



Ottawa, Tuesday, September 23, 2003

Appeal No. AP-2002-104

IN THE MATTER OF an appeal filed with the Canadian International Trade Tribunal, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a request for a ruling that the Canadian International Trade Tribunal decide, as a preliminary matter, whether it has jurisdiction to hear the aforementioned appeal;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated March 7, 2002, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*;

AND IN THE MATTER OF a notice of determination of the Minister of National Revenue dated March 16, 1988.

BETWEEN

PRAXAIR CANADA INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-2002-104

PRAXAIR CANADA INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal, pursuant to section 81.19 of the *Excise Tax Act*, from a decision of the Minister of National Revenue (the Minister) dated March 7, 2002, whereby Praxair Canada Inc. (Praxair) alleges that the Minister refused to refund federal sales tax attributable to co-operative advertising allowances, which it claims should have been deducted from the sale price of the goods sold to its customers. The Minister alleges that the issue was not raised in Determination No. TOR-57201 but, rather, was the subject matter of Determination No. TOR-60848 dated March 16, 1988, and, therefore, that Praxair is statute-barred from filing this appeal. The parties requested a preliminary ruling by the Tribunal on this issue, which was considered in accordance with sections 6 and 23.1 of the *Canadian International Trade Tribunal Rules*.

HELD: The appeal is dismissed. The issue that Praxair raises in this appeal is not properly before the Tribunal. The *Excise Tax Act* is very precise in setting out the steps to be followed by the taxpayer when appealing from a decision. The right of appeal to the Tribunal is available only when, following a notice of determination, a notice of objection is served. Praxair did not object to Determination No. TOR-60848 that decided that certain co-operative advertising allowances were not deductible from the sale price of goods, which is the issue that Praxair is now seeking to have examined by the Tribunal. Parliament has not given the Tribunal the power to remedy this deficiency.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 25, 2003
Date of Decision:	September 23, 2003
Tribunal Member:	Pierre Gosselin, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Salvatore Mirandola, for the appellant Marie Crowley, for the respondent



Appeal No. AP-2002-104

PRAXAIR CANADA INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member

REASONS FOR DECISION

This is an appeal, pursuant to section 81.19 of the *Excise Tax Act*,¹ from a decision of the Minister of National Revenue (the Minister) dated March 7, 2002, whereby Praxair Canada Inc.² (Praxair) alleges that the Minister refused to refund federal sales tax attributable to co-operative advertising allowances, which it claims should have been deducted from the sale price of the goods sold to its customers.

According to the Minister, that issue was not raised in Determination No. TOR-57201 but, rather, was the subject matter of Determination No. TOR-60848 dated March 16, 1988. The Minister argues that Praxair never objected to Determination No. TOR-60848 and that it is time-barred from doing so. Accordingly, the Minister submits that the Tribunal should dismiss this appeal for lack of jurisdiction.

Praxair submits that it is not statute-barred from filing this appeal, arguing that the notice of objection that it served to the Minister in relation to Determination No. TOR-57201 was sufficient to cover the co-operative advertising allowances that are the subject of this appeal. Praxair also cited various case law in support of its position.³

A hearing of this appeal was to have been held on July 24, 2003.⁴ By way of a letter dated June 16, 2003, Praxair requested, on behalf of both parties to this appeal, that the Tribunal decide, as a preliminary matter, whether it had jurisdiction in this appeal, and that the hearing on merits be postponed until the Tribunal ruled on the issue of jurisdiction. The parties requested that the Tribunal decide this matter by way of written submissions pursuant to sections 25.1 and 36.1 of the *Canadian International Trade Tribunal Rules*,⁵ based on the facts and written submissions already on file at that time. On June 25, 2003, the Tribunal informed the parties that it would consider the jurisdiction question, as a preliminary matter, and postpone the hearing on merits until such time as that issue had been decided.

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

2. Praxair, formerly Linde Canada Inc., is the successor corporation of Union Carbide Canada Limited in whose name the refund claim that was the object of Determination No. TOR-57201 was made.

3. *Erin Michaels Mfg. Inc. v. M.N.R.* (10 January 1997), AP-94-330 (CITT); *Barney Printing Limited v. M.N.R.* (15 May 2001), AP-99-062 (CITT); *Scott Paper Limited v. M.N.R.* (11 April 2002), AP-2000-034 (CITT); *Les Pignons L.V.M. du Québec Inc. v. M.N.R.* (19 August 2002), AP-93-315 (CITT); *W. Ralston (Canada) Inc. v. Her Majesty the Queen*, 2002 GTC 1172 (FCTD).

4. C. Gaz. 2003.I.1926.

5. S.O.R./91-499 [*Rules*].

As a matter of procedure, instead of proceeding pursuant to sections 25.1 and 36.1 of the *Rules*, as suggested by the parties, the Tribunal has decided, pursuant to section 6 of the *Rules*, to treat the preliminary issue of its jurisdiction as a request for a decision pursuant to section 23.1 of the *Rules*.

The issue that Praxair raises in this appeal is not properly before the Tribunal.

As stated by the Tribunal in *Beatrice Foods Inc. v. M.N.R.*,⁶ the *Act* sets out some very precise steps to be followed by a taxpayer when claiming a refund. The right of appeal to the Tribunal is available to a party when, following a notice of determination, a notice of objection is served. In this instance, Praxair did not serve a notice of objection to Determination No. TOR-60848. The Tribunal is of the view that Determination No. TOR-57201, which dealt with performance allowances, did not address the issue of deductibility of co-operative performance allowances, which is the issue that Praxair is now seeking to have examined by the Tribunal. The Tribunal notes that Praxair recognizes that it “did not file a Notice of Objection explicitly mentioning [Determination No. TOR-60848]”.⁷ The Tribunal is of the view that Praxair cannot claim that the inclusion of the abbreviation “etc.” in its notice of objection to Determination No. TOR-57201 in any way constitutes an objection to something that was decided by an entirely different determination, i.e. Determination No. TOR-60848. The Tribunal also notes that Praxair’s notice of objection mentions only Determination No. TOR-57201 and makes no reference whatsoever to Determination No. TOR-60848. Parliament has not given the Tribunal the power to remedy this deficiency.

Furthermore, the Tribunal is of the view that the case law cited by Praxair does not support the position that the Tribunal has jurisdiction to hear this appeal.

Consequently, the appeal will not be heard on its merits and is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

6. (19 February 2002), AP-97-086 to AP-97-090 (CITT).

7. Appellant’s Brief, para. 29.