



Ottawa, Wednesday, December 17, 2003

Appeal No. AP-2001-041

IN THE MATTER OF an appeal heard on April 16 and
May 7, 2003, under section 81.19 of the *Excise Tax Act*,
R.S.C. 1985, c. E-15;

AND IN THE MATTER OF two decisions of the Minister of
National Revenue dated July 4, 2001, with respect to notices of
objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

ATLANTIC PROMOTIONS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2001-041

ATLANTIC PROMOTIONS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the *Excise Tax Act* with respect to two decisions issued on July 4, 2001, by the Minister of National Revenue. The issue in this appeal is whether certain discounts given by Atlantic Promotions Inc. to its clients during the relevant periods are equivalent to a sale price reduction for sales tax calculation purposes under the *Excise Tax Act* and whether Atlantic Promotions Inc. is therefore entitled to a refund of tax paid in error.

DECISION: The appeal is dismissed. The Tribunal is of the view that the documentary evidence is insufficient to support the claim from Atlantic Promotions Inc. and that, therefore, the latter did not discharge its burden of proof in this case.

Place of Hearing: Ottawa, Ontario
Dates of Hearing: April 16 and May 7, 2003
Date of Decision: December 17, 2003

Tribunal Members: Pierre Gosselin, Presiding Member
James A. Ogilvy, Member
Ellen Fry, Member

Counsel for the Tribunal: Dominique Laporte

Clerk of the Tribunal: Anne Turcotte

Appearances: Gilles Gosselin and Muguette Boisvert, for the appellant
Marie Crowley, for the respondent



Appeal No. AP-2001-041

ATLANTIC PROMOTIONS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
JAMES A. OGILVY, Member
ELLEN FRY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ with respect to two decisions issued on July 4, 2001, by the Minister of National Revenue (the Minister). The Tribunal began a hearing in this case on April 16, 2003, but, following the submission of new documents, an adjournment was granted. The issue in this appeal is whether certain discounts given by Atlantic Promotions Inc. (Atlantic Promotions) to its clients during the relevant periods are equivalent to a sale price reduction for sales tax calculation purposes under the *Act* and whether Atlantic Promotions is therefore entitled to a refund of tax paid in error.

EVIDENCE

Mr. Gilles Gosselin, Vice-President, Sales and Marketing, and Ms. Muguette Boisvert, Business Contract Analyst, both work for Atlantic Promotions and testified on its behalf. During the period from 1985 to 1987, Mr. Gosselin was the account executive for one of Atlantic Promotions' largest clients and also acted as regional sales manager for Eastern Canada.

Mr. Gosselin explained that Atlantic Promotions is a small- to medium-size business that sells consumer products, particularly in the kitchen and automotive categories. He indicated that, during the relevant periods, Atlantic Promotions sold goods to distributors or retailers and later gave volume discounts and other offers and that taxes were paid in error on these amounts when they should have been deducted for tax calculation purposes. He indicated that Atlantic Promotions had entered into contractual agreements with its clients based on quantities and volumes, that different discount percentages were applicable and that discounts were then given in the form of credit notes or cheques. He stated, with reference to documents on file, that Atlantic Promotions' sales volume for 1987 was about \$40.0 million and that Zellers Ltd. alone represented about \$5.2 million.

Mr. Gosselin submitted that, although Atlantic Promotions had paid out amounts for cooperative (co-op) advertising, its claim is not based on these amounts, but instead on volume discounts that did not relate to advertising flyers. He submitted that the term "co-op", as used for example in financial statements, referred to all volume discounts and to promotional offers, but that it had never referred to co-op advertising. Mr. Gosselin gave the example of the food industry, which represented nearly 7.4 percent of Atlantic Promotions' total sales volume and for which an amount of 5.0 percent was deducted from the sale price,

1. R.S.C. 1985, c. E-15 [*Act*].

whether there had been advertising or not. He also referred to Rona Inc., to which Atlantic Promotions sold pant-saver car mats. For this type of product, Mr. Gosselin conceded that co-op advertising had been paid, which represented 5.0 percent, but he also submitted that Atlantic Promotions had also paid an amount of 3.0 percent in volume discounts. He further explained that other contracts, not pertaining to the relevant periods, had been included to show that this type of discount was always common practice at Atlantic Promotions. Ms. Boisvert stated that the case file of the refund application had been documented by experts using accounting documents that summarized the operations that were paid.

Under cross-examination, Mr. Gosselin stated that, for some of the contracts in question, the discount related directly to advertising evidence that the client had to produce. He estimated that about one third of the contracts related to advertising and that the other two thirds did not. On several occasions, when asked to indicate which contracts pertained to the relevant periods, he was unable to refer to the contracts in question, but instead to proofs of payment or other agreements not pertaining to the relevant years and even to agreements that included an advertising component. In response to questions from the Tribunal, Mr. Gosselin explained that the term “co-op” encompassed all client discounts, i.e. promotional offers, volume discounts and co-op advertising. He reiterated Atlantic Promotions’ intention not to seek a refund on taxes paid in error on the promotional offer portion.

Mr. David Feher, former excise tax auditor for the Minister, was subpoenaed to appear on behalf of Atlantic Promotions. When Atlantic Promotions referred to Mr. Feher’s written notes, which implied that certain discounts given by Atlantic Promotions to its clients could be refunded, he explained that his mandate was to review the work done by another auditor and that he himself did not carry out the initial audit. He indicated that he tried to determine the sales volume for each promotion type and then recommended a refund of 62.2 percent of the amount claimed with the view to reaching a settlement agreement. In response to questions from the Tribunal, Mr. Feher noted that he had taken for granted that co-op advertising had been done in all cases and that he had considered only the advertising percentage that was based on a volume calculation.

Mr. Jacques Courtois, who held the position of senior auditor for the Minister, testified on behalf of Atlantic Promotions. He explained that he had been mandated to audit the refund application submitted by Atlantic Promotions and that, to this end, he had met with Mr. Cousineau, the then sales manager for Atlantic Promotions. He explained that he had concluded that the discounts related not only to sales volume but also to product promotion. He also explained that, following a review of certain agreements, including the one entered into with Alliance Ro-Na Home Inc., he had found that these agreements set out that the discounts related to advertising. He mentioned for example that, in this agreement, an amount of \$9,900 was provided as co-op advertising and that the “newspaper” and “radio” items were checked off.² The documents also included a list of newspapers in which the ads had been published and a list of radio stations that had broadcast the ads.

Mr. Marcel Bouthillier, an appeals officer with the Canada Customs and Revenue Agency (CCRA), testified on behalf of the Minister. He stated that he was involved in the case as objection officer and that he issued the notice of decision. He explained that Mr. Feher’s recommendations did not take into account the promotional offer, in particular the advertising relating to the discounts. He pointed out that the amounts given as a discount were always conditional on an ad and a document to be supplied by the client to confirm

2. Respondent’s Book of Additional Documents, Tab 4 at FT-24.

that the advertising had been done. He explained that the CCRA's policy was not to allow discounts unless they qualified purely as volume discounts.

ARGUMENT

Atlantic Promotions submitted that the amounts paid out for co-op advertising during the periods covered in the refund application, i.e. February 1984 to January 1988, were more than \$3 million in total for over 100 clients and nearly 200 products. It indicated that this was equivalent to about \$95 million in sales. Thus, Atlantic Promotions submitted that the claim for the \$68,000 at issue is minimal compared to the amounts issued in discounts and compared to the volume of business. Atlantic Promotions stated that the decision not to award the refund was based strictly on a few contract examples that included ads, without regard to Atlantic Promotions' largest clients, which represented 75 percent of the company's volume of business. Atlantic Promotions also indicated that, according to Mr. Courtois's report, payments in the food industry were not conditional on producing advertising evidence.

Atlantic Promotions also submitted that, although the documents supplied to the Minister in 2001 did not directly pertain to the relevant periods, they clearly indicated that volume discounts had been paid and are still being paid to this day.

The Minister indicated that the Tribunal first had to deal with the nature of the discounts in question, referred to as "co-op" by Atlantic Promotions. In the latter's view, they are volume discounts. However, the Minister submitted, the auditor who audited the records stated that, although these discounts include a volume component, they also related to advertising. In reference to the decision in *Les Pignons L.V.M. du Québec Inc. v. M.N.R.*,³ the Minister held that the burden was on Atlantic Promotions to prove, by producing documents, that the auditor erred and that the discounts in question related solely to volume. In the Minister's view, most of the documents on file do not pertain to the relevant periods, but to later periods. With respect to the documents pertaining to the relevant periods, they indicate that the discounts given by Atlantic Promotions relate to advertising. For these reasons, the Minister stated that Atlantic Promotions was unsuccessful in discharging its onus to demonstrate that the discounts in question related strictly to volume and that the appeal should be dismissed.

DECISION

To understand the case, the facts need to be put in context. In 1988, Atlantic Promotions filed two refund applications to recover the federal sales tax on discounts given to co-op advertisement clients.⁴ The first application covers the period from February 1984 to March 1985 and represents \$19,551.59. The second application covers the period from February 1986 to January 1987 and represents \$48,461.19. However, at the hearing, the parties indicated that, although only the period from February 1986 to January 1987 was indicated on the second refund application, the attached documents also covered the period from February 1987 to January 1988. This additional period was therefore part of the refund application and was processed as such by the CCRA.⁵ On July 7, 1988, two notices of decision rejecting the refund applications were issued. The appellant then served notices of objection, and the notices of decision were issued by the Minister in 2001.

3. (19 August 2002), AP-93-315 (CITT) [*Pignons*].

4. Respondent's Book of Additional Documents, Tab 1.

5. *Transcript of Public Hearing*, 7 May 2003 at 157.

The relevant provisions of the *Act* read, in part, as follows:

[42.] “sale price”, for the purpose of determining the consumption or sales tax, means

(a) except in the case of wines, the aggregate of

(i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,

(ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and

(iii) the amount of the excise duties payable under the *Excise Act* whether the goods are sold in bond or not,

and, in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof.

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

68. 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 the payment of the moneys.

98. (1) Every person who

(a) is required, by or pursuant to this Act, to pay or collect taxes or other sums or to affix or cancel stamps, or

(b) makes an application under any of sections 68 to 70,

shall keep records and books of account in English or French at that person's place of business in Canada in such form and containing such information as will enable the amount of taxes or other sums that should have been paid or collected, the amount of stamps that should have been affixed or cancelled or the amount, if any, of any drawback, payment or deduction that has been made or that may be made to or by that person, to be determined.

(2.1) Notwithstanding subsection (2), where a person is required by subsection (1) to keep records and books of account serves a notice of objection under section 81.15 or 81.17 or is a party to an appeal under this Part, he shall retain those records and books of account and every account and voucher necessary to verify the information therein until the objection or appeal has been finally disposed of by appeal or otherwise.

In this appeal, the Tribunal must determine whether Atlantic Promotions is entitled to a refund of tax paid in error on amounts representing payments made to clients as volume discounts during the relevant periods. The Tribunal will not address the issue of discounts related to advertising agreements, since Atlantic Promotions indicated its intention not to seek a refund for those discounts.

In this case, Atlantic Promotions submits that, although some of the discounts given to its clients during the relevant periods had been paid for advertising purposes, the amounts claimed were paid solely as volume discounts. The Minister argued that, although they included a volume component, these discounts also related to advertising. Moreover, the Minister submitted that most of the documents on file do not

pertain to the relevant periods. In the Minister's view, in order for discounts given to clients to result in a refund of federal sales tax, Atlantic Promotions must prove that, during the relevant periods, volume discounts were given.

The Tribunal has carefully reviewed the evidence on file and finds that, in this case, Atlantic Promotions was unable to support its refund applications, given that the documentary evidence is insufficient and deals essentially with a later period, not with the relevant periods. Only some evidence pertains to the relevant periods, but the Tribunal cannot draw conclusions that persuade it that Atlantic Promotions paid sales tax in error. The contract with the Ro-Na Group entitled "ADVERTISING AGREEMENT"⁶ [translation] sets out the type of medium and the promotion dates for various Atlantic Promotions products. Moreover, on the application form for Home Hardware, the item "Adv. Partnership" appears, and the Tribunal understands this to be an advertising partnership.⁷ For J. Pascal Inc., on the debit memo issued by the latter, the item "ADVERTISING ALLOW." is checked and the memo indicates that a copy of the flyer confirming the advertising is attached.⁸ All these examples show that the volume discounts given related to an advertising component. Finally, for clients in the food industry, the Tribunal is unable to conclude, on the basis of the evidence on file, that the amounts given were awarded solely as volume discounts and did not include an advertising component.

Even though Atlantic Promotions attempted to supplement the lack of evidence by giving oral evidence and trying to demonstrate its practice of awarding volume discounts to clients for periods following the relevant ones, the Tribunal is of the view that Atlantic Promotions did not discharge the onus placed on it. In this regard, section 98 of the *Act* requires the taxpayer to keep, for six years, records and books of account and every account and voucher necessary to verify the information contained therein. These books and records must also be kept until all procedures have been disposed of under the *Act*, by appeal or otherwise. In *Pignons*, the Tribunal noted that "the provisions of section 98 of the *Act* clearly indicate that Parliament requires that claims under the *Act* be substantiated by documentary evidence."

For all these reasons, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

6. Respondent's Book of Additional Documents, Tab 4 at FT-25.

7. *Ibid.* at FT-37.

8. *Ibid.* at FT-46.