



Ottawa, Tuesday, April 1, 2003

Appeal No. AP-2002-008

IN THE MATTER OF an appeal heard on January 15, 2003,
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 7, 2002, with respect to a notice
of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

THE RUSSO GROUP 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-2002-008

THE RUSSO GROUP INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

The appeal concerns a notice of decision dated February 7, 2002, which confirmed the determination that disallowed the claim for a refund for overpaid federal sales tax paid on imaged articles.

HELD: The appeal is dismissed. The Russo Group Inc. did not provide evidence sufficient to substantiate its claim, such as invoices that indicated the dollar value of products made from imaged articles. The Tribunal is of the view that the onus was on The Russo Group Inc. to demonstrate a *prima facie* case for the validity of its claim for the tax allegedly paid in error. The evidence presented by The Russo Group Inc. did not do so.

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 15, 2003
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-2002-008

THE RUSSO GROUP 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 The Russo Group Inc. (Russo) is entitled to a refund of federal sales tax paid in error on imaged articles under section 68. On August 21, 1992, Russo filed a refund application in the amount of \$151,452.69 for overpaid federal sales tax. On January 27, 1999, the Minister of National Revenue (the Minister) issued a notice of determination and denied the claim for a refund for overpaid federal sales tax on the grounds that Russo had failed to produce supporting documentation. On April 26, 2000, Russo served a notice of objection. On February 7, 2002, the Minister issued a notice of decision denying the claim on the ground that the refund claim was not supported with the books and records required under the provisions of subsections 98(1), (2) and (2.1) of the Act. The appeal is from this decision.

ARGUMENT

Russo submitted that it is entitled to a refund of the federal sales tax that it paid in error on the imaged articles that it made, pursuant to section 68 of the Act and as was confirmed by the Federal Court of Appeal in *Minister of National Revenue (Customs and Excise) v. Baird (Tom) & Associates*.² Russo noted that the basis for the decision was that it lacked sufficient documentation to support the claim.

In its notice of objection, Russo argued that it had remitted tax with respect to some transactions eligible for a refund, which the Minister had accepted. Thus, it was contrary to the principles of fairness for the Minister to keep the tax that was eligible for a refund. Russo referred to a decision of the Supreme Court of Canada in *Hickman Motors v. Canada*³ to argue its position that, while commercial invoices are useful to support a taxpayer's refund entitlement, they are not essential. In its view, the Minister's own records and audit reports provided evidence of the amount of tax paid by Russo. Russo also relied on *Hickman Motors* to show that, once the taxpayer had met the initial onus of proof that it was entitled to a refund, the onus shifted to the Minister. Russo submitted that it would make its *prima facie* case based on the audit reports and oral evidence of former officers of Russo. The Minister opposed the appeal on the grounds that Russo had the onus to establish that it was entitled to the requested tax refund. Given that Russo's brief was stricken from the record and that Russo was not allowed to present oral evidence, the Minister submitted that Russo did not discharge its onus to establish that it was entitled to the tax refund. Moreover, Russo did

1. R.S.C. 1985, c. E-15 [hereinafter Act].
2. (1997), 221 N.R. 201.
3. [1997] 2 S.C.R. 336 [hereinafter *Hickman Motors*].

not 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.

DECISION

Preliminary Matter

On July 23, 2002, Russo filed its brief. On August 20, 2002, the Minister wrote to the Tribunal, submitting that Russo'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, Russo 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 Russo and an additional delay in filing its brief.

On August 26, 2002, the Tribunal indicated to the parties that the *Canadian International Trade Tribunal Rules*⁴ do not provide for "out-of-court" examinations of witnesses during the conduct of an appeal. It also ruled that Russo's brief was not sufficient to meet the requirements set out in rule 34. The Tribunal noted that Russo 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 Russo 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, Russo's brief would be stricken from the record and that 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 Russo'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 Russo. 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 Russo would not be allowed to present oral evidence and the Minister would not be calling any witnesses. On November 20, 2002, Russo advised that it had no objection to the Tribunal deciding the appeal on the basis of the documents already filed with the Tribunal. On January 15, 2003, the Tribunal decided the matter without an oral hearing, based on the documents already filed.

Decision on the Merits

The relevant provisions of the Act are the following:

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.

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

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) Every person required by subsection (1) to keep records and books of account shall retain those records and books of account and every account and voucher necessary to verify the information contained therein until the expiration of six years from the end of the calendar year in respect of which those records and books of account are kept or until written permission for their prior disposal is given by the Minister.

(2.1) Notwithstanding subsection (2), where a person 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.

The Tribunal notes that the Minister refused the claim for a refund of the federal sales tax because Russo had not provided the "records and books of account and every account and voucher necessary to verify the information therein" as required by subsection 98(2.1) of the Act. In its notice of objection, Russo relied on *Hickman Motors* to argue that, while commercial invoices are useful to support a taxpayer's refund entitlement, they are not essential.

It is noteworthy that, in *Hickman Motors*, while accepting that "credible oral evidence from a taxpayer is sufficient notwithstanding the absence of records",⁵ the Supreme Court of Canada found that to be the case where the *Income Tax Act*⁶ does not require supporting documentation. The case before the Tribunal is distinguishable from *Hickman Motors* since the Tribunal is dealing with a situation where the applicable legislation explicitly requires supporting documentation. The provisions of section 98 of the Act require the taxpayer to keep supporting documentation for six years or until the final disposition of every pertinent objection or appeal, including the appeal now before the Tribunal.⁷

In the Tribunal's view, the provisions of section 98 of the Act indicate that Parliament requires that claims under the Act be substantiated by documentary evidence. The material on the record included the refund application submitted by Russo. Although the material filed by Russo asserted the grounds for the claim, it did not provide documentation to substantiate the assertion, such as invoices that indicated the dollar value of imaged articles. Accordingly, the Tribunal is of the view that the documentary evidence that was submitted is insufficient to support Russo's claim.

5. *Supra* note 3, at 376.

6. R.S.C. 1970, c. I-5.

7. See, also, *Les Pignons L.V.M. du Québec Inc. v. MNR* (19 August 2002), AP-93-315 (CITT).

With respect to the issue of onus of proof, as in *Prolith Incorporated*,⁸ the Tribunal is of the view that the onus was on Russo to demonstrate a *prima facie* case for the validity of its claim for the tax allegedly paid in error. The evidence filed with the Tribunal did not establish a *prima facie* case for Russo. Therefore, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

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