

Ottawa, Thursday, May 17, 1990

Appeal No. 3017

IN THE MATTER OF an appeal heard on March 23, 1990,
pursuant to section 51.19 of the *Excise Tax Act*, R.S.C.
1970, c. E-13;

AND IN THE MATTER OF a decision of the Minister of
National Revenue dated June 17, 1988, with respect to a
notice of objection filed pursuant to section 51.17 of the
Excise Tax Act.

BETWEEN

WOLSKI BUILDING CONTRACTORS LTD.

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 an amount equal to tax paid pursuant to paragraph 46(1)(b) for the federal sales tax portion of the purchase price of building materials used in the construction of a public library for the city of Wetaskiwin.

Michèle C. Blouin

Michèle C. Blouin
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

W. Roy Hines

W. Roy Hines
Member

Robert J. Martin

Robert J. Martin
Secretary

Appeal No. 3017

WOLSKI BUILDING CONTRACTORS LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - Whether the appellant satisfies the criteria outlined in subsection 46(1) of the Excise Tax Act in order to qualify for a repayment of federal sales tax - Whether the appellant has made its claim within the statutorily prescribed time period - Principles to be applied in determining whether exemption from sales tax liability should be allowed.

DECISION: *The appeal is dismissed. The onus is on the appellant to clearly show that its claim for exemption from sales tax liability satisfies the conditions set forth in paragraph 46(1)(b) of the Excise Tax Act. The Tribunal considers that the appellant has failed to do this.*

In order to qualify for an exemption, the building materials must have been purchased by, or on behalf of, an organization for the construction of a public library for that organization. In addition, the public library must be operated by, or on behalf of, the organization. The appellant was the contractor for the building of the public library; that was its only role. The library was built for the city of Wetaskiwin and operated by the city. Because the appellant is not an eligible claimant, it is not necessary to consider whether its claim was made within the statutorily prescribed limitation period.

Place of Hearing: Edmonton, Alberta
Dates of Hearing: March 23, 1990
Date of Decision: May 17, 1990

Tribunal Members: Michèle C. Blouin, Presiding Member
Arthur B. Trudeau, Member
W. Roy Hines, Member

Clerk of the Tribunal: Janet Rumball

Appearances: Eugen Wolski, for the appellant
Michael Ciavaglia, for the respondent

Cases Cited: *The Assessment Commissioner of The Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville, [1973] S.C.R. 189; W.A. Sheaffer Pen Company of Canada Limited v. Minister of National Revenue, [1953] Ex.C.R. 251; Joseph Granger v. Employment and Immigration Commission, [1986] 3 F.C. 70; Supercrete Precast Ltd. v. Minister of National Revenue, Appeal No. 2899, October 16, 1989 (unreported).*

Statutes Cited: *Excise Tax Act, R.S.C. 1970, c. E-13, subss. 27(1) and 46(1); 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, s. 34.*

Appeal No. 3017

WOLSKI BUILDING CONTRACTORS LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE C. BLOUIN, Presiding Member
ARTHUR B. TRUDEAU, Member
W. ROY HINES, Member

REASONS FOR DECISION

SUMMARY

The appellant entered into an agreement with the city of Wetaskiwin to build the Wetaskiwin Library building. The appellant purchased building materials from its subcontractors at federal sales tax included prices and now claims the federal sales tax portion of the purchased building materials pursuant to paragraph 46(1)(b) of the *Excise Tax Act*¹ (the Act).

The final purchase date for building materials used in the construction of the library was January 29, 1982.

The library was not constructed for the appellant. Nor did the appellant operate the building as a public library. Rather, the company acted only as the building contractor. Instead, the library was run by the city of Wetaskiwin.

The appellant alleged that it made a claim for the federal sales tax portion sometime in February 1986. The appellant does not have a copy of this claim. The Department of National Revenue (the Department) has no record of this claim either. The appellant alleges that it resubmitted a claim on September 30, 1987, for the same amount of \$81,978.65 to the Edmonton, Alberta, office of the Department. Departmental records pertaining to the appellant contain this claim.

The claim was rejected because the Department considered that the claim was made outside the four-year limitation period established by the Act. The appellant filed a notice of objection with the Minister of National Revenue (the Minister), but the Minister confirmed the earlier ruling of the Department.

1. R.S.C. 1970, c. E-13, as amended.

The appeal is not allowed. The onus is on the appellant to clearly show that its claim for exemption from sales tax liability satisfies the conditions set forth in paragraph 46(1)(b) of the Act. The Tribunal considers that the appellant has failed to do this.

In order to qualify for an exemption, the building materials must have been purchased by, or on behalf of, an organization for the construction of a public library for that organization. In addition, the public library must be operated by, or on behalf of, the organization. The appellant was the contractor for the building of the public library; that was its only role. The library was built for the city of Wetaskiwin and operated by the city. Because the appellant is not an eligible claimant, it is not necessary to consider whether its claim was made within the statutorily prescribed limitation period.

THE LEGISLATION

The assessment period for this appeal is June 8, 1981, to March 4, 1982. This period was determined by the appellant in making a claim for repayment of federal sales tax from the Minister. The relevant provisions of the Act as they read during the assessment period are as follows:

Sales Tax Liability

27(1) There shall be imposed ... a ... sales tax ... on the sale price ... of all goods

(a) produced or manufactured in Canada

(i) payable ... by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier

Repayment by Minister of National Revenue of Amount Paid as Tax - Limitation Period

46(1) Where materials have been purchased by or on behalf of

...

(b) any organization for use exclusively in the construction of a building for that organization that is to be used exclusively or mainly as a public library operated by or on behalf of that organization on a non-commercial basis ...

and the tax imposed by Part V [i.e. section 27(1)] has been paid in respect of those materials, the Minister may, on application by such ... organization ... made to the Minister within four years from the time the materials were purchased, pay to such ... organization ... an amount equal to that tax. (emphasis added)

By virtue of section 34 of *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof*,² subsection 46(1) was repealed and replaced on May 1, 1986, by a similar provision. That provision, section 44.27, reduced the limitation period from four years, from the time the materials were purchased, to two years.

2. S.C. 1986, c. 9.

THE FACTS

The facts have been established from the record and the testimony of Mr. Eugen Wolski, the appellant's president, and Mr. Jocelyn Danis, a Department of National Revenue official in charge of the appellant's claim. The appellant, a small general contracting firm, entered into an agreement with the city of Wetaskiwin to build the Wetaskiwin Library building. The appellant purchased building materials from its subcontractors at federal sales tax included prices totalling \$327,914.60. The appellant claims that the federal sales tax portion of the purchased building materials is \$81,978.65.

According to Mr. Wolski, the library building project commenced in 1981. The Minister claimed that work on the construction of the library was completed by March 4, 1982, the end of the assessment period set forth by the appellant in its claim. The appellant disputed this claim. Although Mr. Wolski was not entirely sure, he testified that the project may have been completed in 1983 due to deficiencies in the construction of the library.

In any event, Mr. Wolski stated that January 29, 1982, was the final purchase date for building materials used in the construction of the library.

According to Mr. Wolski, the library was not constructed for the appellant. Nor did the appellant operate the building as a public library. Rather, the company acted only as the building contractor. Instead, the library was run by the city of Wetaskiwin.

Mr. Wolski testified that sometime in February 1986, the appellant made a claim, pursuant to paragraph 46(1)(b) of the Act, for the amount of \$81,978.65. He said that the claim was made with the Edmonton office of the Department. The appellant did not make any copies of this claim, nor did the appellant have any supporting documents regarding the claim.

Mr. Danis testified that the Edmonton office had no record of the February 1986 claim.

Mr. Wolski also testified that he resubmitted a claim pursuant to paragraph 46(1)(b) of the Act, on September 30, 1987, for the same amount of \$81,978.65 to the Edmonton office of the Department. Departmental records pertaining to the appellant contain this claim.

The claim was rejected. Department officials stated that the claim was made outside the four-year limitation period established by the Act.

On June 17, 1988, the Minister confirmed the earlier ruling of the Department for the following reasons:

Your contract with the City of Wetaskiwin for the construction of the Wetaskiwin Library building was completed on or about March 4, 1982. At that time the Excise Tax Act provided for an application for recovery of sales tax within a four year period. Accordingly, the period of eligibility expired on or about March 4, 1986. Your application was received in the District Excise Office in Edmonton on October 1, 1987.

In addition, your objection cannot be allowed as section 44.27, then subsection 46(1), of the Excise Tax Act, clearly requires the applicant to be the organization that will use the building exclusively or mainly as a public library, operated by or on behalf of itself on a non-commercial basis.

Subsequently, the appellant filed an appeal with the Tariff Board on June 22, 1988.³

THE ISSUES

This appeal raises two issues. First, does the appellant satisfy the criteria outlined in subsection 46(1) of the Act in order to qualify for a repayment of federal sales tax? Second, and assuming that the appellant so qualifies, did the appellant make its claim within the statutorily prescribed time period?

In answer to the first issue, the appellant argued, in its letter to the Tariff Board, that it is a qualified claimant because:

... it was understood by WOLSKI BUILDING CONTRACTORS, LTD. that, we, as the General Contractor, would be claiming the Federal Sales Tax Refund and, therefore, we budgeted ourselves accordingly and Tendered the job accordingly.

In answer to the second issue, the appellant argued that it made a tax rebate claim within the statutorily prescribed time period when it submitted a claim in February 1986. In any event, the appellant argued, work on the Library extended into 1983, thereby extending the period of eligibility to claim a refund to encompass the appellant's claim.

For his part, the respondent argued that the appellant does not satisfy the criteria that must be met before a tax rebate, pursuant to subsection 46(1) of the Act, can be granted. The respondent cited the Supreme Court of Canada case in *The Assessment Commissioner of The Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*⁴ and the Exchequer Court of Canada decision in *W.A. Sheaffer Pen Company of Canada Limited v. Minister of National Revenue*⁵ for the proposition that the onus is on the person claiming exemption from sales tax liability to clearly establish that the claim falls within the relevant statutory exempting provisions.

Thus, the respondent contended that the onus was on the appellant to establish that it satisfied the following criteria:

- (a) that the materials, upon which the sales tax has been paid, are purchased by or on behalf of an organization;
- (b) that the materials are for use exclusively in the construction of a building for that organization;
- (c) that the building is to be used exclusively or mainly as a public library;

3. Although the appeal was originally commenced before the Tariff Board, the appeal is taken up and continued by the Canadian International Trade Tribunal.

4. [1973] S.C.R. 189.

5. [1953] Ex.C.R. 251.

- (d) that the public library must be operated by, or on behalf of, that organization on a non-commercial basis; and
- (e) that an application for refund must be submitted by the organization within four years from the time the materials are purchased.

The respondent argued that the appellant does not satisfy these criteria because it is not the organization that uses the building as a public library.

In response to the second issue, the respondent argued that the statutory time limit imposed by subsection 46(1) of the Act is mandatory. Citing the Federal Court of Appeal decision of *Joseph Granger v. Employment and Immigration Commission*⁶ and the Canadian International Trade Tribunal decision in *Supercrete Precast Ltd. v. Minister of National Revenue*,⁷ the respondent contended that the Tribunal has no power to consider a refund claim beyond the statutorily prescribed limit.

DECISION

As the foregoing recital of the evidence indicates, there has been much discussion both before this Tribunal and at the various appeal levels within the Department on the question of whether or not the appellant made a tax rebate claim within the limitation period prescribed in subsection 46(1) of the Act. However, the Tribunal considers that a more basic and preliminary issue must first be addressed before the issue of limitation periods can be evaluated. That issue is whether the appellant is an eligible claimant pursuant to paragraph 46(1)(b) of the Act. In the Tribunal's view, if the appellant is not entitled to file a tax rebate claim pursuant to this subsection, then any analysis of the applicable limitation period governing this subsection is both unwarranted and premature.

The Tribunal considers that the facts of this appeal, when discussed within the context of the wording of paragraph 46(1)(b) of the Act and the relevant jurisprudence, do not support the appellant's claim that it is entitled to claim the tax rebate in issue.

In the Mennonite Home Association case (*supra*), Mr. Justice Spence stated (at p. 194) the following principle to be applied in determining whether a claimant is entitled to exemption from tax liability:

It is, of course, clearly established that although the words of the statute must plainly assess the tax in order to bring the subject within the levy, the subject must, in turn, clearly establish that his case falls within the exemption in order to claim his benefits. (emphasis added)

In order to do this, the onus is on the appellant to clearly show that its claim for exemption from sales tax liability satisfies the conditions set forth in paragraph 46(1)(b) of the Act. The Tribunal considers that the appellant has failed to do this.

6. [1986] 3 F.C. 70.

7. DD-89-020, Appeal No. 2899, October 16, 1989 (unreported).

According to paragraph 46(1)(b) of the Act, an amount equal to sales tax paid by an organization for building materials purchased by, or on behalf of, that organization may be given to the organization if the following situation occurs:

1. the building materials are used exclusively in the construction of a building for that organization;
2. the building is used exclusively or mainly as a public library; and
3. the public library is operated by, or on behalf of, the organization on a non-commercial basis.

Initially, the appellant provided no evidence to indicate that Wolski Building Contractors Ltd. is an "organization" within the meaning of paragraph 46(1)(b) of the Act. However, assuming that the appellant is an "organization" (a matter on which the Tribunal expresses no opinion), the evidence indicates that it has not satisfied the other conditions set forth in paragraph 46(1)(b) of the Act. The appellant was the contractor for the building of the public library; that was its only role. The library was built for the city of Wetaskiwin and is operated by the city. In other words, the library was not constructed for the "organization," Wolski Building Contractors Ltd., nor has the library been operated by, or on behalf of, Wolski Building Contractors Ltd.

Because the appellant does not satisfy the conditions set forth in paragraph 46(1)(b) of the Act, the Tribunal does not consider it necessary to determine whether the appellant's claim was made within the statutorily prescribed limitation period.

CONCLUSION

For all the foregoing reasons, the appeal is not allowed.

Michèle C. Blouin

Michèle C. Blouin
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

W. Roy Hines

W. Roy Hines
Member