



Ottawa, Tuesday, April 1, 2003

Appeal No. AP-2002-006

IN THE MATTER OF an appeal heard on November 25, 2002,
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 February 14, 2002, with respect to a
notice of objection served under section 81.17 of the *Excise Tax
Act*.

BETWEEN

GRAY O'ROURKE SUSSMAN ADVERTISING INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-2002-006

GRAY O'ROURKE SUSSMAN ADVERTISING INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

The appeal concerns a notice of decision dated February 14, 2002, which confirmed the determination that allowed a partial refund for overpaid federal sales tax, but disallowed the claim for the remaining amount sought by Gray O'Rourke Sussman Advertising Inc. for federal sales tax paid on printed matter.

HELD: The appeal is dismissed. Gray O'Rourke Sussman Advertising Inc. provided no evidence, such as invoices that indicated the amount of printed matter purchased by Gray O'Rourke Sussman Advertising Inc., to substantiate its claim. The Tribunal is of the view that the onus was on Gray O'Rourke Sussman Advertising Inc. to demonstrate a *prima facie* case for the validity of its claim for the remaining tax allegedly paid in error. The evidence presented by Gray O'Rourke Sussman Advertising Inc. did not do so.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 25, 2002
Date of Decision:	April 1, 2003
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	Michèle Hurteau
Clerk of the Tribunal:	Margaret Fisher
Parties:	Michael Kaylor, for the appellant Jean-Robert Noiseux, for the respondent



Appeal No. AP-2002-006

GRAY O'ROURKE SUSSMAN ADVERTISING INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

REASONS FOR DECISION

This appeal, made pursuant to section 81.19 of the *Excise Tax Act*,¹ raises the issue of whether Gray O'Rourke Sussman Advertising Inc. (Gray) is entitled to a refund of federal sales tax paid in error on printed matter under section 68. On November 2, 1990, Gray filed a refund application in the amount of \$88,926.36 for overpaid federal sales tax on art work. On December 21, 1999, the Minister of National Revenue (the Minister) issued a notice of determination and allowed a partial claim in the amount of \$48,928.75, but disallowed the remainder of the claim for \$39,997.61. On March 15, 2000, Gray served a notice of objection. On February 14, 2002, the Minister issued a notice of decision that confirmed the December 21, 1999, determination and indicated that a partial refund had been allowed and that the remaining amount sought was for printed matter subject to federal sales tax. The appeal is from this decision.

ARGUMENT

Gray submitted that, using its federal sales tax licence, it purchased printed matter without paying the federal sales tax and, by error, remitted the federal sales tax on its resale price of the printed matter. It contended that its suppliers should have remitted the federal sales tax upon their sale of the printed matter to Gray. Gray also contended that, once it resold the printed matter, it should not have remitted the federal sales tax. Consequently, Gray argued that it is entitled to a refund of the federal sales tax that it remitted on the sale of the printed matter. The Minister opposed the appeal on the grounds that Gray had the onus to establish that it was entitled to the requested tax refund. Given that Gray's brief was stricken from the record and that Gray was not allowed to present oral evidence, the Minister submitted that Gray did not discharge its onus to establish that it was entitled to the tax refund. Moreover, Gray did not even establish a *prima facie* case for the validity of its claim. Consequently, it is not entitled to the refund and the appeal should be dismissed.

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

DECISION

Preliminary Matter

On July 23, 2002, Gray filed its brief. On August 20, 2002, the Minister wrote to the Tribunal, submitting that Gray's brief contained very few details and that it was therefore difficult for the Minister to prepare the Minister's brief, to fully understand the grounds raised and to provide the Tribunal with all the information needed to decide on the merits of the case. Moreover, Gray had indicated in its brief that it would rely on oral evidence at the hearing to substantiate its refund entitlement. It did not provide any indication of the type of evidence that would be submitted. The Minister requested that it be allowed to conduct an "out of court" examination of a representative of Gray and also requested an additional delay in filing the Minister's brief.

On August 26, 2002, the Tribunal indicated to the parties that the *Canadian International Trade Tribunal Rules*² do not provide for "out of court" examinations of witnesses during the conduct of an appeal. It also ruled that Gray's brief was not sufficient to meet the requirements set out in rule 34. The Tribunal noted that Gray had implied that it intended to "rely on oral evidence during the course of the hearing to substantiate their refund entitlement" without providing information as to what the testimony was going to be. It directed Gray to file, by September 20, 2002, an amended brief that fulfilled the requirements established by rule 34. The Tribunal indicated that, if the requirements were not fulfilled, Gray's brief would be stricken from the record and the appeal would be decided on the remainder of the record. Not having received the amended brief by that date, on September 30, 2002, the Tribunal informed the parties that Gray's existing brief had been stricken from the record and that the case would be determined on the basis of the remainder of the record and without oral evidence from Gray. The Minister filed the Minister's brief on October 18, 2002.

In a letter dated November 19, 2002, the Minister requested that the Tribunal decide on the merits of the case based on the documents filed. The Minister submitted that there was no need for an oral hearing, as Gray would not be allowed to present oral evidence and the Minister would not be calling any witnesses. On November 20, 2002, Gray advised that it had no objection to the Tribunal deciding the appeal on the basis of the documents already filed with the Tribunal. On November 25, 2002, the Tribunal decided the matter without an oral hearing, based on the documents already filed.

Decision on the Merits

The Tribunal notes that the Minister had accepted Gray's original claim, in part, and had refunded a little more than half of the amount claimed. Therefore, the appeal concerns the remaining amount of Gray's original claim.

Gray submitted to the Tribunal an argument that the amount was paid in error and that it should receive a refund of \$39,997.61. However, it provided no evidence, such as invoices that indicated the amount of printed matter purchased by Gray, to substantiate its claim. The Tribunal finds that there is insufficient evidence to conclude that Gray did pay the federal sales tax in error on printed matter and that it should be entitled to a refund pursuant to section 68 of the Act.

2. S.O.R./91-499.

As in *Prolith Incorporated*,³ the Tribunal is of the view that the onus was on Gray to demonstrate a *prima facie* case for the validity of its claim for the remaining tax allegedly paid in error. The evidence filed with the Tribunal did not establish a *prima facie* case for Gray. Therefore, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

3. *Prolith Incorporated v. MNR* (3 October 2002), AP-99-039 and AP-99-058 (CITT).