where tax under Part III or V 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 both such nature and use, would have rendered the sale to that purchaser exempt or relieved from that tax under subsection 21(2.3), paragraph 21(3.1)(b) or subsection 27(2) or 29(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 <u>within two years</u> after he sold the goods ...*
> (Emphasis added)

THE FACTS

The appellant, West Shore, entered into a contract with Her Majesty the Queen in right of Canada, represented by the Minister of Indian Affairs and Northern Development, to construct an access bridge at Fort Babine, British Columbia.

On March 21, 1988, the respondent received a refund claim submitted by the appellant for the amount of $7,756.76. The refund claim, dated March 10, 1988, was for the recovery of taxes paid on certain goods used in the construction of the bridge. On May 2, 1988, the respondent issued a Notice of Determination rejecting the refund claim because it had not been submitted within the statutory two-year time limit.

The appellant filed a Notice of Objection on May 20, 1988. On August 4, 1988, the Minister of National Revenue (the Minister) confirmed the original decision to disallow the refund. In a letter dated September 14, 1988, the appellant appealed the respondent's decision pursuant to section 51.19 of the Act. The appeal, being a continuation of proceedings commenced before the Tariff Board, is taken up and continued by the Canadian International Trade Tribunal (the Tribunal) by virtue of section 60 of the *Canadian International Trade Tribunal Act*.[3] The only issue raised by this appeal is whether the refund claim was filed by the appellant within the two-year limitation period set out in section 44.2 of the Act. If the appellant is successful, the claim will be referred back to the Minister for consideration.

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3. S.C. 1988, c. 56.

The refund claim submitted by the appellant states that the period covered by the claim is November 1985 to January 1986. While it was dated March 10, 1988, it was received in the offices of the respondent on March 21, 1988. The envelope bearing the dated postal stamp has been lost or destroyed. Counsel for the appellant provided a signed statement by the appellant's bookkeeper to the effect that the refund claim was sent by return mail on the date of signature, as is the firm's usual administrative practice.

A part of the contract between the appellant and Her Majesty for the construction of the bridge was included in the appellant's brief and provided at the hearing of the appeal. The relevant articles and conditions, to the extent they were submitted as evidence, are summarized as follows.

The contract was to be completed by January 31, 1986, for an authorized expenditure of $402,200. According to the Terms of Payment, upon the completion of each period of 30 days, the contractor was to deliver to the engineer a request for payment detailing the work done and materials delivered to the site during that period. Then, the engineer was to inspect the part of the work and the material described in the progress claim and issue a progress report indicating their value. Within 30 days after the issue of the progress report, the contractor was to be paid the value indicated in the report, less the amount of the holdback, in this instance, five percent. A condition precedent to each payment was that the contractor make and deliver a statutory declaration to the engineer stating, *inter alia*, that all accounts for sub-contracts, labour and materials and other accounts in respect of the performance of the work covered by the contract had been paid. Final payment under the contract was to be made 60 days following the issue of the final Certificate of Completion and receipt of a statutory declaration.

The following provision, General Condition 13, set out the conditions for the transfer of property in materials to be used in the construction of the bridge. Because it is central to the issues in this case, it is reprinted here in full.

GC13Material, Plant and Real Property Become Property of Her Majesty

13.1All material and plant and the interest of the Contractor in all real property, licences, powers and privileges acquired, used or provided by him for the contract shall, from the time of their acquisition, use or provision, be the property of Her Majesty for the purposes of the work and they shall continue to be the property of Her Majesty

13.1.1 in the case of material, until the Engineer indicates that he is satisfied that it will not be required for the work, and

13.1.2 in the case of plant, real property, licences, powers and privileges, until the Engineer indicates that he is satisfied that the interest vested in Her Majesty therein is no longer required for the purposes of the work.

The following additional documents were entered as evidence. A document, entitled "Request for Contract Payment," relates to the period January 1, 1986, to January 31, 1986, and was evidently the last progress billing made under the contract. The amount claimed is $188,039, bringing the total cost of the project to $404,171. The second page of this document details the value of material delivered to the site and the work completed, during this period and to date.

The engineer's Certificate of Completion was also entered. It was signed by the project engineer and dated March 7, 1986. The "Effective Date" is stated as January 24, 1986. Two items noted as "Deficiencies" are as follows:

1. Fifth riser from east abutment on south side requires replacement. Existing unit checked completely through.

2. South girder at east abutment - earth fill spilled over lower flange and has to be cleaned off.

Estimated value $1,000.

A further note states, "Recommended release of holdback (deficiencies rectified during maintenance period) after sixty day period." Counsel for the appellant told the Tribunal that he had no knowledge of whether or not these deficiencies were ever rectified or of the date on which this work may have been completed.

Also entered were the Statutory Declaration of the Vice President of the appellant company, dated March 10, 1986, and the receipts for two cheques which, according to counsel for the appellant, were issued in payment of the holdback. Both cheques are dated April 8, 1986, and are in the amounts of $5,765.55 and $20,413.45. It is noted on the cheques that they were received and deposited on April 11, 1986.

For ease of reference, the evidence established the following chronology of events:

November 5, 1985	The appellant entered into a contract with Her Majesty the Queen in right of Canada represented by the Minister of Indian Affairs and Northern Development.
January 24, 1986	Effective date of the Certificate of Completion.
January 31, 1986	Projected completion date, as per contract.
March 7, 1986	Certificate of Completion signed by the Project Engineer.
March 10, 1986	Statutory Declaration signed by the Vice President of West Shore Constructors Ltd.
April 8, 1986	Date of cheques issued by Indian Affairs and Northern Development in the amounts of $5,765.55 and $20,413.45.
March 10, 1988	Refund Claim dated.
March 21, 1988	Refund Claim received in the offices of the respondent.

THE ISSUE

The issue in this appeal is whether the claim for a refund of federal sales tax was submitted within the statutory two-year limitation period.

In the course of this appeal, the appellant presented arguments on a number of grounds. The position of the appellant, as set out in its Notice of Objection dated May 2, 1988, is as follows:

> *Where a contractor submits a refund claim, on the basis of progress payments, (which is the case in this instance), for the tax paid on materials used in construction, and it is difficult to ascertain when the goods were incorporated, the date of the progress payments may be accepted by the Department as the date the refund first became payable. It is the norm in the construction industry to file for refund claims based on the issuance of the final certificate of completion, i.e. statutory declaration, prior to this a refund claim is not warranted because of possible deficiencies, release of holdbacks, etc. In our case the claim was submitted on the 10th of March 1988 which was within the two-year time limit, albeit the last day because the Statutory Declaration was duly signed on March 10, 1986 which, in essence, is the completion and final acceptance date.*

At the hearing of this appeal, counsel for the appellant argued that the advice provided in the Department of National Revenue Ruling 5325/8-2 of September 19, 1984, should determine the issues. The effect of this ruling, counsel argues, is that a person may file for a refund on the basis of progress payment or at the time of final completion of the contract. The text of the ruling is as follows:

> *On contracts, tax is payable or refundable in accordance with the terms of the contract. If the contract calls for progress billings, then the goods are deemed to have been sold on the date of the progress billing.*
>
> *It can be argued successfully that materials used in construction have not been purchased until the work covered by the progress billing has been examined, and delivery accepted by way of progress payment.*
>
> ...
>
> *This however, does not restrict a person's entitlement to a refund where that person chooses to delay filing for a refund until the completion of the contract.*

Counsel for the appellant argued that the release of the holdback may be considered a progress payment, and therefore, according to Ruling 5325/8-2, the period for filing for a refund began on April 11, 1986, when the holdback payment was received.

Alternatively, counsel submitted that "final completion" of the project did not occur until all work under the contract was completed. This includes that work noted on the Certificate of Completion as deficient, such as the landscaping which was required to be done in the spring. The appellant thus asserted that, in any event, the contract was not completed until after the date of the Certificate of Completion.

Counsel for the respondent argued that March 7, 1986, when the project engineer declared the work complete by signing the Certificate of Completion, was the latest date from which the period for filing a refund claim could have commenced. Alternatively, he submitted, the effective date of the certificate, January 24, 1986, was the date on which the time began to run.

As section 44.2 of the Act requires a refund claim to be submitted within two years of the date of sale of the goods, counsel for the respondent argued that the terms of the contract pertaining to property in the materials for use on the construction project should have governed when the sale occurred and, accordingly, the commencement date of the refund claim period. Counsel for the respondent argued that General Condition 13 may be considered a "deemed sale" provision and, thus, the date of acquisition of the materials by the contractor must be considered the commencement date.

Counsel further argued that, as there is no evidence before the Tribunal that there was a sale of any goods after January 24, let alone after March 7, the date of the Certificate of Completion must be considered the last day on which the two-year refund claim period could have commenced.

DECISION

The issue to be determined by this appeal is whether the appellant's claim for a refund of federal sales tax was submitted within the two-year period prescribed in section 44.2 of the Act. As that section states, a refund shall be paid " ... if the person who sold the goods applies therefor within two years after he sold the goods...." Thus, the commencement date of the two-year period must be the date of sale of the goods to the purchaser, in this case, Her Majesty as represented by the Minister of Indian Affairs and Northern Development.

There is no doubt that the supply of materials under a contract for construction is a sale for the purpose of claiming a refund of federal sales tax. This was established in the case of *The King v. Dominion Bridge Co. Ltd.*[4] and affirmed more recently in the case of *The Queen v. Stevenson Construction Co. Ltd. et al.*[5]

In the Stevenson Construction case, a number of construction companies were claiming a refund of federal sales tax paid on materials used in the construction and repair of ferry terminals for a provincial government. Mr. Justice Le Dain, referring to the decision in the Dominion Bridge case, found that there had been a "purchase" and "sale" within the meaning of subsection 44(2) of the Act.[6] Subsection 44(2) allowed a refund of sales tax paid on goods purchased by Her Majesty in right of a province where those goods were used under certain conditions. As that case bears many similarities with the present appeal, it is reprinted in part as follows (at pages 89-90):

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4. [1940] S.C.R. 487; [1940-41] C.T.C. 99; D.T.C. 499-14.
5. [1979] C.T.C. 86 (B.C.C.A.).
6. Subsection 44(2) of R.S.C. 1970, c. E-13, was amended by S.C. 1986, c. 9, and became subsection 44.19(1) of the Act, as it stood at the time of these proceedings.

The meaning of this passage, as I read it, is that having regard to the legislative intention disclosed by the deeming provision, a broad view is to be taken of the word "sold" in the refund provision, or the word "purchased" in the corresponding provision in section 44(2) of the Excise Tax Act, and that it is to include any transaction which effects a translation of the property in the goods to the provincial government.... There is no doubt that the effect of the contract in the present case was to translate the property in the goods to the provincial Crown. This is the effect of the contract by its very nature, but in any event the contract makes express provision to this effect in clause 13 of the standard form of contract used in this case, which reads as follows:

> *13. All materials provided by the Contractor in connection with the work shall become, from the time of their being so provided until the final acceptance of the work, the property of the Minister for the purposes of said works, and the same shall on no account be taken away or used or dispensed with, except for the purposes of said works, without the consent in writing of the Engineer. The Minister shall not be answerable for any loss or damage whatsoever in respect of such materials: Provided, however, that the material shall be delivered up to the Contractor upon the completion of the works and upon payment by the Contractor of all money, costs and damages (if any) as shall be due or chargeable from or against the Contractor under this contract.*

Accordingly, I agree with the conclusion of the Trial Division that the goods were purchased by Her Majesty in right of the province within the meaning of section 44(2).

The effect of the contract in the present appeal was also to translate the property in the goods to the Crown, and we may similarly conclude that there has been a sale of the materials to the Crown. General Condition 13 of the contract with West Shore provides that "All material ... acquired, used or provided ... for the contract shall, from the time of ... acquisition, use or provision, be the property of Her Majesty for the purposes of the work...." Thus, the date of sale is the date that the materials were acquired for use in the construction project and the refund claim period began to run from that date.

The contract further provides that all materials for use in the project could have been accounted for within 30 days of their purchase or delivery to the site. The progress claim for the period of January 1 to January 31, which is neither signed nor dated, is apparently the final claim submitted in respect to work done and materials delivered to the construction site. The amounts shown on this claim match the amounts for which a refund of tax has been claimed for the whole of the project. Moreover, the refund claim, which is the subject of this appeal, states that the claim is in respect of goods purchased between November 1985 and January 1986.

On the basis of the evidence, the Tribunal concludes that there was no sale of materials to the Crown after the final billing period and, therefore, the refund claim period commenced no later than January 31, 1986. Consequently, the appellant was outside the statutory two-year time limit when the refund claim was signed on March 10, 1988.

The appellant argued that March 10, 1986, the date that the final statutory declaration was made, is the commencement date for the two-year refund period, as it was only then that the contractor had fulfilled all his obligations under the contract and become entitled to full payment and release of the holdback.

It is evident that the appellant is applying accounting principles, used to establish when an amount is payable and receivable, to determine when the transfer of property took place. When the terms of the contract deal explicitly with the timing of the translation of property, there is no need for recourse to those principles. Rather, the terms of the contract should govern. If the contract had been silent as to the time when the property in the goods was to pass, the terms of payment might have been referred to as one of the factors to be considered in determining the intention of the parties with respect to the moment of transfer of property or the date of sale.

While the departmental ruling cannot be determinative of the issue in this case, the Tribunal also examined the facts in light of that ruling of September 1984, on which the appellant based its argument.

The ruling states that "On contracts, tax is payable or refundable in accordance with the terms of the contract. If the contract calls for progress billings, the goods are deemed to have been sold on the date of the progress billing." In a case such as this one, where the terms of transfer of the property in the goods are explicitly set out in the contract, it is unnecessary to infer a deemed sale from the fact of progress billings.

However, regardless of the time of sale established by a construction contract or of the presumption of sale at the time of progress billing, the departmental ruling clearly states that a person may delay filing for a refund until the completion of the construction contract, thereby implicitly accepting the date of completion as the starting point of the period of limitation. The result, as was suggested by counsel for the respondent, is that a contractor is only required to file once, when all the materials required for the project have been ascertained and purchased. This administrative concession is well-publicized and the taxpayer ought to be able to take advantage of it.

In this case, the effective date of the engineer's Certificate of Completion is stated to be January 24, 1986, although that certificate was signed on March 7, 1986. The evidence also showed that the appellant selected January 24, 1986, as the date of completion in order to claim the benefit of a contractual clause which required the Crown to make the final payment within a specified number of days after that date. As the appellant selected January 24, 1986, as the date of completion in order to claim a benefit under the contract, it should not be entitled to claim a later date as the date of completion for the purpose of claiming a refund of tax from the Crown. On the basis of either the stated date of completion (January 24, 1986) or the date of signing of the Certificate of Completion (March 7, 1986), the appellant's refund claim was not submitted within the two-year limitation period imposed under section 44.2.

CONCLUSION

The appeal is not allowed. It is the conclusion of the Tribunal that the refund claim period commenced no later than January 31, 1986, and thus, the appellant did not submit its claim for a refund of federal sales tax within two years as required under section 44.2 of the Act.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

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Robert J. Bertrand, Q.C.
Member

Kathleen E. Macmillan
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