CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, April 11, 2002

Appeal No. AP-2000-034

IN THE MATTER OF an appeal heard on September 11, 2001, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated May 30, 2000, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

SCOTT PAPER LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-2000-034

SCOTT PAPER LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

This appeal concerns a notice of decision dated May 30, 2000, in which the respondent denied the appellant's claim for a refund of federal sales tax paid in error on sales of bathroom tissue. The appellant filed a refund claim in 1992 in respect of "[o]verpayment of F.S.T. on [e]xempt [s]ales" during the period from April 1 to December 31, 1990. The evidence indicated that the amount claimed was determined in respect of facial tissue only and that, in subsequent dealings with the respondent with respect to the claim, the appellant requested consideration of tax paid in error in relation to sales of facial tissue only.

In 1998, the Federal Court—Trial Division held that facial tissue and bathroom tissue were tax exempt. In 1999, the appellant asked the respondent to consider, as part of its refund claim, amounts of tax paid in error in relation to bathroom tissue. The appellant's refund claim was allowed in relation to the facial tissue, and a partial refund in the amount of approximately $1.6 million was made. The respondent did not allow any refund with respect to bathroom tissue, stating, in the decision, that the claim for bathroom tissue was made outside the two-year limitation period.

HELD: The appeal is dismissed. The appellant argued that, according to section 68 of the *Excise Tax Act*, a taxpayer is not required to apply for a refund of any specific moneys paid in error. Since it applied for a refund of overpaid taxes, the respondent is required to refund an amount equal to those monies. The Tribunal is of the view that the wording of section 68 contemplates that the applicant must indicate the nature of the alleged error. The Tribunal is further of the view that to accept the appellant's interpretation would require the Tribunal to give no effect to the explicit wording pertaining to the two-year limit for filing a refund claim.

The Tribunal finds that appellant's refund claim concerned facial tissue, not bathroom tissue. The appellant did not ask the respondent for a refund of tax paid in error with respect to bathroom tissue until 1999, about six years after the respondent issued the notice of determination and well after the two-year limitation period had expired. Consequently, a refund of taxes paid in error in respect of bathroom tissue during this period cannot be granted.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 11, 2001
Date of Decision:	April 11, 2002
Tribunal Members:	James A. Ogilvy, Presiding Member Peter F. Thalheimer, Member Ellen Fry, Member
Counsel for the Tribunal:	John Dodsworth
Clerk of the Tribunal:	Susanne Grimes
Appearances:	Thomas B. Akin, for the appellant Anne M. Turley, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL

TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-2000-034

SCOTT PAPER LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: JAMES A. OGILVY, Presiding Member
PETER F. THALHEIMER, Member
ELLEN FRY, Member

REASONS FOR DECISION

ISSUE

This is an appeal under section 81.19 of the *Excise Tax Act*[1] from a decision of the Minister of National Revenue dated May 30, 2000. In the decision, the appellant's claim for a refund of federal sales tax (FST) paid on bathroom tissue during the period from April 1 to December 31, 1990, was denied on the grounds that the claim was made outside the two-year limitation period provided for in section 68 of the Act. The issue in this appeal is whether the appellant is entitled to a refund of FST paid in error in relation to bathroom tissue.

EVIDENCE

The parties each filed a brief in this appeal. The appellant filed a supplement to its brief and a consolidated book of documents. The respondent filed a book of documents and a book of additional authorities. In addition, the parties filed an agreed statement of facts.

The evidence indicates that the appellant is a manufacturer of bathroom tissue and facial tissue and was remitting FST as a licensed manufacturer under the Act. On May 15, 1992, the appellant filed a refund claim on the "N 15" form. The appellant first considered applying for a refund in 1986, given that it became aware that a competitor had applied for a refund, claiming that facial tissues were health goods and, therefore, tax exempt. However, the Tariff Board rejected this claim, finding that facial tissues were cosmetics, which, at the time of the decision, were not tax exempt.[2]

The appellant's witness testified that the appellant became aware in 1992, prior to filing the refund claim at issue, that one of its competitors, Kimberly-Clark Canada Inc. (Kimberly-Clark), had filed a refund claim on the basis of the finding in *CIP* that facial tissues were cosmetics. Subsequent to *CIP*, cosmetics were made tax exempt under the Act.

The appellant's witness also testified that the appellant was made aware that Kimberly-Clark's refund claim was made in respect of tax paid in error on both facial tissue and bathroom tissue. However, the witness testified that the President of Scott Paper Limited had told her that he did not believe that

1. R.S.C. 1985, c. E. 15 [hereinafter Act].
2. In 1988, the Federal Court of Appeal upheld the Tariff Board's decision in *CIP* v. *Deputy M.N.R., Customs and Excise* (7 June 1988), A—673—86 (FCA) [hereinafter *CIP*].

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bathroom tissue could be considered cosmetics and, therefore, did not wish to pursue a claim on this ground. The appellant's witness further indicated that the amount of the claim was based on calculations of tax paid only in relation to facial tissue. This fact was confirmed when the working papers, used to make the calculation for the purposes of the "N 15" form, were submitted by the appellant, in 1998, in order to substantiate its refund claim.

The appellant's "N 15" form provided a very limited amount of information. It stated that the refund claim was in the amount of $2,848,844 in relation to "[o]verpayment of F.S.T. on [e]xempt [s]ales" for the period from April 1 to December 31, 1990. The appellant's witness characterized the refund claim as a "protective claim" that would "stop the clock" with respect to limitation periods under the Act. A protective claim, in the view of the witness, is a broadly worded refund claim filed to protect a claimant's right to a refund, should the resolution of a claim made by a competitor subsequently confirm that tax should not have been paid on goods.

On September 21, 1993, the appellant's refund claim was denied. The respondent stated in the notice of determination that "[s]ales of facial tissues by Scott Paper Limited . . . were correctly made on a tax-paid basis." The respondent maintained that facial tissue was taxable under the Act and that the Federal Court of Appeal's decision in *CIP* confirmed the Tariff Board's decision that facial tissues were not health goods, but that it did not confirm the Tariff Board's comments that facial tissues were cosmetics. No reference was made in the notice of determination to any claim regarding taxes paid in error on sales of bathroom tissue. According to the appellant's witness, the appellant considered that the claim concerned only facial tissue at that time.

The notice of objection served by the appellant in relation to the notice of determination also disputed only the respondent's decision denying its refund claim with respect to facial tissue. The evidence indicates that the appellant agreed to the respondent's delaying the issuance of a notice of decision with respect to the notice of objection until after the Federal Court—Trial Division rendered its decision[3] with respect to the claim made by Kimberly-Clark.

The evidence further indicates that it was in 1999 that the appellant first asked the respondent to consider, as part of its refund claim, taxes paid in error in relation to bathroom tissue. The appellant made this request when it was informed by the respondent that the full amount of its refund claim with respect to taxes paid in error in relation to facial tissue (in the amount of $2.8 million) would not be allowed. The appellant's witness was also aware, by that time, that the decision in *Kimberly-Clark* had confirmed that both facial tissue and bathroom tissue were cosmetics and, therefore, tax exempt under the Act. She also testified that she had been informed of the Tribunal's decision in Appeal No. AP-94-330,[4] which, in her view, indicated that an appellant was not limited to receiving a refund of only the amount specified in its refund claim.

With respect to the "N 15" form, the respondent's witness testified that the form on which the claim is made is typically completed by the applicant, but that the auditors rely on the working papers in performing the audit. In this regard, the respondent's witness testified that, until November 24, 1999, all documentation provided by the appellant in relation to the claim concerned facial tissue only.

3. *Kimberly-Clark Canada* v. *Canada* (1998), 145 F.T.R. 265 (FCTD) [hereinafter *Kimberly-Clark*].
4. *Erin Michaels Mfg.* v. *MNR* (10 January 1997) (CITT) [hereinafter *Erin Michaels*].

ARGUMENT

The appellant argued that the refund claim is based on the "N 15" form and that its claim was worded in such a manner that it should be interpreted to constitute a claim for a refund with respect to both facial tissue and bathroom tissue. The appellant argued that the issue in this appeal is the respondent's determination of the refund entitlement and that the challenge of that determination is not limited by what it included in the notice of objection or elsewhere.

The appellant argued that the Tribunal's decision in Appeal No. AP-99-062[5] is distinguishable from the present case, given that, in that case, the taxpayer had filed a very narrow refund claim specific to certain goods (imaged articles). Only later, on appeal to the Tribunal, did it attempt to expand the refund claim to include other goods, arguing that policy dictated that the Crown should not be entitled to retain money that was not owing to it when a timely claim has been made. In contrast, in the present appeal, the appellant's claim was broadly worded.

The appellant referred to the Tribunal's decision in *Erin Michaels* in support of its argument. According to the appellant, the refund claim submitted by the applicant in *Erin Michaels* was also broadly worded. In that case, the Tribunal found that, when considering a valid refund claim, the respondent is responsible for determining the amount of overpayment of tax. In such circumstances, the amount owing, to be refunded to the taxpayer, is not limited by the amount claimed. The appellant also advanced a decision[6] of the Federal Court—Trial Division as supporting the proposition that, having properly filed a notice of objection, a taxpayer is entitled to contest all aspects of an assessment, whether or not described in the reasons.

The appellant submitted that it is entitled to a refund in the amount of $2.8 million given that it had overpaid taxes of at least that amount in the time period covered by the refund claim. The appellant also submitted that the proper approach to the interpretation of a taxing statute is that the provisions are to be given their plain and ordinary meaning and that any presumed intention of Parliament cannot displace the plain and ordinary meaning of the words used.

The appellant argued that the plain and ordinary meaning of section 68 of the Act contemplates that a refund claim is in respect of money paid in error. Since the appellant had filed a refund claim in relation to overpayment of FST on exempt sales, and the appellant had in fact overpaid FST during the period of the claim, the refund claim should be approved. The appellant argued that for a court to limit a taxpayer's right to what would otherwise be his own money would necessitate a clear statutory directive, of which there is none in the present case.[7]

The respondent argued that the appellant did not apply for a refund with respect to bathroom tissue within the two-year limitation period. The respondent argued that the appellant's refund claim was for a specific amount and that the working papers[8] submitted in support of the claim clearly indicate that that amount was calculated in respect of facial tissue only. The respondent argued that to permit a taxpayer to rely on broadly worded refund claims in this type of situation would defeat the purpose of the limitation period.

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5. *Barney Printing* v. *MNR* (15 May 2001) (CITT) [hereinafter *Barney Printing*].
6. *Midwest Oil Production* v. *The Queen*, [1982] 2 F.C. 357 (FCTD) [hereinafter *Midwest Oil*].
7. Amoco Canada Petroleum v. Minister of National Revenue (1985), 57 N.R. 274 (FCA).
8. Appellant's Consolidated Book of Documents, tab 11.

The respondent also argued that it was clear that the appellant was seeking a refund of taxes paid in error on facial tissue. The appellant first asked in 1999 that the respondent consider, as part of its refund claim, taxes paid in error with respect to bathroom tissue, after realizing that the entire amount of its claim with respect to facial tissue was not going to be granted. By contrast, the respondent pointed out, Kimberly-Clark filed its claim with respect to both facial tissue and bathroom tissue.

The respondent argued that the fact that the notice of objection and correspondence with the appellant refer only to facial tissue supports the view that the refund claim, as worded in the appellant's "N 15" form, was only with respect to facial tissue, not bathroom tissue. The respondent referred to the language of section 68 of the Act, which indicates that a refund should be paid if the taxpayer "applies therefor", a requirement that the appellant had not satisfied, with respect to bathroom tissue, within the two-year limitation period.

The respondent argued that the Tribunal's decision in *Erin Michaels* is distinguishable from the present case. In that case, according to the respondent, the Tribunal stated that a taxpayer is entitled to the full amount of tax that it overpaid in relation to a refund claim made with respect to a specific product and is not bound by the amount identified on the refund claim. Whether products not named in the original refund claim could be added after the two-year limitation period had expired was not at issue in that case. The respondent relied on *Barney Printing*, which, it argued, implies that the appellant must report the nature of the error for which the refund is claimed within the two-year limitation period; otherwise, the purpose of the limitation period would be defeated.

DECISION

At issue in this appeal is whether, in the circumstances, the appellant is entitled to a refund under section 68 of the Act of tax paid in error with respect to bathroom tissue. There is no dispute in this appeal that bathroom tissue is tax exempt under the Act – that is the effect of the decision in *Kimberly-Clark*. The appellant argued that it is entitled to a refund of tax paid in error on sales of bathroom tissue. It should be noted that the parties agree that, if this appeal is allowed, the respondent must conduct an audit to determine the amount of tax to be refunded.

Section 68 of the Act states:

> 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.

The appellant argued that the plain and ordinary meaning of section 68 of the Act is that a refund claim is in respect of money paid in error. According to the appellant, the taxpayer is not in fact applying for a refund of any specific moneys, but with respect to money, in general, paid to the respondent in error and in relation to any error that might have been made.

The Tribunal does not agree with the appellant's interpretation of section 68 of the Act. Section 68 of the Act indicates that the amount of the moneys paid in error by a person will be paid to the person "if he applies therefor" within the required period. In the Tribunal's view, the person has not fulfilled the requirement of "appl[ying] therefor" unless the person gives a reasonable indication of what he is applying for. Consequently, it is the Tribunal's view that section 68 requires that a person who applies for a refund indicate the nature of the alleged error.

To accept the appellant's interpretation would require the Tribunal to ignore the explicit wording of the part of the section pertaining to the two-year limitation period. The limitation period would be rendered meaningless if an applicant could simply make a blanket claim, within the two-year period, and then use that claim to support an unlimited number of specific claims, made over an unlimited period of years, as new potential errors are identified.[9] The Tribunal also notes that, according to the Act, the "N 15" form is to be prescribed by the respondent.[10] In this regard, the Tribunal further notes that the "N 15" form and attached schedules clearly require that the applicant provide detailed information regarding the nature of the refund claim.

The Tribunal recently came to a similar conclusion regarding the requirements of section 68 of the Act. In its decision in *Barney Printing*, the Tribunal stated that:

> to accept that the nature of the error not be specified on the application for refund would seem to render the phrase "if he applies therefor", found in section 68 of the Act, devoid of any substantive obligatory content. This, given the obligation put on the respondent to determine the amount payable to an applicant, . . . would place an unreasonable burden on the respondent. As indicated above, it would also constitute a way around the two-year limitation period. In the Tribunal's view, this could not have been Parliament's intent.[11]

The Tribunal is of the view that its decision in *Erin Michaels* does not assist the appellant. The issue in that case was whether the amount of the refund for the alleged error could be increased from the amount claimed. The Tribunal did not consider whether the appellant could collect a refund of tax paid with respect to an error identified by the appellant subsequent to the expiry of the limitation period, nor did it deal with the broadening of the nature or description of goods with respect to which the claim is made.

The Tribunal also finds that the facts in *Midwest Oil* are not analogous to those in the present appeal. In *Midwest Oil*, the appellant was permitted to raise a new argument, not identified in its notice of objection, with respect to a disputed assessment of income tax. There was no attempt to enlarge the areas in dispute, but simply to add another argument in support of the appellant's position. *Midwest Oil* did not deal with a situation like that in the present case, where the appellant wishes to enlarge the area in dispute.

In this appeal, the appellant is claiming that it should be granted a refund in respect of FST that was paid in error in respect of bathroom tissue. However, the appellant's "N 15" form indicates that the reason for the refund claim is an "[o]verpayment of F.S.T. on [e]xempt [s]ales", but does not indicate the nature of this alleged error. Although the "N 15" form calls for descriptive information regarding the nature of the claim to be included or attached, no such information accompanied the appellant's claim.

In fact, documentation provided by the appellant in support of its claim, prior to the respondent's determination, and the communications from the appellant to the respondent during that period clearly indicate that the appellant's refund claim was intended to be only in relation to tax paid in error on sales of facial tissue, not on sales of bathroom tissue. The evidence also indicates clearly that the appellant calculated the amount of its claim with reference only to taxes paid in error in relation to facial tissue. The appellant first raised the issue of bathroom tissue in 1999, approximately six years after the respondent's notice of

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9. A similar approach to the interpretation of a taxing statute, incorporating a purposive analysis of the section in light of applicable limitation periods, was taken by the Federal Court—Trial Division in *Michelin Tires (Canada)* v. *Canada* (1998), 158 F.T.R. 101.
10. Subsection 72(2) and section 2 of the Act.
11. *Supra* note 5 at 4.

determination and well after the two-year limitation period had expired. Therefore, the appellant's refund claim in respect of bathroom tissue was filed late.

For these reasons, the appeal is dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Ellen Fry
Ellen Fry
Member